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The Role of the Rule of Law in ASEAN Integration

Michael Ewing-Chow and Tan Hsien-Li



European University Institute  
**Robert Schuman Centre for Advanced Studies**  
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European University Institute

Badia Fiesolana

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## **Abstract**

From its establishment in 1967, ASEAN has relied more on diplomacy rather than law. Political relations were managed by consultation and consensus and declaratory statements, while treaties denoting binding legal obligations were few. However, upon its 40th anniversary in 2007, the ASEAN Charter vowing to bring the Legal and the Institutional to the forefront of ASEAN discourse was signed. Blueprints for the three ASEAN pillars – the Political-Security, Economic and Socio-Cultural Communities – were also adopted alongside numerous new treaties with detailed obligations and dispute settlement procedures. This paper explores the aspirations, realities and limitations as the regional organisation endeavours to develop into an integrated ASEAN Community by 2015, paying particular attention to the new role of law in regional relations.

## **Keywords**

ASEAN – legal integration – institutions – economic cooperation – political-security cooperation





## Introduction

From the time of its establishment in 1967 under the Bangkok Declaration, the Association of Southeast Asian Nations (ASEAN) has relied more on diplomacy rather than law. Political relations within the region were managed by consultation and consensus and declaratory statements, while treaties denoting binding legal obligations – particularly with effective dispute settlement mechanisms – were few. The founders of ASEAN responded to the existing regional distrust created by some prior military confrontations by focusing on confidence-building activities rather than any concrete integration efforts. The discourse of ASEAN at that time, in contrast to the European experience, may in hindsight be said to be marked by the absence of any grand ambition or deep theory.

However, upon the 40th anniversary of this regional organisation in 2007, the ten ASEAN member states signed the ASEAN Charter stating that: “We, the Peoples of the member states of the Association of South East Asian Nations ... [h]ereby decide to establish, through this Charter, the legal and institutional framework for ASEAN.” For the first time in its history of over four decades, the Legal and the Institutional were brought to the forefront of ASEAN discourse. Blueprints for each of the three ASEAN Communities – the Political-Security Community, Economic Community and Socio-Cultural Community – have also been formulated and adopted as well as numerous new treaties and protocols often with detailed obligations and dispute settlement procedures.

This paper aims to explore the aspirations, realities and limitations as the regional organisation endeavours to develop into an integrated ASEAN Community by 2015. In particular, we shall attempt to understand this new role of law in ASEAN from both a historical and a normative perspective.

Divided into three sections, Part I analyses the core intentions of ASEAN Integration – “Peace and Prosperity”<sup>1</sup> – and how these evolved into ASEAN Integration as it means in the present context. As with other regional integration experiences, it is often in the economic areas that states most readily agree to cooperate and even cede a certain amount of sovereignty. However, unlike the EU, the pay-off for this does not seem to be an integrated market in any sense as the amount of intra-regional trade remains stagnant at about 25%. The low GDP per capita of most of the ASEAN states make it unlikely that the consumer goods produced and exported by these states to the West will be exported in significant volumes to other ASEAN states in the near future. Instead, the integration phenomenon seems more driven by production integration than market integration.

Part II goes on to articulate the fundamental structures ASEAN needs in its integration exercise. Having weathered severe international and intra-regional geo-political and economic storms, ASEAN possesses deep-seated insecurity about being irrelevant on the global plane. This underlying anxiety of being sidelined is a main reason for ASEAN’s development and transformation through the years. ASEAN understands the need for greater clarity in intra-ASEAN and international relations if it is to be taken seriously by global actors, hence there is the emphasis on the rule of law as ASEAN integrates. Here, we unpack the core infrastructure that ASEAN needs to reach its goal of regional integration. These are institutions, legalisation, and mechanisms for resolving disputes.

Whereupon ASEAN Integration is the most rapid in the second pillar, Part III examines the pace of integration in the other two pillars – the ASEAN Political-Security and Socio-Cultural Communities – with a case-study on an ASEAN body that is arguably at the at the other end of the spectrum, the ASEAN Intergovernmental Commission on Human Rights (AICHR). Straddling both the first and third pillars, we find that the AICHR experience of trying to consolidate itself to be effective

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<sup>1</sup> Declaration of the Association of Southeast Asian Nations (Bangkok Declaration), 8 August 1967, at <http://www.aseansec.org/1212.htm>

showcases most lucidly the extreme difficulties of regional integration on political, security, social, cultural matters.

## I. Spearheading ASEAN Integration through economic cooperation

### *ASEAN's vision for regional integration and community-building*<sup>2</sup>

In 1997, the ten ASEAN member states clearly proclaimed their vision for closer integration as a region:

ASEAN shall have, by the year 2020, established a peaceful and stable Southeast Asia where each nation is at peace with itself and where the causes for conflict have been eliminated, through abiding respect for justice and the rule of law and through the strengthening of national and regional resilience...

We will create a stable, prosperous and highly competitive ASEAN Economic Region in which there is a free flow of goods, services and investments, a freer flow of capital, equitable economic development and reduced poverty and socio-economic disparities...

We see vibrant and open ASEAN societies consistent with their respective national identities, where all people enjoy equitable access to opportunities for total human development regardless of gender, race, religion, language, or social and cultural background.<sup>3</sup>

In adopting this Vision, the regional grouping enunciated its goal of becoming a community which would resolve disputes peacefully, forge closer economic integration, and be bound by a common regional identity by 2020.<sup>4</sup> These three-fold aspirations were the foundations upon which ASEAN built its plans of achieving a tri-pillared ASEAN Community, proclaiming in the 2003 Declaration of ASEAN Concord II (Bali Concord II) that the

ASEAN Community shall be established comprising three pillars, namely political and security cooperation, economic cooperation, and socio-cultural cooperation that are closely intertwined and mutually reinforcing for the purpose of ensuring durable peace, stability and shared prosperity in the region.<sup>5</sup>

This was eventually laid out as the ASEAN Security Community (ASC), the ASEAN Economic Community (AEC), and the ASEAN Socio-Cultural Community (ASCC).<sup>6</sup> As momentum built toward the signing of the ASEAN Charter, ASEAN member states undertook to accelerate the formation of the ASEAN Community by 2015 at the 13<sup>th</sup> ASEAN Summit in January 2007.<sup>7</sup>

The ASEAN Charter was signed in November 2007 and came into force on 15 December 2008<sup>8</sup> when all ten ASEAN members had ratified it despite some hesitation on the part of some members

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<sup>2</sup> The legal and institutional undertaking by ASEAN since 2007 is immense and has profound ramifications. Professor Joseph Weiler, Professor Michael Ewing-Chow and Dr Tan Hsien-Li are currently directing the ASEAN Integration Through Law Project at the Centre for International Law (CIL), National University of Singapore. The Project involves over 70 researchers from Asia and around the world. This Project aims to support the integration efforts of ASEAN member states. See <http://cil.nus.edu.sg/research-projects/asean>

<sup>3</sup> ASEAN Vision 2020, available at <http://www.asean.org/1814.htm>.

<sup>4</sup> *Ibid.*

<sup>5</sup> Declaration of ASEAN Concord II (Bali Concord II) 2003, para. 1 at <http://www.aseansec.org/15159.htm>.

<sup>6</sup> *Ibid.*

<sup>7</sup> Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015 (2007) at <http://www.aseansec.org/19260.htm>.

<sup>8</sup> ASEAN Secretariat, The ASEAN Charter Comes into Force Today (15 December 2008), at <http://www.asean.org/Bulletin-Dec-08.htm#Article-4>.

over the Myanmar problem.<sup>9</sup> Alongside the adoption of the ASEAN Charter in 2007 were the seminal documents mapping out the steps for the integration of ASEAN into a tri-pillared Community. These are namely the ASEAN Political-Security Community Blueprint,<sup>10</sup> ASEAN Economic Community Blueprint,<sup>11</sup> and ASEAN Socio-Cultural Community Blueprint<sup>12</sup> which have been compiled and renamed as the Roadmap for an ASEAN Community 2009–2015 (the “Roadmap”).<sup>13</sup>

Before discussing the role of the rule of law in ASEAN Integration, it is important to note that while the word “integration” has only been used in ASEAN documents in the context of the AEC and the language referring to the other two pillars tends to be more visionary and inspirational than hortatory or programmatic, the very idea of an ASEAN Community supported by three pillar Communities suggests an aspiration towards integration at some level. If so, the text of ASEAN Vision 2020 and the Roadmap states a level of ambition beyond any other previous regional integration projects save that of the European Union.

At this juncture, it might also be appropriate to map out the differences between the obvious comparator – the experience of European Integration – and to state at the outset that a direct comparison would not only be simplistic and impressionistic but also deeply flawed. The history of ASEAN, its great diversity, and the very different political economy of the region militates against measuring ASEAN Integration by the experiences of the EU and of forecasting its future by referencing a European past. The vision for ASEAN integration will have to be applied to a landscape that is significantly different from what the EU was built upon.

Politically and economically, there are major differences – even fundamental ones – between the EU and ASEAN. Politically, the EU vision is conveyed by the words in the preamble to the 1957 Treaty Establishing the European Economic Community, EEC Treaty (Treaty of Rome) where signatories were expressly “determined to lay the foundations of an ever closer union among the peoples of Europe”.<sup>14</sup> This is a farsighted goal and all member states need to subscribe to that goal. Temporary derogations and transitional periods are granted but the goal is there for all to strive toward. This European undertaking goes far beyond what ASEAN could plausibly agree to, based on practical economic considerations. This is starkly demonstrated when comparing the member state economies – the economy of the EU member states shows a ratio of between its highest GDP per capita (PPP), Luxembourg, and that of its lowest, Bulgaria, at approximately 17:1 as compared to ASEAN with a ratio between the highest GDP per capita, Singapore, and the lowest GDP per capita, Myanmar, standing at 63:1.<sup>15</sup>

Moreover, when the European Integration project was conceptualised, France and Germany, the two largest and most economically powerful members, were able to form an alliance that propelled the project. By contrast, ASEAN lacks such a driving force. Indonesia with a population of about 240 million and a territory of 1.9 million square kilometres is the largest ASEAN member by far. Indeed, the population of Indonesia is almost equal to that of all the other ASEAN countries put together. However, despite Indonesia dwarfing its ASEAN neighbours geographically and in terms of population, it has a much lower GDP per capita than many other ASEAN members. The Indonesians remain sceptical – and in some segments of the population, divided – about the virtues of ASEAN Integration, particularly economic integration. Notably, also, the two ASEAN members with the

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<sup>9</sup> “Burma Ratifies ASEAN Charter”, *The Australian*, 22 July 2008.

<sup>10</sup> ASEAN Political-Security Community Blueprint at <http://www.aseansec.org/21083.pdf>

<sup>11</sup> ASEAN Economic Community Blueprint at <http://www.aseansec.org/21083.pdf>

<sup>12</sup> ASEAN Socio-Cultural Community Blueprint at <http://www.aseansec.org/5187-19.pdf>

<sup>13</sup> Roadmap for an ASEAN Community 2009–2015 at <http://www.aseansec.org/publications/RoadmapASEANCommunity.pdf>

<sup>14</sup> Treaty of Rome (1957) at [http://ec.europa.eu/economy\\_finance/emu\\_history/documents/treaties/rometreaty2.pdf](http://ec.europa.eu/economy_finance/emu_history/documents/treaties/rometreaty2.pdf)

<sup>15</sup> Based on IMF 2011 data on GDP per capita in USD (estimated).

highest GDP per capita in ASEAN, Brunei and Singapore, are the smallest states. They are unable to form the backbone of any integration project in a way that the Franco-German alliance has done over the past decades.

One last point of importance should also be borne in mind. Unlike the integration efforts of Europe which have seen the inclusion of states which may be characterised as democracies, the political systems of ASEAN members are much more diverse. They range from active democracies in Indonesia and the Philippines, one party-dominated democracies like Malaysia and Singapore, a military dominated presidential republic in Myanmar, socialist states in the case of Vietnam or Laos, a constitutional monarchy in Cambodia and Thailand, and a traditional monarchy in the case of Brunei. Yet, despite these obvious differences in their political systems, these differences do not even adequately begin to highlight the even greater diversity of the role of law and the rule of law in each of the ASEAN member states.

Puchala once famously observed that the difficulty of defining integration was similar to the story of the blind men who attempted to describe an elephant.<sup>16</sup> The beast was so big and each perceived it only through his experience with the beast but each had enough evidence to disbelieve the others and to “maintain a lively debate about the nature of the beast”.<sup>17</sup> This has indeed been the case for ASEAN and has been made worse by the constantly evolving nature of ASEAN.

### *The original reason for ASEAN*

To understand the ongoing process of ASEAN integration fully, it is necessary to grasp the essential reasons for the founding of the organisation, the manner in which it developed, and its modus operandi in international and regional relations.

ASEAN was established on 8 August 1967 in Bangkok, Thailand, with the signing of the Bangkok Declaration (“the Declaration”)<sup>18</sup> by Indonesia, Malaysia, Philippines, Singapore, and Thailand. Brunei Darussalam then joined on 8 January 1984, Viet Nam on 28 July 1995, Lao PDR and Myanmar on 23 July 1997, and Cambodia on 30 April 1999, thereby making up what is today the ten member states of ASEAN.

Prior to the founding of ASEAN, from 1962 to 1966, an undeclared military conflict between Indonesia and Malaysia (which included Singapore for part of that time) known as the *Konfrontasi* was a major source of tension in the region. While purportedly a dispute over the island of Borneo, it was also an exercise in hegemony by the Sukarno government of Indonesia. The *Konfrontasi* was marked by several relatively small skirmishes but resulted in the breaking off of diplomatic relations between Malaysia and Indonesia and strained diplomatic ties between the parties and other Southeast Asian nations. At the same time, the Vietnam war was escalating and many countries in the region feared that communism in the region would spread as predicted by the domino theory.

Thus, when General Suharto ousted President Sukarno in 1966, the five founding members of ASEAN quickly moved to restore diplomatic ties and created an organisation to encourage peaceful relations with each other and limit external interference. This initial *raison d’être* found its clearest expression in the 1979 Treaty of Amity and Cooperation,<sup>19</sup> which provided that ASEAN members would abide by the following principles:

- a) Mutual respect for the independence, sovereignty, equality, territorial integrity and national identity of all nations;

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<sup>16</sup> Donald J Puchala, *Of Blind Men, Elephants and International Integration* (1971) 10 *JCMS* 267

<sup>17</sup> *Ibid.*

<sup>18</sup> *Supra* note 1.

<sup>19</sup> Treaty of Amity and Cooperation in Southeast Asia (TAC), 24 February 1976, at <http://www.asean.org/1217.htm>.

