

THE ASEAN ECONOMIC COMMUNITY

A WORK IN PROGRESS



EDITED BY

SANCHITA BASU DAS • JAYANT MENON
RODOLFO SEVERINO • OMKAR LAL SHRESTHA

THE ASEAN ECONOMIC COMMUNITY

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INSTITUTE OF SOUTHEAST ASIAN STUDIES
Singapore

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Institute of Southeast Asian Studies
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FOREWORD

by Tan Chin Tiong, Director, Institute of Southeast Asian Studies, Singapore

As 2015 approaches, that year, at least in the more knowledgeable parts of the countries of the Association of Southeast Asian Nations (ASEAN), is increasingly associated with the creation of the ASEAN Community. After all, ASEAN's leaders had declared in 2007 "ASEAN's strong commitments towards accelerating the establishment of an ASEAN Community by 2015".

In 2009, the leaders issued the Roadmap for the ASEAN Community (2009–15) containing blueprints for the ASEAN Economic Community (AEC), which they had adopted in 2007, and the Political-Security and Socio-Cultural Communities.

The AEC Blueprint comes with a matrix called "Strategic Schedule", most of which lays down very specific measures to be taken in 4 two-year tranches until 2015. With the support and collaboration of the Asian Development Bank, the Institute of Southeast Asian Studies (ISEAS) engaged experts, most of them leading authorities in their fields especially with respect to ASEAN, to examine the prospects of the AEC's achievement by 2015, identify the domestic political obstacles to that achievement, and suggest policy measures to address them.

The experts found that, if the commitments were to be taken literally and at face value, and if the obstacles were to be taken into account, it would be very difficult for the AEC measures to be carried out by 2015. While the ASEAN vision of creating an economic community marked by the free flow of goods, services, foreign direct investment and skilled labor and the "freer flow of capital", is far-sighted, courageous and ambitious, too much

political opposition and inadequate institutional infrastructure lie in the way of their effective implementation.

However, if the measures in the AEC Blueprint are to be regarded as ASEAN aspirations and commitments pointing in the general direction of creating the region as a single market and production base, and if the year 2015 is to be seen as a benchmark of progress in that direction, the AEC 2015 should be taken seriously not only by the ASEAN states but also by businesses and by not-for-profit organizations.

It is in this spirit that we at ISEAS consider the findings and conclusions of the prominent experts whom we have engaged.

FOREWORD

*by Iwan J. Azis, Head, Office of Regional Economic Integration,
Asian Development Bank*

When the ASEAN Secretariat approached the Asian Development Bank to undertake an analysis of the barriers and impediments in realizing the ASEAN Economic Community by 2015, we were delighted to respond positively, given the importance of the issue and the strong ties between our institutions. We were also delighted to collaborate with the Institute of Southeast Asian Studies to produce this volume, enlisting the support from external experts in the field. With the publication of this book some 2 years before the deadline of 2015, we hope and expect that policy-makers and other stakeholders will have sufficient time to address the issues raised, and meet the challenges identified.

A key message coming out of this volume is that the target date of 2015 should not be viewed as a hard deadline but rather a milestone, *albeit* important, in a much longer journey. It is a journey that began in 1967, although during its first decade the primary focus of ASEAN was on creating harmony and cohesion within a troubled region, rather than increasing economic integration. But pursuing regional economic integration has gained prominence in ASEAN affairs over succeeding decades. From the initial focus on trade liberalization, through the Preferential Trading Arrangement and eventually the ASEAN Free Trade Agreement (AFTA), ASEAN's regional economic integration agenda has broadened to now include services trade, investment, labor migration, and even macroeconomic policy. ASEAN's regional economic integration efforts are meant to culminate in the creation of an ASEAN Economic Community, one of the three pillars of the ASEAN Community espoused

in ASEAN's Vision 2020 — the other two being the Political-Security Community and the Socio-Cultural Community.

Whatever is realized come 2015, the work must continue beyond it. ASEAN's own assessments, based on its scorecards, suggest that many of the targets will not be met by this date. The challenges identified in this volume support this conclusion. But more importantly, the agreements that have been signed, before and after this date, must be implemented legitimately. Often effective implementation will require domestic rules and regulations to be amended in order to accommodate the agreed protocols. Monitoring at this stage is often guided by little more than goodwill, and this too poses obvious challenges. Therefore, it is critical that member countries are convinced that the reforms that they agree to will be in their self-interest. This volume makes the case on the benefits of liberalization and integration in the various sectors forcefully and convincingly.

I believe that this volume will be of interest to all ASEAN watchers, both within and without the region and, of course, the policy-makers that are tasked with the realization of the AEC.

PREFACE

This study aims to answer the following three questions: (i) whether the ASEAN Economic Community (AEC) is achievable by 2015, (ii) the obstacles along the way in achieving it, and (iii) the measures needed for its eventual achievement.