- b) The right of every State to lead its national existence free from external interference, subversion or coercion;
- c) Non-interference in the internal affairs of one another;
- d) Settlement of differences or disputes by peaceful means;
- e) Renunciation of the threat or use of force;
- f) Effective cooperation among themselves.<sup>20</sup>

These principles have led ASEAN to develop what has been known as “the ASEAN Way” of cooperation and dispute resolution in which members do not interfere with the internal affairs of other members and decision-making (as well as dispute resolution) is done only by consensus. While this has enabled ASEAN to develop (albeit as a relatively loosely integrated organisation), ASEAN has often been criticised for its ASEAN Way and its seeming adherence to the principle of non-interference.<sup>21</sup> Many commentators suggest that this adherence to non-interference and consensus undermines the rule of law and ASEAN’s seriousness to integrate.<sup>22</sup> ASEAN has usually responded that, culturally speaking,<sup>23</sup> the ASEAN Way was a more effective method to resolving disputes in South East Asia.<sup>24</sup> Indeed, at the recent 14<sup>th</sup> ASEAN Summit in Thailand, the new ASEAN Anthem, “The ASEAN Way” was officially introduced with the lyrics proclaiming “we dare to dream, we care to share, for it’s the way of ASEAN”.<sup>25</sup>

Over the decades, as the threat of the spread of communism and regional military conflicts diminished, economic cooperation between ASEAN member states has begun to take on more prominence. This change may be attributed to the oft-referred to Bicycle Theory of integration – like a bicycle, integration projects must keep have some minimum forward momentum otherwise they will fall. With this new focus on economic integration in ASEAN, there has been the increased adoption of legally-binding frameworks to govern economic relations between member states.<sup>26</sup>

Indeed, economic cooperation has been the main driving force behind ASEAN Community-building and integration efforts thus far. The first generation of economic agreements adopted by ASEAN include the 1977 Agreement on ASEAN Preferential Trading Arrangements,<sup>27</sup> the 1979 Agreement on the ASEAN Food Security Reserve,<sup>28</sup> and the 1980 Basic Agreement on ASEAN

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<sup>20</sup> *Ibid*, Article 2.

<sup>21</sup> See e.g Gillian Goh, *The ‘ASEAN Way’: Non-intervention and ASEAN’s Role in Conflict Management*, 3 *Stanford Journal of East Asian Affairs* (2003) 113 ; Shaun Narine, *Explaining ASEAN : Regionalism in Southeast Asia* (Boulder, Colorado: Lynne Rienner Publishers, 2002) for an overview of the criticism and a response that separates the ‘ASEAN Way’ and the principle of non-intervention. For a historical perspective of the ASEAN Way, see Amitav Acharya, *Constructing a security community in southeast Asia: ASEAN and the problem of regional order* (Abingdon, Oxon; New York: Routledge, 2009)

<sup>22</sup> *Ibid*.

<sup>23</sup> We will examine later in this paper whether the word “culturally” is an appropriate word to use in explaining the ASEAN Way. It suffices at this stage to note that the word does not evoke any of the old Asian values debate but seems to describe a preference based on strategic interests.

<sup>24</sup> TAC, *supra* note 19.

<sup>25</sup> See ASEAN Anthem Competition, at [http://www.14thaseansummit.org/thailand\\_activities\\_01.php](http://www.14thaseansummit.org/thailand_activities_01.php).

<sup>26</sup> Paul J Davidson, “The ASEAN Way and the Role of Law in ASEAN Economic Cooperation” (2004) 8 *S.Y.B.I.L.* 165 at 168–169.

<sup>27</sup> Agreement On ASEAN Preferential Trading Arrangements, 24 February 1977, at <http://www.aseansec.org/1376.htm>

<sup>28</sup> Agreement On The ASEAN Food Security Reserve, 4 October 1979, at <http://www.aseansec.org/1315.htm>

Industrial Projects.<sup>29</sup> These were early examples of ASEAN members entering into legally-binding instruments to facilitate economic cooperation.<sup>30</sup>

In 1992, legal rationalisation took place within the context of the Framework Agreements for Enhancing ASEAN Economic Cooperation (“Framework Agreements”).<sup>31</sup> As these were framework agreements, they mainly affirm ASEAN members’ commitment to cooperate in various economic areas; they do not contain any specific binding legal obligations on economic cooperation.<sup>32</sup> However, agreements containing more precise binding terms have been enacted by members to implement the mandate of the Framework Agreements.<sup>33</sup>

More recently and perhaps seminally, the ASEAN Charter was signed on 20 November 2007 at the 13<sup>th</sup> ASEAN Summit in Singapore. Notably, in setting out the purposes of ASEAN, Article 1 of the Charter expressly included that ASEAN was “to create a single market<sup>34</sup> and production base”.<sup>35</sup> This economic goal was further elaborated in the AEC Blueprint<sup>36</sup> for implementation by 2015. In adopting the AEC Blueprint subsequent to the ASEAN Charter at the 13<sup>th</sup> Summit, the ASEAN member states iterated in the Declaration on the ASEAN Economic Community<sup>37</sup> that:

[T]he AEC Blueprint will transform ASEAN into a single market<sup>38</sup> and production base, a highly competitive economic region, a region of equitable economic development, and a region fully integrated into the global economy.<sup>39</sup>

All of this suggests that, at least initially, much of ASEAN’s *raison d’être* was more either based on realism, the self-interest of each state or at best functionalism based on the common interests of each state.<sup>40</sup> ASEAN arose not from the ashes of the Second World War but from the *realpolitik* of the Cold War.

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<sup>29</sup> Basic Agreement On ASEAN Industrial Projects, Kuala Lumpur, 6 March 1980, at <http://www.aseansec.org/1362.htm>

<sup>30</sup> Ong Keng Yong, “ASEAN and the 3 L’s: Leaders, Laymen and Lawyers”, at <http://www.asean.org/17356.htm>.

<sup>31</sup> Framework Agreements on Enhancing ASEAN Economic Cooperation, ASEAN member states, 28 January 1992, at <http://www.asean.org/12374.htm>.

<sup>32</sup> See generally *ibid.*

<sup>33</sup> See e.g. the various instruments enacted to implement the ASEAN Free Trade Area (AFTA) at <http://www.asean.org/12039.htm>.

<sup>34</sup> The AEC will have free movement of goods, services, *skilled* labour and *freer* movement of capital but is unlikely to be a custom union. This is unlikely because a customs union has to create a common external tariff policy. Singapore has an almost zero tariff policy (only beer, stout, samsu and medicated samsu are subject to tariffs though a universal excise tax is imposed on goods such as cigarettes, automobiles and wine). This means that Singapore’s tariffs will have to go up or that other ASEAN members will have to go down significantly to implement a common external tariff policy. Further, Singapore will have to give up many of its FTAs with non-ASEAN partners unless they agree with all the other ASEAN partners or the preferential tariff rates are harmonised with the ASEAN common external tariff rates (thus, making the FTAs superfluous at least for goods).

<sup>35</sup> ASEAN Charter, 20 November 2007, Article 1(5) at <http://cil.nus.edu.sg/2007/2007-charter-of-the-association-of-southeast-asian-nations-signed-on-20-november-2007-in-singapore-by-the-heads-of-stategovernment/>.

<sup>36</sup> AEC Blueprint, *supra* note 11.

<sup>37</sup> Declaration on the ASEAN Economic Community Blueprint, at <http://www.asean.org/21081.htm>.

<sup>38</sup> To most people, a single market is synonymous with a customs union which also includes not just free movement of goods but also of labour, services and capital. The most famous single market, the European Union (EU) began life as the European Coal and Steel Community in 1951 (Treaty of Paris (1951)) and went on to become the European Economic Community (EEC) in 1957 (Treaty of Rome (1957)) (when it become known in Britain and Ireland as “the Common Market”). The abolition of internal tariff barriers was achieved in 1968. The Single European Act was signed in 1986 to establish a Single European Market by 1992, by removing the barriers to free movement of capital, labour, goods and services.

<sup>39</sup> Declaration on the AEC Blueprint, *supra* note 37, paragraph 1.

<sup>40</sup> Michael Ewing-Chow, “Culture Club or Chameleon: Should ASEAN Adopt Legalization for Economic Integration?” (2008) 12 SYBIL 225 at 228.

Absent in many of the ASEAN documents is any reference to liberalism or the democratic peace theory that was present in the Schuman Declaration of 9 May 1950. No ASEAN document contains a statement similar to the Schuman Declaration that the European Coal and Steel Community (ECSC) was created to establish a solidarity in production so that **“any war... becomes not merely unthinkable, but materially impossible”**.<sup>41</sup> **The intention was to pool, through the transfer of sovereignty, the key strategic sectors – coal and steel – making it impossible for any member state to use these resources for rearmament, though it did indirectly lead to a more integrated production base in Europe.**<sup>42</sup>

This absence of any clear enunciated goal of ASEAN Integration is perhaps the main reason why trying to understand the project is akin to that of blind men trying to understand the shape of an elephant. It has developed without a unifying thesis and in different stages so that an observer looking at these aspects would come to understand ASEAN only from those compartmentalised experiences.

We do not attempt to develop a theory that explains all the various past and present aspects of the ASEAN Integration project holistically but rather are content to provide a theory for the main thrust of the ASEAN Integration project as it stands today. As stated above, we develop our thesis on the assumption that each of the ASEAN member states prioritises self-interest or enlightened self-interest in the project similar to members of the early European endeavours.

### ***The key to ASEAN Integration: The Integrated Production Network (IPN)***

Unfortunately, unlike the clear benefits a Single Market brought to Europe, the benefits for ASEAN are more complex and less obvious. While the combined population of ASEAN at approximately 600 million<sup>43</sup> compares favourably with that of EU's 500 million<sup>44</sup>, the combined GDP of ASEAN is only US\$1.8 trillion<sup>45</sup> compared to EU's US\$16.3 trillion<sup>46</sup>. Thus, any impressionistic understanding of ASEAN revolving around the value of a marketplace for ASEAN goods will have to be moderated by the short term realities that the consumers in ASEAN at the moment are not wealthy enough to buy many of the goods and intra-ASEAN trade – which on average comprises one quarter of the total annual ASEAN trade<sup>47</sup> (as compared to intra-EC trade which comprised nearly half of members' trading activity from 1958-1972)<sup>48</sup> – is currently not a driving force in ASEAN Integration.

We think that the main driver of ASEAN integration therefore is the integrated production network (IPN).

An IPN is a network of enterprises that have chosen to link their production based upon cost-effectiveness to the extent that standing outside the network becomes no longer viable. The IPN can be horizontal or vertical. When an IPN becomes transnational, it faces several challenges. The main challenge beyond the cost of transport and logistics planning is ensuring that the rules applicable to each actor in the network remain predictable and certain. Where the IPN operates in countries where

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<sup>41</sup> Schuman Declaration, 9 May 1950, at [http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index\\_en.htm](http://europa.eu/about-eu/basic-information/symbols/europe-day/schuman-declaration/index_en.htm)

<sup>42</sup> See Heribert Dieter, “Transnational Production Networks in the Automobile Industry”, (Notre Europe, 2007) Study No.58, at [http://www.notre-europe.eu/uploads/tx\\_publication/Etud58\\_01.pdf](http://www.notre-europe.eu/uploads/tx_publication/Etud58_01.pdf).

<sup>43</sup> ASEAN Community in Figures 2011, at <http://www.asean.org/documents/ASEAN%20community%20in%20figures.pdf>, at 1.

<sup>44</sup> Europe in Figures, Eurostat Yearbook 2011, at [http://ep.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-CD-11-001/EN/KS-CD-11-001-EN.PDF](http://ep.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-CD-11-001/EN/KS-CD-11-001-EN.PDF), at 109.

<sup>45</sup> *Supra* note 43 at 4.

<sup>46</sup> Report for Selected Countries and Subjects, International Monetary Fund, available at <http://www.imf.org>.

<sup>47</sup> *Supra* note 43 at 9.

<sup>48</sup> European Central Bank, Occasional Paper Series No. 40, Dec 2005, at <http://www.ecb.int/pub/pdf/scpops/ecbocp40.pdf>.

the rule of law is weaker, guarantees against arbitrary intervention and discrimination become more critical for the continued effective functioning of the IPN.

The automotive industry is frequently put forward as one of the best examples of IPN in Europe and that may well be true. Direct production of cars account for 2.2 million jobs, but on top of that comes 9.8 million jobs in closely related sectors. Even countries like Denmark (7000 jobs) and Finland (6000 jobs) without any kind of automotive industry reap job benefits from the IPN.<sup>49</sup>

Thus, the economic integration of ASEAN is not necessarily about the development of a Single Market but rather the development of an IPN but that is not the whole story. While the creation of the European Single Market indirectly created the environment for new networks of businesses and production, in Asia, counter intuitively, these networks already exist despite some trade barriers. Rather than changing the general environment to allow a climate for such networks, Asian businesses took advantage of the less than transparent discretion provided to policy makers at all levels in many Asian countries to obtain specific solutions to the trade barriers they faced.

Hence, since the 1960s, subject to the changing players and gravitational forces, much of intra-Asia trade is the trade of components which is part of a production chain of “Factory Asia”. That is to say, each state is part of a process that culminates in a final product for export to developed countries.<sup>50</sup> ASEAN because of its low labour cost and high raw material endowment has always been the hub of such a “Factory Asia” network. Thus, unrestricted regional trade is “an important building bloc for the region’s economic strength, and consequently disruptions – whether political or administrative – puts this competitiveness at risk.”<sup>51</sup>

Dieter writing about the development of the automotive market in Europe points out that “without the creation of a single regulatory sphere, the integration processes could not have taken place.”<sup>52</sup> He suggests that the expansion of the EU itself enlarged the space for business while the PANEURO scheme (that allowed for the cumulation of origin) increased the area available for sourcing of components without having to consider the local content requires of the EU.<sup>53</sup> By contrast, writing in 2006, Baldwin characterised East Asian regionalism as being “a mess” in that while there is a high level of regional division of labour in the production process, there has been limited legalisation of the process.<sup>54</sup> He suggested that the problem with “Factory Asia” was not a plan but the management of the plan highlighting that the unilateral tariff-cutting that created “Factory Asia” is not subject to WTO discipline (bindings) or any alternative legal disciplines.<sup>55</sup>

Indeed, production integration in Asia has been more a bottom-up process than a top-down one. Abo called this process “spontaneous integration”<sup>56</sup> which perhaps may also be described as the de

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<sup>49</sup> European Automobile Industry Report 09/10, European Automobile Manufacturers Association (ACEA), at [http://www.acea.be/images/uploads/files/20090519\\_ACEA\\_Industry\\_Report09FULL.pdf](http://www.acea.be/images/uploads/files/20090519_ACEA_Industry_Report09FULL.pdf), at 51-4.

<sup>50</sup> See WTO & IDE-JETRO, “Trade Patterns and Global Value Chains in Asia (2011)”, at [http://www.wto.org/english/res\\_e/booksp\\_e/stat\\_trade/stat\\_tradepat\\_globvalchains\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/stat_trade/stat_tradepat_globvalchains_e.pdf).

<sup>51</sup> Dieter, *supra* note 42 at 38.

<sup>52</sup> *Ibid.*, at 17-18.

<sup>53</sup> *Ibid.*

<sup>54</sup> Richard Baldwin, “Managing the Noodle Bowl: The Fragility of East Asian Regionalism”, Centre for Economic Policy Research Working Paper No. 5561, March 2006.

<sup>55</sup> *Ibid.*

<sup>56</sup> Abo Tetsuo, “Spontaneous Integration in Japan and East Asia: Development, Crisis, and Beyond”, in G.L. Clark, M.P. Feldman, and M.S. Gartler (eds) *The Oxford Handbook of Economic Geography* (Oxford: Oxford University Press, 2000), Chapter 31.



facto regionalisation identified by Higgott.<sup>57</sup> This has resulted in a business environment which is less transparent and less certain than that of Europe but one which is no less productive. Dieter shows that the production of automobiles and electronics in East Asia is relatively integrated in practice but is facing the headwinds of protectionism and inconsistent governmental policies.<sup>58</sup> He also describes the responsiveness to the problems and illustrates that by way of the replacement of the Brand-to-Brand Complementation (BBC) scheme adopted by ASEAN countries in 1988 with the ASEAN Industrial Co-operation (AICO) scheme in 1995. Notably, AICO has broadened the scope of ASEAN cooperation beyond automobile parts and has also finally included Indonesia in the regime.<sup>59</sup>

Having studied AICO in some detail, Sim notes:<sup>60</sup>

AICO was created in 1996 to encourage cross border investment and trade within ASEAN, serving as an early harvest of the ASEAN Free Trade Area (AFTA, which in 2010 became the ASEAN Trade in Goods Agreement, or ATIGA). Companies operating in two or more ASEAN member states could qualify for the early application of the 0-5% AFTA rates for their production inputs and finished goods if they could demonstrate that the proposal involved resource sharing/pooling and/or industrial complementation. The inputs and outputs also had to have 40% ASEAN content. After approval of the AICO application, the ASEAN Secretariat would issue an AICO certificate of eligibility which would allow the company to enter goods from the other ASEAN member using the reduced AFTA rates. This AICO certificate thereby created a set of rights and expectations between the company and the ASEAN Secretariat.

As almost all of the approved AICO projects – 89 out of 129 – involved the automotive industry (because Japanese companies used the AICO scheme to enjoy major cost savings from the reduced import duties), we shall use it as a case study here.

With the full implementation of AFTA/ATIGA in 2010, Sim highlighted that the tariff reductions had reached their final level. The reduced tariff rates under AICO were now equivalent – or in some cases a little higher – to the AFTA/ATIGA rate. This meant that that using AICO no longer offered any practical advantage over using ATIGA.<sup>61</sup> However, Thailand continued to apply AICO, particularly for the importation of complete knocked-down (CKD) automobiles from other ASEAN member states. This arguably was inconsistent with the requirements of ATIGA – no import quotas were to be imposed on intra-ASEAN trade in goods. However, after several months of internal pressure and ASEAN-style consensus building, Thailand agreed with other ASEAN members to terminate AICO and allow it to become superseded by ATIGA.<sup>62</sup>

Therefore, as exemplified by the above, if Factory Asia already exists, what real gains may be provided by ASEAN Integration? We posit that ASEAN Integration may provide two core benefits for ASEAN member states.

First, the codification and legalisation of existing policies to facilitate the IPN will provide comfort and security to many of the MNCs investing in this region. An IPN cannot develop without the inflow of investment capital. The ASEAN member states are cognizant of this and this desire to protect investments (including intra-ASEAN investments) is clearly stated in Articles 1 and 2 of the 2009 ASEAN Comprehensive Investment Agreement (ACIA). Here, ASEAN has proclaimed it intends to “create a liberal, facilitative, transparent and competitive investment environment in ASEAN” as well as to improve “transparency and predictability of investment rules, regulations and procedures

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<sup>57</sup> Richard Higgott, “De facto or De Jure Regionalism: The Double Discourse of Regionalisation in the Asia Pacific”, 11 *Global Society* (1997) 166.

<sup>58</sup> *Supra* note 42 at 41-2.

<sup>59</sup> *Ibid.*

<sup>60</sup> Edmund Sim, ASEAN Economic Community Blog, at <http://aseanec.blogspot.sg/2011/06/celebrating-life-and-death-of-aico.html>

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*

conducive to increased investment among member states.”<sup>63</sup> Generally, ACIA builds on ASEAN’s two previous investment agreements – the 1987 ASEAN Agreement for the Promotion and Protection of Investments and the 1998 Framework Agreement on the ASEAN Investment Area – and governs the international investment regime among the member states.

After solidifying the international investment regime among ASEAN member states through ACIA, the ASEAN member states also signed three other agreements related to investment in 2009. These were, namely, the ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA), which includes a chapter dedicated to investment on 27 February 2009 and the Agreements on Investment under the Framework Agreement on Comprehensive Economic Cooperation with the Republic of Korea and the People’s Republic of China (AKIA and ACFTA) on 2 June 2009 and 15 August 2009 respectively.

All of these agreements provide for the first time a clarity regarding which investments would be protected, how future investments might apply for such protections, and a binding dispute settlement system for investors to bring a claim against a state. Investment agreements like these will codify and regularise existing understandings between investors and the relevant governments as well as constrain new governments from changing policies overnight. This should provide an extra incentive for MNCs to invest in the ASEAN IPN and ensure that changes in governments do not unduly affect the production network.

Second, while some ASEAN member states have been successful in the past at picking which industries to focus on, the rapidly evolving global marketplace will make such forecasting increasingly difficult. At the same time, many of the incumbent governments in ASEAN have embraced more democratic processes. This means that the power to make autocratic choices for economic development will diminish over time. The fall of Marcos in the Philippines, Suharto in Indonesia, and more recently, Thaksin in Thailand; the reduced parliamentary majorities of the People’s Action Party (PAP) in Singapore and the Barisan Nasional (BN) and United Malays National Organisation (UMNO) in Malaysia; and the decision of the military junta in Myanmar to allow elections, all suggest that centralised choices about which industries to favour will not only become more difficult but may not be possible for ASEAN governments in the future.

Thus, by creating an environment conducive to an IPN, ASEAN States may be able to focus on macro-economic policies while allowing more private enterprise influences over their industrial development. This, as Porter suggests, is often a more successful way of developing industrial policy and frees ASEAN governments from having to make successful choices (which as Porter suggests they are less well placed to do than private business) to support their perception of legitimacy by their electorate<sup>64</sup>.

Will such a *laissez-faire* business environment really develop in ASEAN? Perhaps just as ASEAN Integration is integration but not as we previously understood it from the European experience, a free business environment in ASEAN will likely have a flavour unfamiliar to that of the West. The Four Freedoms of Europe – the free movement of goods, services, people, and capital – while echoed in the AEC Blueprint, have been textually modified into “free movement of goods, services, skilled labour, and freer movement of capital”.<sup>65</sup> The fact that even the Four Freedoms of Europe are not unfettered by regulations and standards highlights the semiotic difference between Europe and ASEAN. The narrative told to ASEAN citizens is not the European ideal of an “ever closer union among the peoples

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<sup>63</sup> ASEAN Comprehensive Investment Agreement (ACIA), 26 February 2009, at <http://www.asean.org/22244.htm>.

<sup>64</sup> Michael Porter, *Competitive Advantage of Nations* (USA: Simon and Schuster, 1998).

<sup>65</sup> AEC Blueprint, *supra* note 11 at paragraph 9. This principle was earlier accepted in the recommendations of the High Level Task Force on Economic Integration annexed to the 2003 Vientiane Action Programme, and in the 2007 ASEAN Charter. You may be interested also in the first reference to 2+x (a close relative of ASEAN-X) in the 1992 Framework Agreements on Enhancing ASEAN Economic Cooperation.

of Europe” – one of the stated aims of the Treaty of Rome and repeated in the Maastricht Treaty. This aspiration of bringing the peoples of ASEAN together is not echoed in any form in any ASEAN documents. Instead, the main promise seems to be voluntary cooperation leading to economic development without significant cost.<sup>66</sup>

One may be forgiven for thinking that the major issues that have political ramifications would be naturally subject to agreement on a case-by-case basis but that technical issues may often be left to a non-political coordinating body. While it is difficult to categorise each issue as political or technical, it should be noted that even the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA)<sup>67</sup> provides flexibilities which allow members to withdraw tariff concessions which they would otherwise be obligated to grant. This is pursuant to the 2000 Protocol Regarding the Implementation of the CEPT Scheme Temporary Exclusion List (“2000 CEPT Protocol”)<sup>68</sup> which declares that in order to provide flexibility,<sup>69</sup> it allows ASEAN member states to withdraw tariff commitments which have already been agreed upon under the liberalisation scheme.<sup>70</sup> The 2000 CEPT Protocol was a response to Malaysia’s withdrawal of automobiles and completely knocked down automobile kits from AFTA tariff reductions it had previously agreed upon in the aftermath of the Asian Financial Crisis.<sup>71</sup> Some commentators have suggested that as only the products under the CEPT Inclusion List are subject to liberalisation, it should be noted that this means that specific tariff lines may be kept out of the Inclusion List interminably.<sup>72</sup> Nonetheless, Article 6 of 2000 CEPT Protocol allows for the suspension of equivalent concessions by an affected ASEAN member state in the case of a non-agreement situation. This thus provides for some economic cost disincentives as well as a political one.

The practice of flexibility in ASEAN relations is well-ingrained from the time of ASEAN’s establishment. Beginning with the Bangkok Declaration in 1967, ASEAN leaders made the deliberate choice to steer clear of binding legal obligations to allow for more flexible engagement. The Bangkok Declaration itself is only a political statement (as opposed to a legal document) that required no ratification.<sup>73</sup> The ASEAN founding fathers wanted it to be an organisation with minimal legal institutionalisation. This was because ASEAN was first and foremost a diplomatic instrument for confidence-building at a time when their common concern was the containment of communist China.<sup>74</sup> This emphasis on flexibility continues to permeate how ASEAN Integration is to proceed.

With that said, the cognitive process of confidence-building in ASEAN has begun. ASEAN member states are increasingly subjecting themselves to obligations in regional agreements and many of them are more vocal about announcing their intentions to adhere to a greater rule of law. A business environment conducive to all Western investors will be unlikely in the near future but a business environment that codifies and regularises current IPNs, provides for greater transparency in

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<sup>66</sup> An assessment of ASEAN’s identity, objectives and the means for their achievement as reflected in its textual instruments in Chan Sze-Wei and Tan Hsien-Li, “The Quest for the ASEAN Identity: Holding up the Textual Mirror of Veracity to Its Self-Portrait” [forthcoming - working title].

<sup>67</sup> Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area (CEPT) (1992), at <http://www.asean.org/12375.htm>.

<sup>68</sup> Protocol Regarding the Implementation of the CEPT Scheme Temporary Exclusion List (2000) (CEPT Protocol), at <http://www.asean.org/12365.htm>.

<sup>69</sup> *Ibid.*, Preamble.

<sup>70</sup> *Ibid.*, Article 1.

<sup>71</sup> Marcus Hund, “From ‘Neighbourhood Watch Group’ to Community? The Case of ASEAN Institutions and the Pooling of Sovereignty” (2002) 56 *Australian Journal of International Affairs* 99 at 103.

<sup>72</sup> *Ibid.*

<sup>73</sup> See generally *ibid.*

<sup>74</sup> Ong, *supra* note 30.

governmental discretion for investments while binding ASEAN States to a dispute settlement process may be sufficient to promote the future development of the IPN in ASEAN for now.

***ASEAN Plus: Broadening Asian economic cooperation***

It must be pointed out that the ASEAN IPN is not a purely intra-ASEAN phenomenon. It is an Asian one and in some cases even a global one.

The 2011 WTO IDE-JETRO publication on “Trade Patterns and Global Value Chains in Asia” describes how in 1985 there were only four major trade in goods players in the Asian region; Japan, Malaysia, Indonesia, and Singapore. Resource-rich states Malaysia and Indonesia would supply resources to Japan while Singapore manufactured component parts for assembly in Japan which would then be exported to the West. In 1990, the number of key players increased with Korea, Thailand, and Chinese Taipei, all newly industrialised economies, joining the supply chain. Around 1995, Japan started to supply its intermediate/intermediary products to the newly industrialised developing states. This led to the creation of strong linkages in core suppliers of Japan and their affiliates. While there was a strong linkage between Asian states with a high level of technological transformation, the level of technological development was low. The high product flow was attributed more to supply than value addition especially between Singapore and Malaysia.

The gravitational forces changed when in 2001 China joined the WTO and began to access Japan’s current supply chain of component parts. By 2005, the centre of gravity had shifted to China, with it being the main market for all intermediary products from the Asian region. The competitiveness of China’s export is not only attributable to its cheap labour but also to the intermediary high quality goods/products it receives from the other Asian states (and in particular ASEAN states) in the supply chain structure. ASEAN states today produce parts/accessories and components and exports them to China which, copying the previously successful Japanese model, then assembles the products and exports the finished products principally to the West.

This historical account of the Asian supply chain brings into question the previous suggestion that ASEAN Integration should be understood to be about Production Integration rather than Market Integration. If ASEAN is only a link in the chain that led previously to Japan and now leads more to China, can Production Integration in ASEAN really be understood separate from the production chains of the rest of Asia? At the same time, the very narrative of ASEAN Integration has been largely fuelled by the dismay of ASEAN States at the FDI flowing away from ASEAN towards China (as it is arguably large enough to be an integrated production base). This apparent paradox of cooperation with China in production but in competition with China for foreign investment deserves some unpacking.

The explanation may lie in a neo-classical analysis of the comparative and competitive advantages of each Asian state. China has a low cost and relatively high productive labour force but limited natural resource endowments. Many ASEAN states, conversely, have high natural resource endowments. Others, like Singapore, have technological advantages over China. Despite the size of China, it makes sense for manufacturers to outsource the production of natural resource-intensive goods to some ASEAN states with the relevant advantages and precision-engineered high technology goods to other ASEAN states. At the same time, the strength of extant trade networks (both legal and commercial) also favour the use of hubs like Singapore to provide strategic trade, logistical, and tax advantages when planning the production chain.

Indeed, the focus in ASEAN on the ASEAN Plus Three (China, Korea, and Japan) relationship underscores the point that ASEAN Integration cannot be understood as separate from Asian economic integration. It is still about Production Integration but not limited only to ASEAN. It is still not about Market Integration as the Plus Three countries still maintain a certain level of protectionist tariffs for manufactured goods and at the same time keenly support the development of supply chains and production networks for the manufacture of goods to export to the West.

The ASEAN Plus Three countries – China, Korea, and Japan – generally tend to prefer a regional free trade agreement with their ASEAN counterparts as opposed to individual free trade agreements with each ASEAN state. The ASEAN-China agreement entered into force in 2007 and the ASEAN-Korea and ASEAN-Japan agreements entered into force in 2009. There are, however, two major exceptions to this generalization.

First, each of the Plus Three countries pursued individual free trade agreements with Singapore. The China-Singapore agreement entered into force in 2009 while the Korea-Singapore agreement entered into force in 2006 and the Japan-Singapore agreement in 2002. Singapore is one of the most open economies in the world and it has a vast free trade agreement network.

The second noteworthy example is Japan. Before entering into the Japan-ASEAN agreement, Japan pursued individual free trade agreements with a majority of the ASEAN states. This policy may be attributed to Japan's historical presence in Southeast Asia that dates back to the 1960s. After its first FTA with Singapore (2002), Japan attempted to solidify its ASEAN position before negotiating a regional agreement with ASEAN countries *in toto*.<sup>75</sup> Japan subsequently signed Free Trade Agreements with Indonesia (2008), Malaysia (2006), Philippines (2008), Thailand (2007), and Vietnam (2009).<sup>76</sup>

Interestingly, neither the US nor the EU has concluded a free trade agreement with ASEAN. The US has instead initially pursued a bilateral approach starting with the US-Singapore FTA in 2002.<sup>77</sup> Its successive individual negotiations with Malaysia and Thailand, however, were delayed and suspended as a result of political and other issues.<sup>78</sup> Currently, the US is working with ASEAN under the 2006 US-ASEAN Trade and Investment Framework Agreement<sup>79</sup> while engaging with multiple ASEAN countries (Brunei Darussalam, Malaysia, Singapore, Vietnam) through the negotiations of the Trans-Pacific Partnership Agreement showing a preference for the group approach.<sup>80</sup> The EU is following a similar strategy negotiating individual free trade agreements with Singapore, Malaysia, and Vietnam.<sup>81,82</sup>

Some speculate that the ASEAN countries prefer to negotiate as a single entity to take advantage of greater negotiating leverage *vis-à-vis* the larger countries such as China, Korea, Japan, and the United States. Others have noted, however, that even though the presumption is that ASEAN will negotiate as a bloc, it has not always occurred in this manner when negotiating with third parties.<sup>83</sup> Although

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<sup>75</sup> See C.L.Lim, *East Asia's Engagement with Cosmopolitan Ideals under Its Trade Treaty Dispute Provisions*, 56 McGill L.J. (2011) 821 at 846-7. See also Hatakeyama Noboru, "A Short History of Japan's Movement to FTAs (Part 3)" (2003) 22 *Journal of Japanese Trade & Industry* 42.