All the experts' emphatic answer to the first question is that it would be very difficult to achieve AEC by 2015 in terms of the commitments in the AEC Blueprint. The reasons are many. Several commitments made toward AEC 2015 have not been implemented by ASEAN member states. While progress has been made in lowering tariffs and some behind-the-border economic hurdles, non-tariff barriers remain as major impediments to AEC 2015. Similar lags take place in the commitments made on the liberalization of trade in services despite the growing importance of services in the ASEAN economies. Regional institutions remain weak, as member states guard their sovereignty. When national goals differ from regional ones, decisions of political leaders tend to favor national goals. Flexibilities designed to accommodate the different levels of development of member states seem to have been used to justify non-compliance with their commitments; yet, such non-compliance is not censured, as maintaining a unified position among member states becomes more important to their leaders. Interest groups and those opposing regional competition tend to succeed in preventing their national leaderships from enforcing AEC commitments.

In the above context, the chapter writers' view is that the increased intra-ASEAN trade and investments over the years have been driven more by market forces than by regional agreements. Accordingly, it is in the interest of each ASEAN state to take unilaterally measures

toward improving its business climate and liberalize trade and investment policies without waiting for regional agreements to be concluded. There is a view that the year 2015 needs to be regarded as a vision than as a hard-and-fast target year, so that the year could serve more as a benchmark of progress. Depending on the speed of progress, more measures for integration can be undertaken aimed at 2015 and beyond 2015. More than anything else, it would be in ASEAN states' interest to avoid grand designs and stress effective compliance with their existing commitments instead of concluding additional new agreements.

Since non-compliance with NTB commitments has been among the major impediments to the AEC vision, there is an urgent need to give these NTBs a common definition and subject them to compliance review, including Web-based monitoring. With regard to the tariff issues, there is a need to reduce the exclusion list and accelerate transition periods, avoid inconsistencies between ASEAN+1 FTAs and bilateral FTAs, and simplify ROO (rules-of-origin) between FTAs. As a way of encouraging commitments compliance, it may be desirable to establish third-party mechanisms that could help assess the gap between FTA commitments and the actual outcome and make the findings public. Recognizing the increasing importance of the service sector in the ASEAN economies, compliance will be easy and monitorable if the liberalization of trade in services is undertaken on certain specific sectors rather than across the board. Experts also feel the need to harmonize national product standards and conclude Mutual Recognition Arrangements (MRAs) for traded goods and services. Promoting competition among the ASEAN states could potentially be impeded by firms using their Intellectual Property Rights (IPR). Hence enforcement of IPR calls for respecting the ASEAN states' differences in their respective capacities.

Recognizing that the development divide among the ASEAN states could slow down the AEC process, effective coordination and implementation of IAI is considered as a crucial instrument to address the issue. In this context, the experts also see the importance of promoting regional projects that enhance physical connectivity among the ASEAN countries and the urgency to explore new financial approaches to support the ASEAN Infrastructure Fund.

With regard to the Dispute Settlement Mechanism (DSM), the experts are unanimous on the need to provide assistance to those states requiring help, so that all member states are well-equipped

to use DSM effectively. Suggestions like distributing DSM-related materials and brochures widely, keeping the DSM Website more user-friendly, and teaching ASEAN trade and investment dispute settlement law courses in the member states' colleges and universities are worth serious consideration by the policy-makers. Furthermore, the experts see the necessity of improving the physical and electronic infrastructure at the ASEAN Secretariat, so that Jakarta could become more attractive to those involved in dispute settlement.

In the final analysis, the experts see the need for strengthening the institutions recommended by the High Level Task Force on ASEAN Economic Integration and adopted by the Leaders at the 2003 Summit. There is also scope for undertaking reforms of the ASEAN Secretariat, so as to support the overall coordinative and other substantive tasks that the Secretariat has to perform. Given the finding of the business survey showing low awareness of the AEC vision in the business communities in the ASEAN countries, it is important to embark upon programs to sensitize them to the long-term and short-term benefits of regional economic integration.