<sup>76</sup> WTO, "Regional Trade Agreements" ("Japan") at <http://rtais.wto.org>.

<sup>77</sup> Trade and Investment Framework Agreements, which provide the basis for further trade and investment discussions, have been entered into with Brunei, Cambodia, Indonesia, Malaysia, Philippines, Thailand and Vietnam. USTR, "Trade & Investment Framework Agreements", at [http://www.ustr.gov/trade\\_agreements/trade-investment-framework-agreements](http://www.ustr.gov/trade_agreements/trade-investment-framework-agreements).

<sup>78</sup> See USTR, Thailand at <http://www.ustr.gov/countries-regions/southeast-asia-pacific/thailand> and Malaysia at <http://www.ustr.gov/trade-agreements/other-agreements/malaysia-fta>.

<sup>79</sup> See USTR, ASEAN at <http://www.ustr.gov/countries-regions/southeast-asia-pacific/association-southeast-asian-nations-asean>

<sup>80</sup> USTR, Trans-Pacific Partnership Agreement at <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/united-states-trans-pacific-partnership>.

<sup>81</sup> "EU Trade Talks May Trigger Vietnam Investment Revival", Bloomberg News, 26 June 2012, at <http://www.bloomberg.com/news/2012-06-25/eu-trade-talks-progress-may-trigger-vietnam-investment-revival.html>.

<sup>82</sup> There was a stalled attempt to negotiate an ASEAN-EU FTA, mentioned in the 2007 Plan of Action to Implement the Nuremberg Declaration on an EU-ASEAN Enhanced Partnership, at <http://www.asean.org/21122.pdf>. There was also an attempt at an ASEAN-US TIFA, mentioned in the 2005 Joint Vision Statement on the ASEAN-US Enhanced Partnership, at <http://www.asean.org/17871.htm>.

<sup>83</sup> *Supra* note 76 at 847.

negotiating with the ASEAN countries as a whole may be more attractive, sometimes the political realities dictate otherwise.

Just as Singapore was the hub for the ASEAN region, the development of the AEC coupled with the evolving Free Trade Agreements (FTAs) ASEAN has negotiated with the Plus Three countries suggests that ASEAN is trying to position itself as a hub for Asia. This is a strategy that some have suggested is also based on the perception that the Plus Three countries harbour deep historical distrust of each other and would prefer a neutral intermediary in their supply chains. Indeed, while there have been sporadic discussions about a North East Asian FTA (“East Asia FTA”) between the Plus Three countries, there has been limited progress and the focus of Japan has recently shifted towards the Trans Pacific Strategic Economic Partnership (TPP). This also does not consider the obvious competitive and comparative advantages that ASEAN possesses such as high natural resource endowment, a relatively (in the case of Korea and Japan) cheaper labour force and good logistical networks.

The fragmentation of production and the rise of successful hub-spoke models of trade together with the increased reliance by manufacturers of supply chains have resulted in the creation of extant Asian IPNs. With that said, the current competitive and comparative advantages should not lull ASEAN into a sense of security of its place in the Asian production chain. China is actively sourcing natural resources in Africa and Latin America while Korea is expanding its production strategies to reach beyond Asia. Thus, ASEAN Integration can be understood not just as a way of making the region more attractive to investment from Western MNCs but also a way of continuing to provide value to the Asian production chains that are linked to the region. If so, then enhancements to the value of ASEAN as a regional hub must be found in the gains from the development of greater efficiencies, predictability and coordination that ASEAN Integration promises. If this does not occur, it may well be that the competitive and comparative advantages elsewhere may cause the Asian production chains to shift their focus.

Where is there room for improvement? For manufactured goods which are part of existing production chains, the tariffs in ASEAN are already relatively low.<sup>84</sup> The barriers that are faced are not necessary border measures but behind the border regulations. Investment regulations, trade in services rules, and product safety standards if harmonised will increase the attractiveness of ASEAN, not perhaps as a custom union but rather a regulatory union that facilitates production and investment. While there is some development in ASEAN on this front,<sup>85</sup> the Single Market of ASEAN, as stated above, is not understood by ASEAN member states as being similar to the Common Market of Europe. The improbability of a custom union will mean that there will be little internal impetus for the creation of harmonized common policies (which are expensive and complicated to negotiate) and there is even less desire to share the individual benefits that each ASEAN member obtains from the Single Market with each other. Instead, it may well be that the focus of ASEAN Integration may be more in the realm of coordination and branding of the extant IPN while creating more comfort and security for investors involved in that IPN by increasing the role and rule of law in ASEAN.

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<sup>84</sup> See WTO Annual Report 2011 at [http://www.wto.org/english/res\\_e/booksp\\_e/anrep\\_e/anrep11\\_e.pdf](http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep11_e.pdf).

<sup>85</sup> An assessment of ASEAN’s progress towards implementation of a single market in Peter J. Lloyd, “What is a Single Market? An Application to the Case of ASEAN” in Denis Hew, ed., *Brick by Brick: The Building of an ASEAN Economic Community* (Singapore: ISEAS, 2007), 13 at 30-34.

## **II. From the spirit of the times to structuring for integration**

### *ASEAN zeitgeist: Fear, survival, and global relevance*<sup>86</sup>

What then can we distil from the foregoing narrative and discussion to enable us to understand ASEAN Integration better? A running theme throughout the evolution of ASEAN Integration since its creation in 1967 is the sense of fear and uncertainty by ASEAN states about their future and about each other. It is not so much an existential insecurity that often marks the debates about Europe but rather one more rooted in the poverty and chaos of the past; it is more focused not on understanding one's place in the world as much as simply on survival.

It has always been priority for ASEAN member states to avoid being irrelevant in the international order. They have been strenuously convincing themselves and the outside world that the region and its effort to integrate was a serious and worthwhile attempt to enhance conditions for economic prosperity and political survival, both domestically and externally. However, today, it is not survival in the sense of where is the next meal coming from. Many ASEAN members (with the exception of perhaps Cambodia, Laos, and Myanmar) have progressed beyond that. Yet, even rich members like Malaysia and Singapore, often worry about the drying up of trade growth and a reduction in the standard of living. Until recently, this was not the conversation in Europe. Conversely, the remembrance of a time of scarcity is often at the forefront of the consciousness of most ASEAN member states. For example, the GDP per capita of Singapore at the time of its independence and then separation from Malaysia in 1965 was US\$516 which has since increased approximately 100 times to US\$50,123 in 2011.<sup>87</sup> The fear is that if growth was that fast, perhaps a change in the environment could lead to a precipitous fall.

ASEAN has had to face significant changes in its internal environment since the 1960s and even more changes in its external environment. The consolidation of nation states that continued in this post-war, post-independence period was challenged by deep-seated inter-ethnic tensions, struggles between political factions, separatist movements, and transitions from monarchy to constitutionalism. These tensions also affected Thailand even if it was not coming out of colonialism. Between states, relations moved from a fear of each other during the *Konfrontasi* in the 1960s, to a fear of outside threats to peace and security in the form of the Vietnam War and the Khmer Rouge in Cambodia in the 1970s, to fearing a complete economic meltdown in the form of the Asian Financial Crisis that resulted in severe social and political upheavals in Indonesia, Malaysia, and Thailand in the late 1990s. Just as it was recovering from that Asian Financial Crisis, ASEAN faced the challenge of the rise of China (and to a lesser extent, India) as a major competitor for FDI. In all of these situations, ASEAN has always had to react, adapt, and readjust.

Initially a confidence-building exercise, ASEAN Integration today is about providing certainty as it seeks to improve its attractiveness as a link in an Asian IPN. Where previously the role of law in ASEAN and its emphasis on the ASEAN Way as a mechanism for confidence-building was critical, at least textually today, ASEAN aspires towards a greater role for the rule of law governing the relationship between its members. The 2007 ASEAN Charter declared that ASEAN's new self-understanding was that it would recognise clear and binding obligations, rules for dispute settlement, and sanctions for breaches of such rules (at least in economic matters). As ASEAN now endeavours to attract FDI from the West as well as Asia as both an production base in itself as well as part of the

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<sup>86</sup> See Michael Ewing-Chow and Joergen Oerstroem Moeller "A Theory of ASEAN Integration" [working title – forthcoming].

<sup>87</sup> Time Series on Per Capita GDP at Current Market Prices (1960-2011), at <http://www.singstat.gov.sg/stats/themes/economy/hist/gdp.html>.

larger Asian IPN, ASEAN has textually accepted that it must be perceived by itself and the world as an integration project where prior agreed bargains stick and the rule of law is observed.<sup>88</sup>

However, herein lies the chasm between aspiration and execution of the ASEAN Integration vision. We know where ASEAN wants to go and why it wants to get there. The most difficult question for ASEAN to answer is *how* it should get there. It hopes to do so with ambitious treaty texts and very little else — domestic courts in many ASEAN members are weak with underdeveloped human capital, no ASEAN supranational adjudication body has been proposed, and the ASEAN Secretariat remains severely underfunded.<sup>89</sup>

Without such infrastructure, what then can propel ASEAN Integration? While we are not proponents of institutional path dependency, the absence of coordinating institutions for an integration project that is very much about coordinating, codifying, and regularising existing production networks should be a matter of high concern for ASEAN. In this respect, it is imperative that ASEAN sets in place core infrastructure to reach its goal of regional integration – namely, institutions, legalisation, and dispute settlement mechanisms.

### ***ASEAN Institutions: Intergovernmental or Supranational?***

For deeper regional integration to take place, it also is important to enhance coordination among new and existing ASEAN institutions and to facilitate the interpretation and enforcement of ASEAN decisions. What then are the modes of institutions we should be considering in the ASEAN Integration context?

Huntington's theory on institutions has been described as simply "institutions are absorbers of conflicts".<sup>90</sup> In this respect it is interesting to note the small role institutions have played in forging ASEAN. We can go so far as to say that, except for most recent years, institutions have been absent. To counter this, the ASEAN Charter established and formalised a number of regional organs to enable ASEAN to develop the ASEAN Community, such as the ASEAN Summit (Article 7); ASEAN Coordinating Council (Article 8); ASEAN Community Councils, which consist of the Political-Security Council, the Economic Community Council and the Socio-Cultural Community Council (Article 9); and ASEAN Intergovernmental Commission on Human Rights (Article 14).

The ASEAN Charter also established a Committee of Permanent Representatives (CPR). The CPR comprises delegates that are appointed by each ASEAN member state to ASEAN. These representatives hold the rank of Ambassador and are based in Jakarta. However, the CPR will not be the primary decision-making body. Instead, the ASEAN Summit will continue to be the main forum for decision-making and decisions at all levels will continue to be made by consultation and consensus.

Moreover, the Charter also expands the role and function of the Secretary-General and the ASEAN Secretariat to enable them to play a more substantive role, including to facilitate and to monitor the progress of the implementation of ASEAN agreements and decisions towards the realisation of an ASEAN community. Article 11(2) of the Charter makes it clear that one of the function of the Secretary-General is to improve ASEAN's compliance to ASEAN agreements, and in light of this function, the Charter accorded the Secretary-General ministerial status.

While the ASEAN Secretary-General and the ASEAN Secretariat have been given greater responsibility to monitor compliance and facilitate the implementation of the ASEAN agreements, the

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<sup>88</sup> ASEAN Charter, *supra* note 35, Article 5.

<sup>89</sup> Michael Ewing-Chow, "Translating the Design into a Bloc: The Domestic Implementation of the ASEAN Charter" in S. Tiwari, ed., *ASEAN: Life after the Charter* (ISEAS Publishing, 2010), at 79.

<sup>90</sup> See Samuel P. Huntington, *Political Order in Changing Societies*, (Yale University Press, 1968).



budget for the ASEAN Secretariat remains very tight. In the 2011 financial year, the ASEAN Secretariat was given US\$15.76 million with each member state contributing equally to the budget. This insistence on equal contributions means that the annual budget of the Secretariat is limited by the amount that the less developed ASEAN member state may be willing to contribute. This will continue to keep the ASEAN Secretariat budget tight as some the ASEAN members, being Least Developed Countries, may find it more difficult to increase their contributions. Indeed, in very practical terms, the very limited budget that ASEAN enjoys will likely limit its effectiveness as a legally separate entity from its members for all the clarity that legal personality has provided.

All these organs were intended to provide ASEAN with the institutional framework to improve the member states adherence to ASEAN agreements and commitments. However, the Charter provides few details on the roles of these organs and how they relate with each other. Take the ASEAN Summit, for example. Article 7 establishes the ASEAN Summit as “the supreme policy-making body of ASEAN” comprising of the “Heads of State or Government of the member states”. That is to say, the highest level of decision-making in ASEAN is an intergovernmental one. One of the tasks of the ASEAN Summit is to “decide on matters referred to it under Chapters VII”, which touches on decision-making within ASEAN. Chapter VII confirms that the ASEAN Way of consultation and consensus will remain a basic principle of decision-making in ASEAN, whereupon the ASEAN Summit comes into the picture only when a consensus cannot be reached.<sup>91</sup> In this situation, the ASEAN Summit “may decide how a specific decision can be made”.<sup>92</sup>

An examination of Article 7, however, reveals that there is scant information on how the ASEAN Summit is to arrive at specific decisions in the event of non-consensus. The provision, whilst empowering the ASEAN Summit to “decide on matters referred to it under Chapter VII”, does not clarify whether decisions by the ASEAN Summit have to be reached via unanimous consensus or voting. If unanimous consensus is required, there is no information in the provision indicating what is to happen to a matter referred to the ASEAN Summit under Chapter VII if the ASEAN Summit is unable to reach a consensus. In this regard, the Charter perhaps missed an opportunity to prescribe mechanisms for effective decision-making that is necessary for successful economic integration. It may well have been that the political realities made such silence a necessity.

Another possible reason of why the ASEAN Charter does not elaborate the roles of these organs in details, is probably because the Charter was meant to be a general all-encompassing document, without having to deal with the technical details of each provisions. Indeed, Article 49 of the Charter actually empowers the ASEAN Coordinating Council to issue the terms of reference and rules of procedure for ASEAN. This would also make it easier to review and amend each of the terms of reference and rules of procedure separately without having to amend the ASEAN Charter.

ASEAN has thus far concluded the Rules of Procedure for the Conclusion of International Agreements by ASEAN, Rules of Procedure for the Interpretation of the ASEAN Charter, Rules of Procedure of the Committee of Permanent Representatives, Rules of Authorisation for Legal Transactions under Domestic Laws, and Rules of Reference of Non-Compliance to the ASEAN Summit. It is still in the process of finalising the ASEAN Secretariat Staff Regulations. These terms of reference and rules of procedure are all aimed to establish clear, transparent, and efficient working relationships between the ASEAN Organs. However, it is unclear as to the degree that these rules of procedure are being adhered to.

Therefore, if ASEAN institutions either do not currently exist or are not strong enough, could domestic institutions such as the municipal courts be resorted to?

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<sup>91</sup> ASEAN Charter, *supra* note 35, Article 20(1).

<sup>92</sup> *Ibid.*, Article 20(2).

The European experience reveals an evolution of its legal system in which the domestic courts of each member state were integral to its development towards greater legalism. This was however not the result of political will (at least initially) but an autochthonous development of the European Court of Justice (ECJ) which transpired from its desire to build its own legitimacy and its vision of European Integration (which was in fact in direct conflict with the will of member states). As mentioned above, the ECJ managed to push its vision of European legalisation using the preliminary ruling mechanism in Article 177 of the Treaty of Rome, which greatly promoted member states' compliance with European law by making them subject to binding decisions from their own domestic courts.

The national courts of each EU member state became willing enlisteeds of the ECJ's constitutionalism doctrine. They actively used the preliminary ruling system to their advantage as it provided them the opportunity to escape their national hierarchies and to bolster their independence and authority vis-à-vis other higher courts and political bodies.<sup>93</sup> By referencing cases to the ECJ, the national courts were also enforcing European law and contributing to the process of European Integration.

The unique legal mechanisms existing in the European system that allowed domestic courts to successfully contribute to the legalisation of Europe process, however, would be difficult to replicate in ASEAN. First of all, ASEAN does not have any form of supranational court that can push domestic courts to enforce ASEAN law. Second of all, studies have shown that domestic courts in most ASEAN countries are not sufficiently strong enough both in terms of human capital or political capital to be absorbers of conflict.

Alternatively, could international institutions fill the gap? Alvarez argues that that the region's participation in non-binding institutions is not necessarily inconsistent with legal regimes because these alternatives to institutionalisation often work in tandem with or under the shadow of formal international organisations.<sup>94</sup> While this may be true for the areas under the *umbra* of those international organisations, does not provide comfort for the areas in the *grey penumbra* or in the areas outside the shadow itself. For example, if there are insufficient overlaps such as when ASEAN enters into internal WTO plus trade agreement like AFTA that provide for disciplines beyond those subject to the WTO's Dispute Settlement Mechanism, the global institutional supply may prove insufficient to resolve a dispute.

While ASEAN may have done so for disputes concerning the interpretation or application of ASEAN economic agreements by agreeing in the Charter that these would be settled in accordance with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM),<sup>95</sup> which provides for a negative consensus rule for the adoption of any report,<sup>96</sup> this system has not yet been activated despite it being available since 1996. The system adopted under the EDSM follows the dispute settlement mechanism of the World Trade Organisation's (WTO) Dispute Settlement Understanding, albeit with even shorter timelines. Although this mechanism have never been invoked, it is interesting to note that Singapore in 1995 (pre-dating the EDSM) and the Philippines in 2008 (post EDSM) have preferred to invoke the WTO dispute settlement mechanism against other ASEAN countries (Malaysia and Thailand, respectively) rather than use existing ASEAN dispute settlement mechanisms. Although it is worth to note that Singapore claim against Malaysia pre-dates the EDSM (Singapore lodged the complaint to WTO in 1995, prior to the 1996 Protocol on Enhanced Dispute Settlement Mechanism). This suggests that ASEAN members themselves trust the multilateral WTO dispute settlement mechanism more than the ASEAN dispute settlement mechanisms as an absorber of conflict.

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<sup>93</sup> JHH Weiler, "The Transformation of Europe" (1991) 100 Yale LJ 2403, at 2426.

<sup>94</sup> Jose E Alvarez, "Institutionalised Legalisation and the Asia-Pacific 'Region'" (2007) 5 NZJPIL 9.

<sup>95</sup> ASEAN Charter, *supra* note 35, Article 24(3).

<sup>96</sup> ASEAN Protocol on Enhanced Dispute Settlement Mechanism (2004 EDSM) (2004), Articles 9(2) and 12(13) at <http://www.asean.org/16754.htm>.

Keeping regulations and policies transparent is a fundamental condition of international trade. As mentioned earlier, ASEAN intends to “create a liberal, facilitative, transparent and competitive investment environment in ASEAN” as well as to improve “transparency and predictability of investment rules, regulations and procedures conducive to increased investment among member states”.<sup>97</sup>

In the WTO, surveillance of national trade policies is a fundamentally important activity running throughout the work of the WTO. At the centre of this work is the Trade Policy Review Mechanism (TPRM). The main objective of the TPRM is facilitating the smooth functioning of the multilateral trading system by enhancing the transparency of Members’ trade policies.<sup>98</sup> Nevertheless, there is no policy review mechanism within ASEAN. It is submitted that the TPRM may be a viable tool to facilitate trade and absorb conflicts among ASEAN members. ASEAN can consider setting up an equivalent trade policy review body as that of the WTO to carry out reviews on policies and practices of goods trade, services, and intellectual property within ASEAN. Setting up a TPRM within ASEAN will increase the transparency and understanding of members’ trade policies and practices. Specifically, regular monitoring of each member’s trade policies and examining trade policymaking institutions and the macroeconomic situation of each member would inevitably impose normative pressures to the members. Thus each member would arguably be more active in achieving a high standard of self-compliance. Also, the TPRM would function as an *ex ante* mechanism to prevent trade conflicts among members. In particular, by making trade policies transparent and by attending public and intergovernmental debate on different issues, it is easier for members to understand each other’s trade policies and practices and their national concerns behind.

Nonetheless, setting a TPRM would require substantial costs and effort from ASEAN member states in that it requires comprehensive procedural and technical support from each state. The staff capacity and financial resources of the TPRM would also affect the effectiveness of the function of TPRM.

Moreover, whether the TPRM will have a significant impact on the behaviour of ASEAN members depends largely on each member’s self-adherence to the established policies and measures. And whether a member would respond positively to the TPRM also depends on its domestic circumstances and policy priorities. Therefore, when preparing the establishment of the TPRM within ASEAN, we will have to take into account each member’s economic conditions, their wider economic and developmental needs, their policies and objectives, and the external economic environment that they face.

However, the institutionalisation of the new ASEAN Charter<sup>99</sup> raises the question of whether ASEAN is changing culturally towards a more legalised basis for its intra-ASEAN international relationships and if this is an effective strategy for decision-making and greater integration within the region. It must be noted, however, that we feel that the dichotomy between Intergovernmental and Supranational decision-making institutions is false. In the case of ASEAN (as is elsewhere), it is more about having good rather than bad (or non-existent) institutions such that decisions can be made effectively to promote regional integration.

### ***ASEAN Legalisation***

In addition to ASEAN Institution-building, legalisation is another important cornerstone for ASEAN Integration. Some have suggested that what ASEAN needs to look towards are some of the rules-based

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<sup>97</sup> ACIA, *supra* note 63 at Articles 1(c) and 2.

<sup>98</sup> See WTO, “Overseeing national trade policies: the TPRM”, at [http://www.wto.org/english/tratop\\_e/tp\\_r\\_e/tp\\_int\\_e.htm](http://www.wto.org/english/tratop_e/tp_r_e/tp_int_e.htm)

<sup>99</sup> *Supra* note 35.

principles (though not necessarily adopt the exact practices) of the EU.<sup>100</sup> This echoes the literature on legalisation. In particular, Legalisation as a concept in international relations was developed by the authors of the Legalization Issue of the journal, *International Organization*, to explain “the use and consequences of law in international politics”.<sup>101</sup> Referring to the characteristics that institutions may possess, they Goldstein, Kahler, Keohane, and Slaughter have conceptualised the elements of legalisation as obligation, precision, and delegation.<sup>102</sup> While other conceptions of legalisation exist, it is useful to adopt this as a perspective in which to analyse ASEAN from a descriptive methodology rather than a normative agenda.

Obligation refers to international actors being legally bound by legal rules and procedures, whether international or domestic. Such legal rules and procedures impose obligations that are distinct from obligations resulting from coercion, comity, and morality.<sup>103</sup> Precision means that these rules and procedures define rights and obligations in unambiguous ways.<sup>104</sup> That is, the scope of reasonably interpreting them is narrow. In Franck’s parlance, this means that such rules are determinate.<sup>105</sup> Finally, delegation relates to the grant of authority to third parties, such as courts, arbitrators, and administrative bodies, to interpret and apply rules during dispute settlement and also to make further rules.<sup>106</sup> Dispute resolution mechanisms are highly legalised when parties agree, on the basis of clear and generally applicable rules, to be bound by the decisions of these third parties. They are less legalised when political bargaining goes on and parties are not bound to accept the determinations of third party adjudication.<sup>107</sup>

The authors in the *International Organization* issue on Legalisation in 2000 postulate that institutions exhibit each of these elements along a continuum, ranging from the weakest (the complete absence of obligation, precision, and delegation) to the strongest form. They caution that it was difficult to draw a strict dichotomy between various types of international legalisation and that it was probably not instructive to say that a form of legalisation is inherently superior to other forms. Indeed, they take pains to clarify that the range of soft law types in the middle rows may be more applicable in certain circumstances than the hard law types.<sup>108</sup> Nonetheless, it should be noted that ASEAN was classified as having weak legalisation whereas the EU was seen as having strong legalisation.<sup>109</sup>

In that issue, Kahler argued, however, that Asia’s choice on the degree of legalisation was instrumental and strategic and it did not reflect any deeper cultural preference.<sup>110</sup> Writing in the midst of economic reforms after the 1997 Asian economic crisis, he opined that although the crisis promotes institutional change, more legalisation may not offer solutions to the economic challenges faced by the region. Further, Kahler argued that as Asian economies are already globally engaged, global institutional supply may prove adequate for Asia’s circumstances without the need for the region to

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<sup>100</sup> See e.g., Ong Keng Yong, “Forty Years of ASEAN: Can the European Union be a Model for Asia?” speech delivered to the Konrad Adenauer Foundation, Berlin, 16 July 2007, at <http://www.aseansec.org/20890.htm>.

<sup>101</sup> Judith Goldstein, Miles Kahler, Robert O. Keohane, and Anne-Marie Slaughter, “Introduction: Legalization and World Politics” (2000) 54 I.O. 385 at 386.

<sup>102</sup> Kenneth W. Abbott, et. al., “The Concept of Legalisation” (2000) 54 I.O. 401 at 403.

<sup>103</sup> *Ibid* at 408.

<sup>104</sup> *Ibid* at 403.

<sup>105</sup> Thomas Franck, *The Power of Legitimacy Among Nations* (1990) quoted by Abbott, *supra* note 102 at footnote 27.

<sup>106</sup> Abbott, *supra* note 103 at 403.

<sup>107</sup> *Ibid* at 415.

<sup>108</sup> *Ibid* at 408.

<sup>109</sup> *Ibid*.

<sup>110</sup> Miles Kahler, “Legalisation as Strategy: the Asia-Pacific Case” at (2000) 54 I.O. 549 at 562.

legalise more by developing its own institutions.<sup>111</sup> It is submitted that this may or may not be true depending on whether there are sufficient overlaps in the institutions ability to deal with the needs arising from further economic integration in Asia and a study of these interactions should probably be undertaken. It is not within the scope of this paper to do so.

Kahler also suggested that in order to understand how the ASEAN legal framework is developing, it is necessary to appreciate how ASEAN has been operating by the ASEAN Way. For more than 40 years, ASEAN has functioned without a formal constitution. By choice, it has conducted its affairs in a loose, informal way with few legally-binding arrangements and weak institutions.<sup>112</sup> Indeed, the ASEAN way, a term derived from the Malay concepts of *musjawarah*<sup>113</sup> and *mufakat*<sup>114</sup> stresses decision-making by consensus.<sup>115</sup> The approach involves conducting informal behind-the-scene discussions to reach a general consensus, which will form the starting point around which a unanimous decision is to be made at formal meetings. This can be contrasted with formal across-the-table negotiations which result in deals enforceable in a court of law.

A brief discussion about the types of ASEAN instruments may be more instructive for our understanding of ASEAN. We have to state at the outset that the exact status of these ASEAN instruments is often unclear. The nomenclature of agreements, declarations, memoranda of understanding (MOU), policies and frameworks, and roadmaps is usually not indicative of whether these instruments impose binding obligations. This is because the criteria for classifying ASEAN instruments as treaties – e.g. intention of the parties, the use of hard law language, the need for ratification processes, etc. – remain unclear to date.<sup>116</sup> A quick scan of the ASEAN Secretariat’s table of “ASEAN treaties” reveals this confusion.<sup>117</sup>

Generally, with the exception of agreements pertaining to economic cooperation and dispute settlement,<sup>118</sup> ASEAN instruments are political rather than legal in nature.<sup>119</sup> On defence and security matters, the two key treaties remain the Treaty of Amity and Cooperation in Southeast Asia (TAC)<sup>120</sup> and the Treaty on the Southeast Asia Nuclear Weapon-Free Zone (SEANWFZ).<sup>121</sup> In short, the ASEAN Way is distinct from the formal legalism present in most Western international legal

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<sup>111</sup> *Ibid* at 571.

<sup>112</sup> Rodolfo Severino, “Framing the ASEAN Charter: an ISEAS Perspective” in *Framing the ASEAN Charter: an ISEAS Perspective* (Rodolfo Severino, ed, Singapore: ISEAS, 2005) at 3–4.

<sup>113</sup> This refers to decision-making through consultation and discussion.

<sup>114</sup> This refers to unanimous decision that is derived through *musjawarah*.

<sup>115</sup> Thambipillai and Saravanamuttu, *ASEAN negotiations: two insights* (Singapore: ISEAS, 1985) at 11-13.

<sup>116</sup> Authors’ sources.

<sup>117</sup> See e.g. Table of ASEAN Treaties/Agreements And Ratification (as of June 2012) at <http://www.aseansec.org/document/Table%20of%20Agreement%20and%20Ratification%20as%20of%20June%202012.pdf>

<sup>118</sup> For a summary of ASEAN law-making, see Ong, *supra* note 30. See also Michael Ewing-Chow, *Culture Club or Chameleon: Should ASEAN adopt legalization for Economic Integration?*, 12 *S.Y.B.I.L* (2008) 225-37, at 228-9.

<sup>119</sup> For a list of ASEAN treaties and other agreements, see “Table of ASEAN Treaties/Agreements and Ratification”, *supra* note 118. It is notable that the majority of legally binding agreements are economic in nature, e.g. ACIA; the Agreement on Investment of the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the People’s Republic of China, 15 August 2009; the Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area (AANZFTA), 27 February 2009; and the ASEAN Trade in Goods Agreement (ATIGA), 26 February 2009. For a more detailed discussion, see Tan Hsien-Li, “Non-state Actors in Southeast Asia: How does Civil Society Contribute Towards Norm-building in a State-centric Environment?”, in Jean d’Aspremont (ed.), *Participants in the International Legal System: Multiple Perspectives on Non-State Actors in International Law* (Routledge 2011), 109–25.

<sup>120</sup> *Supra* note 19.

<sup>121</sup> Treaty on the Southeast Asia Nuclear Weapon-Free Zone (SEANWFZ), 15 December 1995, at <<http://www.aseansec.org/2082.htm>>.

institutions.<sup>122</sup> Thus, descriptively, it may well be that perhaps ASEAN is less legalised than many of its Western counterparts. Nonetheless, ASEAN has realised that to avoid being left behind in the new global economy, it must grow beyond its “loose association”.<sup>123</sup> The incumbent Secretary-General of ASEAN, Surin Pitsuwan, has stressed

ASEAN cannot be *ad hoc* and informal in its approach to community-building [but must] be more legalistic and more systematic” in spearheading regional integration efforts for not only ASEAN but the wider East Asian region to meet the challenges of “emerging economies, particularly China and India.”<sup>124</sup>

To that end, ASEAN has proclaimed:

[t]he ASEAN Charter serves as a firm foundation in achieving the ASEAN Community by providing legal status and institutional framework for ASEAN. It also codifies ASEAN norms, rules and values; sets clear targets for ASEAN; and presents accountability and compliance... With the entry into force of the ASEAN Charter, ASEAN will henceforth operate under a new legal framework and establish a number of new organs to boost its community-building process. In effect, the ASEAN Charter has become a legally binding agreement among the 10 ASEAN Member States.<sup>125</sup>

Thus far, in the whole history of ASEAN, all legal obligations undertaken by the organisation has entailed the individual endorsement of each state, in line with the principle of consultation and consensus.<sup>126</sup> If unanimity cannot be reached, the matter can be tabled at the ASEAN Summit for resolution,<sup>127</sup> whereupon it is inevitable that the ten member states will compromise to breach the impasse. Contrary to popular perception, ASEAN’s practice of unanimity does not mean that the members who veto propositions impede ultimate decision-making. ASEAN being what it is will always try to reach an agreeable middle ground with all parties making certain concessions toward that end.<sup>128</sup> There is more room for negotiation and movement with ASEAN economic integration where the “ASEAN minus X” formula may be applied – again, where there is consensus to do so.<sup>129</sup> To date, ASEAN’s exercise of legal personality is somewhat limited. Under domestic law, ASEAN can enter into contracts, acquire and dispose of property, and engage in legal proceedings through the Secretary-General, Deputy Secretaries-General or any member of the staff of the ASEAN Secretariat authorised by the Secretary-General.<sup>130</sup> In the exercise of its capacities under international law, including entering into agreements, ASEAN shall continue to act through its representatives authorised by the Member States.<sup>131</sup> It is obvious that with such will be some time before ASEAN has a distinct personality from its constituent member states.<sup>132</sup>

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<sup>122</sup> *Supra* note 26 at 166–7.

<sup>123</sup> Tan, *supra* note 120, at p.112.

<sup>124</sup> Secretary-General of ASEAN, Dr Surin Pitsuwan, Speech given at the International Symposium on East Asia beyond the Global Economic Crisis, Tokyo, 2 December 2009.

<sup>125</sup> See the Overview of the ASEAN Charter at [http://www.aseansec.org/about\\_ASEAN.html](http://www.aseansec.org/about_ASEAN.html).

<sup>126</sup> ASEAN Charter, *supra* note 35 at para.20(1).

<sup>127</sup> *Ibid.*, para.20(2).

<sup>128</sup> ASEAN official, anonymous, closed-door meeting, August 2009.

<sup>129</sup> ASEAN Charter, *supra* note 35, para.21(2). The “ASEAN minus X” formula basically means that members states ready to move ahead with regional policies can do so.

<sup>130</sup> Agreement on the Privileges and Immunities of the Association of Southeast Asian Nations, 25 October 2009, at <<http://www.aseansec.org/15thsummit/Agreement-on-Privileges-and-Immunities.pdf>>, para.2(1).

<sup>131</sup> *Ibid.*, para.2(2).

<sup>132</sup> Tan, *supra* note 120 at 179.

### ***ASEAN Dispute Settlement Mechanisms***<sup>133</sup>

As institutionalisation and legalisation develop in ASEAN, fora where disputes can be resolved typically follow. Since its establishment, ASEAN has developed three main mechanisms for dispute settlement. The first one was actually established less than ten years after the Bangkok Declaration, with the adoption of the 1976 Treaty of Amity and Cooperation (TAC). Almost twenty years later, when economic integration became the focus of ASEAN, the member states adopted the 1996 Protocol on Dispute Settlement Mechanism for disputes relating to ASEAN economic agreements, which was updated by the 2004 ASEAN Protocol for Enhanced Dispute Settlement Mechanism (EDSM). Finally, Chapter VIII of the ASEAN Charter contains dispute settlement provisions that serve as an overarching framework for dispute settlement in ASEAN.<sup>134</sup> The dispute settlement mechanisms provide under the TAC, the EDSM, and the ASEAN Charter have never been utilised by member states.

#### **A. Treaty of Amity and Cooperation**

The TAC was signed on 24 February 1976, in conjunction with the Declaration of ASEAN Concord, which declared that “member states, in the spirit of ASEAN solidarity, shall rely exclusively on peaceful process in the settlement of intra-regional differences”. The TAC in Article 13 sets out that member states should “refrain from the threat or use of force” and settle any disputes through “friendly negotiations”. Any unresolved disputes will be brought in front a High Council comprising ministerial representatives of all member states of ASEAN and ministerial representatives of non-ASEAN contracting parties that are directly involved in the dispute.

All parties to the dispute must agree to submit the dispute to the High Council, before the High Council can recommend appropriate means of dispute settlement to the disputing parties, which include the High Council’s good offices, or constituting a committee for mediation, inquiry, or conciliation. The dispute settlement mechanism under the TAC, although an important achievement for ASEAN, is pretty much a validation of the ASEAN Way, where disputes can only be brought up to settlement mechanism by agreement of all parties. Furthermore, even if all parties agree to settle the dispute according to the TAC, the modes available are all non-legal modes, which show the reluctance of the member states to allow third parties to decide on international disputes between them.

#### **B. Protocol for the Enhanced Dispute Settlement Mechanism**

The 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM) was signed in Vientiane in 2004 by the ASEAN Economic Ministers. It supersedes the 1996 Protocol on Dispute Settlement Mechanism, which in turn superseded the 1987 Agreement for the Promotion and Protection of Investments prior to it. The EDSM applies to disputes arising under the 1992 Framework Agreement on Enhancing ASEAN Economic Cooperation, as well as all retroactively to earlier key economic agreements and to future ASEAN economic agreements. The essence of the dispute settlement mechanism under the EDSM is a mandatory dispute settlement process involving a panel established by the Senior Economic Officials Meeting (SEOM) to assess disputes that cannot be settled through good offices, mediation, or conciliation. The panel will have sixty days to come up with recommendations,<sup>135</sup> which then have to be adopted by the SEOM within thirty days, unless the SEOM decides by consensus not to adopt the recommendations, or a party decides to

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<sup>133</sup> See Michael Ewing-Chow and Leonardo Bernard “The ASEAN Charter: the Legalisation of ASEAN?” in the GAL Casebook (2012) Chapter I.B.7 for more details about this. This section is an abridged version of that chapter.

<sup>134</sup> ASEAN Charter, *supra* note 35, Chapter VIII, Articles 22–28.

<sup>135</sup> 2004 EDSM, *supra* note 96, Article 8(2).

appeal.<sup>136</sup> Appeals will go to an appellate body established by the ASEAN Economic Ministers, which must decide on the appeal on the issues of law and interpretation within sixty days.<sup>137</sup>

Under Article 16 of the EDSM, if a party fails to implement the findings and recommendations of the panel's or the appellate body's reports adopted by the SEOM within sixty days, then the party having invoked the dispute settlement procedures may enter into negotiations with the other party to reach a mutually acceptable compensation.<sup>138</sup> Failing to do so, the party having invoked the dispute settlement procedures may request authorisation from the SEOM to suspend the application to the member state concerned of concessions or other obligations under the covered agreements.<sup>139</sup> The SEOM must grant this authorisation within thirty days of the expiry of the sixty day period unless there is a consensus against the request.<sup>140</sup>

The system adopted under the EDSM follows the dispute settlement mechanism of the World Trade Organisation's (WTO) Dispute Settlement Understanding, albeit with even shorter timelines. To date, the EDSM and therefore the suspension have not been resorted to by ASEAN member states. Although this mechanism have never been invoked, it is interesting to note that Singapore in 1995 (pre-dating the EDSM) and the Philippines in 2008 have preferred to invoke the WTO dispute settlement mechanism against other ASEAN countries (Malaysia and Thailand, respectively) rather than use existing ASEAN dispute settlement mechanisms. Although it is worthwhile to note that Singapore claim against Malaysia pre-dates the EDSM (Singapore lodged the complaint to WTO in 1995, prior to the 1996 Protocol on Enhanced Dispute Settlement Mechanism). This suggests that ASEAN members themselves trust the multilateral WTO dispute settlement mechanism more than the ASEAN dispute settlement mechanism, including the EDSM.

### C. The ASEAN Charter

Chapter VIII of the 2007 ASEAN Charter on Dispute Settlement provides a comprehensive framework for existing and future dispute settlement mechanisms in ASEAN. Article 24(1) of the ASEAN Charter provides that where specific ASEAN instruments provide for a dispute settlement mechanism, disputes would be resolved with reference to that mechanism. Article 24(2) states that disputes not concerning the application or interpretation of ASEAN agreements are to be resolved in accordance with the TAC, while Article 24(3) further provides that disputes concerning the interpretation or application of ASEAN economic agreements would be settled in accordance with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism. While these provisions do provide more certainty for enforcement, where there are no pre-existing dispute settlement mechanisms, Article 25 of the ASEAN Charter suggests that "appropriate dispute settlement mechanisms, including arbitration, shall be established." The application of this provision is further elaborated in the 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (2010 Protocol), which provides for consultations within a fixed timeframe and the possibility to convene an arbitral tribunal.

Aside from disputes concerning the interpretation or application of the ASEAN Charter, the 2010 Protocol also applies to disputes concerning the interpretation or application of other ASEAN instruments that do not provide any means of settling such disputes, or other ASEAN instruments that specifically refer to the 2010 Protocol. The Protocol provides that a complaining party may request consultation to the responding party, in which case the responding party must reply to the request within thirty (30) days and must enter into consultation within sixty (60) days from the date of the

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<sup>136</sup> *Ibid.*, Article 9(1).

<sup>137</sup> *Ibid.*, Article 12.

<sup>138</sup> *Ibid.*, Article 16(2).

<sup>139</sup> *Ibid.*, Article 16(2).

<sup>140</sup> *Ibid.*, Article 16(6).



receipt of the consultation request. If, and only if, the responding party does not respond to the consultation request or if consultation fails to settle the dispute within ninety (90) days from the date of the receipt of the request for consultation, then the complaining party can request the establishment of an arbitral tribunal. Still, under the 2010 Protocol, an arbitration tribunal can only be convened if both parties agree to do so. If the responding party does not agree or fails to respond to the request within the period provided in Article 8(3) of the 2010 Protocol, then the complaining party may refer the dispute to the ASEAN Coordinating Council to decide on how the dispute is to be resolved, failing which, any party can refer the dispute to the ASEAN Summit. The problem is, there are no clear publicly available procedures or descriptions of how the ASEAN Summit should reach its decisions, whether it is by positive or negative consensus or any other methods. Moreover, since the ASEAN Summit is comprised of officials from all the member states, it will be difficult for the ASEAN Summit to reach a decision against one member state.

The 2010 Protocol has some similarities with the dispute settlement procedure contained in North American Free Trade Agreement (NAFTA) Chapter Twenty (Institutional Arrangements and Dispute Settlement Procedures). Both mechanisms provide for consultation; good offices, mediation and conciliation; as well as arbitration. There are two main differences, however. First, NAFTA Article 2007 provides that good offices, mediation, and conciliation can only be requested if consultation between the parties fails; and arbitration can only be initiated if good offices, mediation, or conciliation fails. Under the 2010 Protocol, good offices, mediation, and conciliation can be initiated at anytime by the parties; and the request for arbitration can be made after consultation fails to reach any settlement, without having to go through the process of good offices, mediation or conciliation. Second, NAFTA Articles 2008 and 2011 provide automatic establishment of arbitral tribunal once a request is made (although, in practice, this automatic panel appointment procedures cannot function, since the NAFTA Parties have never agreed on a Chapter 20 arbitrator roster and as a result the responding party can delay panel selection indefinitely). By contrast, in the 2010 Protocol, an arbitral tribunal can only be convened if the responding party agrees to such request.

In light of this, Chapter VIII of the ASEAN Charter envisions the ASEAN Summit playing two roles. First, the ASEAN Summit is to act as a *de facto* final arbiter. When “a dispute remains unresolved” after the parties have used dispute settlement mechanisms available within the ASEAN framework, they can bring their dispute to the ASEAN Summit for its decision. Second, the ASEAN Summit takes on the role of “enforcing” a decision that has been reached using one of ASEAN’s dispute settlement mechanisms. If there is non-compliance with a decision, the member state “may refer the matter to the ASEAN Summit for a decision”. However, as the Charter is silent about decision-making at the ASEAN Summit level, this could mean resolution by the “ASEAN Way”, which means resolution through dialogue, consultation and negotiation.

In both instances, the role of the ASEAN Summit as an arbitrator appears weak for two reasons. First, Article 7 of the ASEAN Charter does not prescribe a mechanism for the ASEAN Summit to act in this capacity. Is the Charter’s silence an implicit acknowledgement that the Summit is to adopt the consensus approach? If so, what if there is no consensus? Second, Article 7 does not oblige member states to comply with the decision of the ASEAN Summit. These uncertainties may need to be clarified in the future in order to facilitate the enhanced coordination between member states and the enforcement of decisions by the ASEAN Summit.

Having mapped out descriptively some of the concerns about rule-making, monitoring, and enforcement for ASEAN, we now turn to the normative jurisprudential question of what sort of laws and institutions would be useful for ASEAN to have in order to promote the integration it wants.

In this regard, the epistemic standard of “legitimacy” as suggested by Buchanan and Keohane<sup>141</sup> of “minimal moral acceptability, comparative benefit and institutional integrity”<sup>142</sup> may be an effective (even if largely utilitarian) method to evaluate ASEAN. While Buchanan and Keohane point out that their “three substantive conditions are best thought of as what Rawls calls “counting principles” – “the more of them an institution satisfies, and the higher the degree to which it satisfies them, the stronger its claim to legitimacy”,<sup>143</sup> the “legitimacy” of ASEAN as a regional institution may well be examined by applying these standards on ASEAN’s own terms.

The Preamble to the ASEAN Charter concludes as follows:

“We, the Peoples of the member states of the Association of South East Asian Nations ... [h]ereby decide to establish, through this Charter, the legal and institutional framework for ASEAN.”

Unlike prior ASEAN declarations and instruments, the Charter brings the legal and the institutional issues to the forefront of ASEAN’s objectives for the first time. As the “minimal moral acceptability” element is arguably satisfied by ASEAN’s declared (if not necessarily always enforced) adherence to basic human rights principles,<sup>144</sup> the question becomes what sort of laws and institutions does ASEAN have currently and what would be useful for ASEAN to have to promote the integration it wants and therefore develop a stronger claim to “comparative benefit and institutional integrity”.

Peng contends that the legal culture of East Asia differs considerably from the West’s because the former focuses on the Confucian principle of harmony and kinship while the latter stresses the use of formal legal rules to govern relationships.<sup>145</sup> Peng argues that in the age of globalization, the prosperity of East Asia depends on the region’s adherence to the Western legalised framework of the WTO because Western legal culture has now transcended regional boundaries. Peng concludes that with East Asia’s extended stake in the WTO, the region has to reshape its legal culture to conform to WTO norms. This suggests is that while the starting point of a non-legal basis to international relationships may be a cultural preference in East Asia, that East Asian pragmatism usually trumps such cultural preferences. This may also be true for Southeast Asia.<sup>146</sup>

It is submitted, that the juxtaposition of moves towards greater legalism on some issues (particularly economic integration issues) and a general tendency to prefer informal consensus on others suggests that the ASEAN Way is probably the result of political expediency instead of cultural determinism. In other words, ASEAN leaders made the strategic choice to pick the ASEAN Way rather than out of any deep-rooted Asian aversion to legalism. Therefore, it follows that if ASEAN members are convinced of the long-term advantages the AEC will bring to their self interests, the political will to adopt legalisation will likely surface regardless of any rhetoric about the importance of national sovereignty and the principle of non-interference.

Alvarez attempts to provide an alternative view to the thesis that the ASEAN region is under-legalised.<sup>147</sup> Alvarez’s objections to the lack of legalisation are mainly two-fold – first, that the region’s participation in non-binding institutions is not necessarily inconsistent with legal regimes because these alternatives to institutionalisation often work in tandem with or under the shadow of

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<sup>141</sup> Allen Buchanan and Robert O. Keohane, *The Legitimacy of Global Governance Institutions* (2006) 20 *Ethics and International Affairs* 405.

<sup>142</sup> *Ibid.*, at 424.

<sup>143</sup> *Ibid.*

<sup>144</sup> The Preamble to the Charter emphasizes that ASEAN the Charter is based on adherence “to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms.” *Supra* note 35.

<sup>145</sup> Shin-yi Peng, “The WTO Legalistic Approach and East Asia: From the Legal Culture Perspective” (2000) 1 *APLPJ* 1.

<sup>146</sup> Shaun Narine, *Institutional theory and Southeast Asia: the case of ASEAN*, 161 *World Affairs* 33 (1998).

<sup>147</sup> *Supra* note 95.

formal international organisations; and second, the tri-fold emphasis on obligation, precision, and delegation misleads and is outdated because international law and institutions are increasingly diverse and cannot be confined to top-down, precise forms of obligation.

The first objection while true for the areas under the *umbra* of those international organisations, does not provide comfort for the areas in the grey *penumbra* or in the areas outside the shadow itself. For example, if there are insufficient overlaps such as when ASEAN enters into internal WTO plus trade agreement like AFTA that provide for disciplines beyond those subject to the WTO's Dispute Settlement Mechanism, the global institutional supply may prove insufficient to resolve a dispute. ASEAN would need to develop a way to resolve that dispute and while it has done so for disputes concerning the interpretation or application of ASEAN economic agreements by agreeing in the Charter that these would be settled in accordance with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism,<sup>148</sup> which provides for a negative consensus rule for the adoption of any report,<sup>149</sup> as highlighted above, the enforcement of the report is still likely to be subject to consensus.

It is also true that international legal sources are no longer confined to treaty, custom, or general principles but include a welter of soft law whose content and legal effects involve the discourse of law. As such, to look only at hard legal institutions for the rule of law in ASEAN may be reductive and in the main, while the obligations may not be specifically enforceable through an adjudicative process, the international obligations are usually complied with due to the political costs resulting from non-compliance. Many international agreements in any case provide for specific safety valves where the international political cost of non-compliance is outweighed by the domestic political costs thus allowing states *in extremis* to make a calculation to suspend certain obligations rather than to withdraw completely from the regime.<sup>150</sup>

Nonetheless, that there has been a movement internationally towards a rules-based framework to regulate international economic relations, particularly as manifested by the WTO legal framework, is evident to most international economic law scholars.<sup>151</sup> The reason for this is that in the absence of clear rules, the incentive to conform to domestic pressure could become over emphasized and the safety valve could become a gaping hole. This was true of the old GATT dispute settlement mechanism which required positive consensus before a report was adopted.<sup>152</sup> The new WTO Dispute Settlement Understanding reversed this position to require negative consensus thereby creating a greater incentive for adherence to pre-agreed (and hard bargained as well as mutually exchanged) concessions.<sup>153</sup> In contrast, within ASEAN, much economic cooperation has in the past been largely achieved by the ASEAN Way, which relies to a large extent on a personal and consensual approach though the advent of the Charter could signal a paradigm shift.

Only time will tell whether this personal and consensual approach is part of the cognitive process of habituation and comfort-creation of ASEAN or it is an evolutionary *cul-de-sac* of ASEAN transformation. However, if ASEAN wants to be an institution providing "comparative benefit" for economic integration efforts then processes for the recognition and adherence to obligations arising from lengthy negotiation efforts should be eventually more developed. Further, if ASEAN is to exhibit "institutionally integrity", a greater observance of the rule of law within ASEAN will be necessary for ASEAN to be taken seriously.

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<sup>148</sup> ASEAN Charter, *supra* note 35, Article 24(3).

<sup>149</sup> 2004 EDSM, *supra* note 97, Articles 9(2) and 12(13).

<sup>150</sup> See e.g. the anti-dumping, safeguard and subsidies provisions in the WTO Agreement as well as the exception clauses such as Article XX of the GATT.

<sup>151</sup> See e.g. JHH Weiler, "The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement" 35 *Journal of World Trade* (2001) 191.

<sup>152</sup> *Ibid.*

<sup>153</sup> *Ibid.*

Indeed, the ASEAN approach may be changing in the face of the global phenomenon of legalisation and the impetus for greater economic integration within ASEAN. ASEAN's former Secretary-General, Ong Keng Yong, has suggested that "ASEAN has to become increasingly more legalistic", so that it could engage more in economic cooperation.<sup>154</sup> Therefore, if the realisation of the AEC is an avowed aim of the Charter, the question is whether the Charter has taken a right step in the direction towards the AEC. Whether it can do so beyond the AEC is an even bigger question.

Nonetheless, if ASEAN does not develop its institutional structures further, it may well be that other institutions may provide greater "comparative benefit" and thereby encourage individual member states to focus on other options for trade liberalisation such as the Asia-Pacific Economic Cooperation (APEC) forum or if the individual member is economically attractive enough, bilateral deals with selected trading partners. Indeed, as variable geometry is already pre-agreed into the AEC in the form of ASEAN Minus X, ASEAN's greatest challenge to its "comparative benefit" as a institution as well as an internally consistent institution that purports to represent the region may be ASEAN Minus X itself which allows some ASEAN members to move forward into deeper integration without the other members.

### **III. Integration in the ASEAN Political-Security and Socio-Cultural Communities: Case study of the ASEAN Intergovernmental Commission on Human Rights**

Having analysed the predominantly economic driving force behind ASEAN integration and the general institutional and legal structures necessary to bring about closer community-building, we proceed to examine an ASEAN body which is entirely outside the realm of the ASEAN Economic Community for some contrast. We have chosen the ASEAN Intergovernmental Commission on Human Rights (AICHR) which straddles both the ASEAN Political-Security and Socio-Cultural Communities. The APSC strives to ensure that "countries in the region live at peace with one another and with the world in a just, democratic and harmonious environment".<sup>155</sup> In doing so, ASEAN member states

[p]ledge to rely exclusively on peaceful processes in the settlement of intra-regional differences and regard their security as fundamentally linked to one another and bound by geographic location, common vision and objectives. It has the following components: political development; shaping and sharing of norms; conflict prevention; conflict resolution; post-conflict peace building; and implementing mechanisms.<sup>156</sup>

As to the ASCC, ASEAN member states are

[f]ocused on nurturing the human, cultural and natural resources for sustained development in a harmonious and people-oriented ASEAN... It seeks to forge a common identity and build a caring and sharing society which is inclusive and where the well-being, livelihood, and welfare of the peoples are enhanced.<sup>157</sup>

We find that, as compared to structures related to the AEC, ASEAN integration in the first and third pillars is relatively slow, especially in the area of human rights. AICHR exemplifies this. It arguably lies at the other end of the spectrum of ASEAN priorities. Moreover, it is undoubtedly a weak institution which relies, if at all, on soft law. One could plausibly put this down to the abiding suspicion ASEAN member states have against human rights regimes – they view them as intrusive and interfere with member states' internal affairs. I.e. human rights are diametrically opposite to the erstwhile practice of the ASEAN Way.

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<sup>154</sup> Ong, *supra* note 30.

<sup>155</sup> ASEAN Political-Security Community, Overview, at <http://www.aseansec.org/18741.htm>

<sup>156</sup> *Ibid.*

<sup>157</sup> ASEAN Socio-Cultural Community, Overview, at <http://www.aseansec.org/18770.htm>

Prior to the ASEAN Charter, ASEAN had mentioned its support (albeit in a somewhat vague manner) of human rights and the possibility of establishing a regional human rights mechanism in the joint communiqués of the ASEAN Foreign Ministers beginning from 1993.<sup>158</sup> Momentum for this idea grew and as part of the transformation of ASEAN into a regional organisation with legal personality and credible international standing undertaken at its fortieth anniversary in 2007, ASEAN incorporated for the first time in a binding constituent instrument, the ASEAN Charter, that it would adhere to the principles of democracy and respect and protect human rights. Apart from the references to human rights and democracy throughout the ASEAN Charter,<sup>159</sup> Article 14 of the ASEAN Charter provides that:

1. In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body.
2. This ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting.<sup>160</sup>

Subsequently, the Blueprints for the ASEAN Political-Security and Socio-Cultural Communities unveiled in January 2009 elaborated on the initiatives ASEAN would undertake to achieve this goal of promoting and protecting human rights. The APSC Blueprint stated that ASEAN should establish an ASEAN human rights body by 2009; take stock of ASEAN bodies that work on human rights issues, including the rights of migrant workers, women, and children, and improve the networks among them as well as with civil society; enhance information-sharing and public education on human rights; and work with other ASEAN sectoral bodies to establish the ASEAN Commission on the Promotion and Protection of the Rights of Women and Children.<sup>161</sup> Concomitantly, the ASCC Blueprint enunciated that ASEAN should safeguard the interests and rights of, provide equal opportunities, and raise the quality of life and standard of living for women, children, the elderly, persons with disabilities, and migrant workers.<sup>162</sup>

After prolonged and somewhat tense negotiations, AICHR was set up on 23 October 2009 pursuant to the adoption of the Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights (TOR).<sup>163</sup> As the “overarching human rights institution in ASEAN”,<sup>164</sup> AICHR is mandated to promote and protect human rights in accordance with international standards in the ASEAN region whilst “taking into account the balance between rights and responsibilities”<sup>165</sup> and respecting the bulwark of “non-interference in the internal affairs of ASEAN member states”.<sup>166</sup> Proceeding on a five-year work cycle,<sup>167</sup> AICHR is primarily tasked with developing human rights strategies to complement ASEAN Community-building,<sup>168</sup> the first of which is to come up with the ASEAN Human Rights Declaration (AHRD).<sup>169</sup> Among other things, AICHR is also to promote human rights

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<sup>158</sup> See especially Joint Communiqués of the ASEAN Ministerial Meetings in 1993, 1997, and 1999 onwards at [www.aseansec.org](http://www.aseansec.org)

<sup>159</sup> See particularly ASEAN Charter, *supra* note 35, Preamble, Article 1 (Purposes), and Article 2 (Principles).

<sup>160</sup> *Ibid.*, Article 14.

<sup>161</sup> *Supra* note 10, para. A.1.5.

<sup>162</sup> *Supra* note 12, paras. C1–3.

<sup>163</sup> Cha-am Hua Hin Declaration on the ASEAN Intergovernmental Commission on Human Rights, 23 October 2009 at <http://www.aseansec.org/documents/Declaration-AICHR.pdf>

<sup>164</sup> Terms of Reference of the ASEAN Intergovernmental Commission on Human Rights (TOR), 23 October 2009, para. 6.8.

<sup>165</sup> *Ibid.*, paras. 1.4–1.6.

<sup>166</sup> *Ibid.*, para. 2.1(b).

<sup>167</sup> *Ibid.*, para. 9.6.

<sup>168</sup> *Ibid.*, para. 4.1.

<sup>169</sup> *Ibid.*, para. 4.2.

capacity-building, increase rights awareness, encourage ASEAN member states' accession to and ratification of international human rights instruments, and the full implementation of ASEAN instruments on human rights.<sup>170</sup> It is also expected to come up with thematic studies on human rights issues in ASEAN and to submit an annual report on its activities.<sup>171</sup>

Perhaps unsurprisingly, AICHR has not achieved very much in its three years of existence. While its establishment in 2009 was considered a real milestone for human rights in the ASEAN region, its development thereafter has not met expectations. Out of the list of goals listed in the APSC and ASCC Blueprints, ASEAN has, in addition to the establishment of AICHR, set up the ASEAN Commission on the Protection and Promotion of the Rights of Women and Children (ACWC). The ASEAN Committee to Implement the Declaration on the Protection and Promotion of the Rights of Migrant Workers (ACMW) has since reached a standstill over intra-regional tensions on the issue of illegal migrant labour flows. Leaving aside the work of the ACWC which is beyond the scope of this paper, we find that the most basic targets of AICHR have still yet to be met. The status of the Rules of Procedure governing how AICHR is to operate, its Five-Year Work Plan outlining the targets of its first cycle of tenure,<sup>172</sup> and the ASEAN Human Rights Declaration (AHRD)<sup>173</sup> which is to enunciate clearly the rights (and responsibilities) of the peoples of ASEAN is still unclear. The AICHR Rules of Procedure and Work Plan are supposedly finalised but there is no public information on this to date, while the AHRD drafting process is still underway after a year's delay. In the meantime, there has neither been any public education or awareness drive on human rights by AICHR nor any stocktaking or network-linking of human rights organisations in the ASEAN region. There has also not been the disclosure of AICHR's annual report on its activities.

What could possibly explain this phenomenon? It would be too simplistic to deride ASEAN's human rights development exercise as mere window-dressing for the international audience. With human rights and democracy being integral principles of the international order, ASEAN understands that it must respect human rights and democracy in an authentic manner for it to be taken seriously on the global plane. However, there are genuine tensions with its erstwhile *modus operandi* – the ASEAN Way of non-interference – as ASEAN tries to embrace institutionalisation, legalisation, and human rights and democracy. Unlike in Europe where one must adhere to a certain level of human rights before being accepted into the community, the tenets of human rights and democracy are not a prerequisite of ASEAN Integration. Indeed, given the tension surrounding human rights in the drafting of the ASEAN Charter, the inclusion of Article 14 was considered a surprising coup and there was even greater surprise that the deadline of 2009 for the establishment of AICHR was met.

There is good reason why AICHR remains the sole Asian human rights system even as Asian states ratify the international human rights treaties. Recalling the north-south, east-west divide on the universalistic and particularistic characteristics of human rights in the 1993 Bangkok and Vienna Declarations on human rights,<sup>174</sup> Asia remains suspicious of the intrusiveness of human rights, viewing it as “Western imperialistic ideology” as vestiges of the 1990s “Asian values debate” persist. Nonetheless, the importance of human rights is making steady inroads in the ASEAN region through

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<sup>170</sup> *Ibid.*, paras. 4.3–4.6.

<sup>171</sup> *Ibid.*, para. 4.12–4.13.

<sup>172</sup> These are purportedly in operation but they are not publicly available and the status of their implementation is unclear.

<sup>173</sup> The AHRD has been unveiled in late October 2012 after protracted delay in the drafting process. (Because of the recent adoption of the AHRD, time does not permit its examination/discussion here.) Again, the drafting of the AHRD, as with the other matters in the development and operation of AICHR, have been criticised for being non-inclusive (i.e. little consultation with civil society and other stakeholders).

<sup>174</sup> World Conference on Human Rights, 14-25 June 1993, Vienna, Austria, at <http://www.ohchr.org/EN/ABOUTUS/Pages/ViennaWC.aspx>

the gradual democratisation of each ASEAN member state,<sup>175</sup> the growing momentum of civil society movements internally and externally, the increased activity in the international order with other state actors and global institutions, and also not least because ASEAN is conscious of its reputation and does not want to be seen as a human rights violator.

Institutionally, therefore, AICHR is intentionally weak. This is not only garnered from its ineffectuality and limited mandate thus far but that ASEAN member states have explicitly held that it should be so (though stronger powers might ostensibly be accorded to AICHR as it evolves). The TOR unequivocally states that “AICHR is an intergovernmental body and an integral part of the ASEAN organisational structure. It is a consultative body”.<sup>176</sup> Indeed, the name finally agreed upon by the ASEAN member states is significant, particularly the inclusion of the term “intergovernmental”. Paragraph 3 of the TOR stresses that AICHR is “an *intergovernmental* body and an *integral* part of the ASEAN organisational structure”<sup>177</sup> – the latter of which is essentially state-centric given that most decision-making in ASEAN is made by consensus.<sup>178</sup> Member state dominance is further assured as the clause goes on to add that AICHR is a “consultative” body<sup>179</sup> where the representatives are appointed by the respective member states, with each appointing government having the discretionary powers to replace its representative.<sup>180</sup> Even if the AICHR representatives have strong experience in civil society work and continue to have connections with human rights NGOs, they expressly state that they act in their intergovernmental capacity when executing official AICHR duties.

Consultation and consensus are repeatedly emphasised, in particular with respect to decision-making where it has to be in accordance with Article 20 of the ASEAN Charter.<sup>181</sup> There is therefore no mention of AICHR being an *independent* entity or the need for transparency and accountability. Rather, AICHR representatives are expected to discharge their duties *impartially*.<sup>182</sup> In the exercise of its mandate and bearing in mind that “the primary responsibility to promote and protect human rights and fundamental freedoms rests with each member state”,<sup>183</sup> AICHR is also not to interfere in the internal affairs of ASEAN member states and must adopt a “constructive and non-confrontational” and evolutionary approach to develop human rights norms and standards in the region.<sup>184</sup>

As to legalisation, AICHR could be said to exemplify the classic ASEAN model of non- or soft legalisation. There are differences between the AICHR system and the other regional human rights systems which need to be pointed out. First, AICHR’s establishment is somewhat “inverted”. AICHR was set up with only a Terms of Reference and not a human rights treaty. Where the European, Inter-American, and African systems were all established with a human rights convention, the rights which AICHR is meant to protect are as yet undefined. The ASEAN Declaration Human Rights (AHRD) was meant to be endorsed at the ASEAN Summit at the end of 2011 but is now slated for 2012. It must also be remembered that the AHRD is NOT a treaty – it does not impose binding obligations. In fact, none of the human rights documents in relation to AICHR – the TOR, Blueprints, Rules of Procedure, and Work Plan – is binding and there is no intention that they become so in the foreseeable future. The

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<sup>175</sup> Samuel Huntington, *The third wave : democratization in the late twentieth century* (Norman : University of Oklahoma Press, 1991)

<sup>176</sup> TOR, *supra* note 165, para.3.

<sup>177</sup> *Ibid.*

<sup>178</sup> ASEAN Charter, *supra* note 35, Article 20. However, there is a formula for flexible participation where economic commitments are concerned stipulated in Article 21.

<sup>179</sup> TOR, *supra* note 165, para. 3.

<sup>180</sup> *Ibid.*, paras. 5.2 and 5.6.

<sup>181</sup> *Ibid.*, para. 6.

<sup>182</sup> *Ibid.*, para. 5.7.

<sup>183</sup> *Ibid.*, para. 2.3.

<sup>184</sup> *Ibid.*, paras. 2.1(b), 2.4, and 2.5.

specific protections which the AHRD is to be derived from are those outlined in the Universal Declaration of Human Rights and the nine other core UN human rights treaties. This is despite the fact that the only two which all ten ASEAN Member States hold in common are the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC). It is uncertain how comprehensive the list of rights covered by the AHRD will be, especially if the exigencies and cultures of every member state will have to be accommodated.

It follows naturally from the above that AICHR is strictly an “intergovernmental” commission and there are no plans for the establishment of a court. In terms of enforcement mechanisms, AICHR does not have an individual petition system, reporting or monitoring powers, or other types of enforcement or dispute settlement mechanisms that human rights commissions are empowered with.<sup>185</sup> In the event of interpretive differences of the TOR among the AICHR representatives, resolution would be deferred to the ASEAN Foreign Ministers at their annual meeting.<sup>186</sup>

With this in mind, how should we understand AICHR, an ASEAN body of the political-security and socio-cultural pillars of integration? It might be fair to say that AICHR epitomises the other end of the spectrum on ASEAN Integration efforts. However, this does not mean that ASEAN is insincere about incorporating human rights as it integrates into a Community. As mentioned before, there is the tension between the desire to respect human rights and democracy and to be taken seriously in the international order and the ASEAN member states’ lingering suspicions of the impingement upon their sovereignty by human rights.

Second, there is the issue of having adequate funding for the programmes AICHR wishes to carry out and, even more importantly, to have personnel familiar with human rights working in AICHR. Presently, only three out of ten AICHR representatives have experience working on human rights – Sriprapha Petcharamesree (Thailand),<sup>187</sup> Rafendi Djamin (Indonesia), and Rosario Manalo (Philippines). It is interesting to note that those AICHR representatives who have a background in human rights work “struggle” within their limited mandate and are keen to expand the scope of AICHR’s powers. This has been evidenced in the aftermath of the Maguinadanao massacre of journalists in November 2009 where families of the victims (through various NGO representatives) petitioned AICHR to assist them in seeking redress.<sup>188</sup> This was despite AICHR’s lack of mandate to conduct public inquiries and to hold onsite visits and investigations. In turn, certain elements within AICHR are receptive to stronger powers. For instance, the Indonesian AICHR representative, Rafendi Djamin, stated in response to the petition, “With all due respect to your families, of course, if it were up to me, I will take it up immediately. But AICHR is composed of ten countries. This will have to be discussed, especially how we are going to deal with the complaints. I can only say that I will do my best to really strengthen the position of AICHR – our power and mandate.”<sup>189</sup>

If human rights are to be genuinely integrated into ASEAN Community, ASEAN must clarify what it desires to achieve through AICHR and be committed to such goals. If the human rights priority for now is ASEAN’s traditional emphasis on social justice and development, e.g. human trafficking,

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<sup>185</sup> There is an anecdotal account that the name of the ASEAN Human Rights Body was a serious issue of contention when it was being established. The name “Human Rights Commission” would invite comparisons with other international and regional human rights systems and might denote accordingly the autonomy and powers that the ASEAN Member States were disinclined for the ASEAN Human Rights Body to possess. In the end, the ASEAN human rights institution was named the ‘ASEAN Intergovernmental Commission on Human Rights’.

<sup>186</sup> TOR, *supra* note 165, para. 9.8.

<sup>187</sup> CVs of Sriprapha Petcharamesree (Thailand) at <http://www.aseansec.org/documents/AICHR/cv09.pdf>, Rafendi Djamin (Indonesia) at <http://www.aseansec.org/documents/AICHR/cv03.pdf>, and Rosario Manalo (Philippines) at <http://www.aseansec.org/documents/AICHR/cv07.pdf>

<sup>188</sup> ASEAN human rights body fails kin of massacred journalists (ABS-CBN News, 29 March 2010) at <http://www.abs-cbnnews.com/nation/03/29/10/asean-human-rights-body-fails-kin-massacred-journalists>.

<sup>189</sup> *Ibid.*



migrant labour, and the rights of women and children, then the requisite resources should be allocated. In terms of law, we should see the firming of human rights provisions as there is strong pressure for AICHR and the ASEAN Human Rights Declaration to uphold international human rights norms, especially beginning with CEDAW and CRC. This will take some time and we cannot predict the timeframe but it is quite certain that this will occur. This would come within the wider rule of law framework that ASEAN is currently undertaking as it moves in the direction of coalescing into an ASEAN Community. Second, at the regional level, beyond AICHR, the ASEAN human rights framework encompasses the ACWC and ACMW. The ACWC, because it is empowered by the fact that all ten ASEAN States have ratified CEDAW and CRC, is trying to ensure that international human rights protections stipulated by these treaties are upheld in the region.

There is also crucial need for the national infrastructure for access to justice be boosted. This would include local grassroots institutions, municipal courts, as well as national human rights institutions (NHRIs). Already we are seeing how synergies are being sorted out at the national level – international and regional human rights protections need to be effected and these are ultimately experienced on the domestic plane. We hopefully might expect clearer enunciation of rights protections within the domestic legal system and that these are weaved throughout national policy architecture. As such, it is necessary that national human rights institutions will be given stronger powers and the space to work with AICHR to ensure that human rights are promoted and protected in the region, and ultimately, that national courts will take human rights and constitutional protections more seriously so that there can be a true sense of the exhaustion of national remedies before we seek redress at the regional level.

It should also be highlighted that the receptivity towards human rights varies with each ASEAN member state and while there is consensus for decision-making, there is usually some compromise – the decision taken is not just lowest common denominator of the member states' preferences. Certain sections within ASEAN governments are increasingly supportive of human rights. We also see the effects of democratisation – Indonesia is a strong advocate of human rights having experienced its empowerment after the Suharto dictatorship. The same is true for the Philippines, Thailand, and indeed democracy and human rights are making inroads too in other ASEAN Member States. It is encouraging to hear from colleagues working on human rights in Myanmar that internal change is underway. The peoples of ASEAN do want things to change and are willing to improve human rights in society. Moreover, we believe it is fair to say that the AICHR representatives are serious about their mandate and are committed to ensuring that the AICHR is not a false front, despite the limits to their competencies. They are pushing boundaries and working out the parameters of their powers. This is especially so for the AICHR representatives from Indonesia, the Philippines, and Thailand who have extensive human rights experience in the ASEAN region.

While ASEAN economic integration is pushed forward due to external reasons such as the need for ASEAN to stay competitive, human rights integration is increasingly propelled by internal forces. This is because of the changing social dynamics in the region. We have all witnessed the transformative power of human rights – once it is instituted, it is hard to suppress its progress. Similarly, as the ASEAN region familiarises itself with human rights and participates more actively in its development, AICHR will inevitably be strengthened in the years to come. All this boils down to the key human rights proponents in ASEAN society. Civil society in the ASEAN region is very active and it is constantly pushing for AICHR to have full powers of a commission, meaning that it is governed by a human rights treaty, has powers of investigation and petition, and eventually establishes a human rights court. More generally, civil society is encouraging and pushing ASEAN member states towards more transparency and accountability where human rights are concerned, for example in the appointment of commissioners and the drafting of human rights policies.

At the governmental level, we are also witnessing internal changes as officials and civil servants engage more on, and indeed are encouraging of, human rights. Stable avenues of cooperation will emerge as transgovernmental alliances are forged between state and non-state actors.<sup>190</sup> The concomitant political, generational, and societal changes within ASEAN states themselves have further enabled a greater space for engagement. With increasing esteem for democracy within ASEAN states, non-state actors increasingly operate as “transnational norm entrepreneurs” by educating the public and mobilising instruments for change. These communities would further push the boundaries in shaping a more conducive, rights-friendly environment despite state predominance. State officials having experienced greater democracy and convinced of human rights begin to work as “governmental norm entrepreneurs”, promoting human rights domestically and regionally.<sup>191</sup> In time to come, these networks will help, in a significant yet nuanced manner, to enforce the soft norms of human rights as more information and expertise are shared, and state and non-state actors work to realise shared objectives.<sup>192</sup>

## Conclusion

While there are areas that will need to be addressed as ASEAN evolves, the Charter does provide for some legal rules which are internally consistent with ASEAN enhanced cooperation and integration, as well as serve to move such integration efforts somewhat forward. Unlike prior ASEAN declarations and instruments, the Charter brings the legal and the institutional issues to the forefront of ASEAN’s objectives, and it will help guide ASEAN’s future. With that said, ASEAN must exhibit “institutionally integrity”, as a greater observance of the rule of law within ASEAN will be necessary for ASEAN to be taken seriously.

ASEAN also needs to develop a more comprehensive way to resolve disputes. ASEAN has done so for disputes pertaining to ASEAN economic agreements by agreeing in the Charter to resolve such disputes in accordance with the EDSM. Like the WTO Dispute Settlement Understanding, the EDSM provides for a negative consensus rule to adopt a report, as highlighted above, which permits a report to be enforced as long as one member state supports it. In practice, however, that particular member state will likely face pressure from the other member states, and may choose to follow the consensus of the majority pursuant to the “ASEAN Way”.

For non-economic disputes relating to agreements without their own dispute settlement mechanism, the 2010 Protocol applies. Although the 2010 Protocol has established a comprehensive procedure to decide disputes concerning the interpretation of the ASEAN Charter, arbitration can only be convened with the agreement of both parties. The alternative is to submit the dispute to the ASEAN Coordinating Council, and, if settlement still cannot be reached, then any party can submit the dispute to the ASEAN Summit. Thus, in the end the dispute could ultimately be resolved by means of informal consensus or dialogue. This seems to continue the “ASEAN Way” practice for non-economic disputes.

This general tendency to prefer informal consensus over other means of dispute settlement is probably the result of political expediency instead of cultural determinism. Nonetheless, ASEAN members are convinced of the long-term advantages ASEAN integration will bring. The political will to adopt legalisation will likely surface regardless of any rhetoric about the importance of national sovereignty and the principle of non-interference. This legalisation based on the existing rules will

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<sup>190</sup> Jenia Iontcheva Turner, Transnational networks and the international public order, in Russell Miller and Rebecca Bratspies (eds.), *Progress in International Law* (Leiden; Boston: Martinus Nijhoff Publishers, 2008), at 415.

<sup>191</sup> Monica Schurtman, The challenges of evaluating NGO “success” in cross-border rights initiatives, in Miller and Bratspies (eds.), *ibid.*, at 358.

<sup>192</sup> Turner, *supra* note 194, at 414 and 450.

probably develop, even in practice, once the process of cognitivism develops greater trust in the institutions amongst the ASEAN members. While there are areas that will need to be addressed as ASEAN evolves, the Charter does provide for some legal rules which serve to move regional integration efforts forward. Still, we hope that this is not the final legal chapter for ASEAN but rather a step in the development of a more effective regional entity that endeavours to make bargains (particularly economic ones) stick and relations work.

Nonetheless, while there are areas that will need to be addressed as ASEAN evolves, the Charter does provide for some legal rules which are internally consistent with ASEAN cooperation and serve to move such integration efforts somewhat forward. Sticking with the vehicular metaphor, it does not matter whether the vehicle is less than precision engineered so long as it brings us to our destination. Still, it is hoped that this is not the final legal chapter for ASEAN but rather a step in the development of a more effective regional entity. It may well be that as ASEAN develops the ASEAN Way may be increasingly more restricted to the process of negotiation and legalisation may become more pronounced in the textual products of such negotiations so as to make the economic bargains stick. Regardless, choices will have to be made by the ASEAN members about how things should proceed.

Finally, it should be again emphasized that the EU itself did not spring full grown from the minds of its Fathers, though eventually legalisation may have been an effective strategy for European Integration, much evolution and compromise were needed for the cognitive regionalism that we see today.<sup>193</sup> It is, however, conceded that the currently weak legalisation in the ASEAN is perhaps an unusual basis for a regional integration project. Yet, to suggest that this is not regional integration of a sort is akin to suggesting that Impressionism is not art because it does not conform to the ideals of Renaissance art. ASEAN has gone beyond the ad hoc cooperation and confidence building exercises of its early years. Perhaps therefore while integration, like the elephant, may be difficult to define positively, integration may be defined by what it is not. It is not ad hoc, it is systemic and progressive, it is not time limited, it is open-ended and future oriented, and it is not only defined in terms of self-interest but also defined by a sense of commonality and common interests. ASEAN integration ultimately will be judged by how much it delivers towards these common interests.

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<sup>193</sup> See JHH Weiler, "The Transformation of Europe" (1991) 100 Yale LJ 2403.

**Authors contacts:**

**Michael Ewing-Chow**

Centre for International Law

NUS. Block B, #02-01

469 Bukit Timah Road

Singapore 259756

Email: lawmec@nus.edu.sg

**Tan Hsien-Li**

Centre for International Law

NUS. Block B, #02-01

469 Bukit Timah Road

Singapore 259756

Email: ciltht@nus.edu.sg