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ABBREVIATIONS

ABAC	ASEAN Business Advisory Council
AA	ASEAN Architect
AAC	ASEAN Architect Council
AANZFTA	ASEAN-Australia-New Zealand Free Trade Area
AAR	ASEAN Architect Register
ABC	ASEAN Business Club
ACB	ASEAN Compliance Body
ACFTA	ASEAN-PRC FTA
ACIA	ASEAN Comprehensive Investment Agreement
ACPE	ASEAN Chartered Professional Engineer
ACPECC	ASEAN Chartered Professional Engineers Coordinating Committee
ACT	ASEAN Consultation to Solve Trade and Investment Issues
ACWL	Advisory Centre on WTO Law
ADB	Asian Development Bank
AEC	ASEAN Economic Community
AEGC	ASEAN Experts Group on Competition
AEM	ASEAN Economic Ministers
AFAS	ASEAN Framework Agreement on Services
AFlag	ASEAN Federation of Land Survey and Geomatics
AFTA	ASEAN Free Trade Area
AIA	ASEAN Investment Area
AIA	ASEAN Investment Area
AICO	ASEAN Industrial Cooperation Scheme

AIF	ASEAN Infrastructure Fund
AIFTA	ASEAN-India FTA
AII	ASEAN Information Infrastructure
AIJV	ASEAN Industrial Joint Venture
AIMO	ASEAN Integration Monitoring Office
AiTi	Authority for Info-Communication Technology Industry
AJCEP	ASEAN-Japan Comprehensive Economic Partnership Agreement
AMRO	ASEAN Plus Three Macroeconomic Research Office
AMs	ASEAN Member States
ANZCERTA	Australia New Zealand Closer Economic Relations Trade Agreement
APEC	Asia-Pacific Economic Cooperation
APSC	ASEAN Political-Security Community
ARF	ASEAN Regional Forum
ASA	Air Service Agreement
ASCC	ASEAN Socio-Cultural Community
ASEAN	Association of Southeast Asian Nations
ASEAN-CCI	ASEAN Chambers of Commerce and Industry
ATA	ASEAN Tourism Agreement
ATIGA	ASEAN Trade in Goods Agreement
ATR	ASEAN Trade Repository
ATSP	ASEAN Tourism Strategic Plan
AWGIPC	ASEAN Working Group on Intellectual Property Cooperation
BCDA	Bases Conversion and Development Act
BIMP-EAGA	Brunei Darussalam-Indonesia-Malaysia-The Philippines-East ASEAN Growth Area
BIMSTEC	Bay of Bengal Initiative for Multi-Sectoral Technical and Economic Cooperation
CARICOM	Caribbean Community and Common Market
CCS	Competition Commission of Singapore
CDC	Committee for Protection/Defense of Competition
CECA	Comprehensive Economic Cooperation Agreements
CEPA	Comprehensive Economic Partnership Agreements

CEPT	Common Effective Preferential Tariffs
CIB	Cambodia Investment Board
CIMT	Centre for IMT-GT Subregional Cooperation
CLMV	Cambodia, Lao People's Democratic Republic, Myanmar and Viet Nam
CMC	Council of the Common Market
CMG	Common Market Group
CPC Code	Central Product Classification Code
CPCN	Certificate of Public Convenience and Necessity
CRPs	Competition Related Provisions
CTC	Comprehensive Trade Costs
DMO	Domestic Market Obligation
DSM	Dispute Settlement Mechanism
DSU	Dispute Settlement Understanding
EAI	East Asian Institute
ECAP II	EC-ASEAN Intellectual Property Rights Co-operation Programme
ECAP III	ASEAN Project on the Protection of Intellectual Property Rights
ECJ	European Court of Justice
EDB	Economic Development Board
EDSM	Enhanced Dispute Settlement Mechanism
EEC	European Economic Community
EEZ	Exclusive Economic Zone
EPC	European Patent Convention
EPG	Eminent Persons Group
EPLA	European Patent Litigation Agreement
ERC	Energy Regulatory Commission Regulatory Commission
ERIA	Economic Research Institute for ASEAN and East Asia
ESCAP	Economic and Social Commission for Asia and the Pacific
ETC	Electricity Telecommunication Company
ETP	Economic Transformation Programme
EU	European Union
EUPC	European Union Patent Court

EWEC	East–West Economic Corridor
FDI	Foreign Direct Investment
FIC Guidelines	Foreign Investment Committee Guidelines
FTA	Free Trade Agreement
FTC	Federal Trade Commission
GATS	General Agreement on Trade in Services
GCI	Global Competitiveness Index
GDP	Gross Domestic Product
GFCF	Gross Fixed Capital Formation
GLCs	government-linked corporations
GMS	Greater Mekong Subregion
GMS-BF	Greater Mekong Subregion Business Forum
GMS-ECP	Greater Mekong Subregion Economic Cooperation Program
GPN	Global Production Network
HLTF	High-Level Task Force
HSR	High Speed Rail
IAI	Initiative for ASEAN Integration
IDA	Infocomm Development Authority of Singapore
IDR	Iskandar Development Region
IGA	Investment Guarantee Agreement
ILO	International Labour Organization
IMT-GT	Indonesia-Malaysia-Thailand Growth Triangle
InTi	Infrastructure Provider for the Telecommunication Industry
IPR	Intellectual Property Rights
ISEAS	Institute of Southeast Asian Studies
ISIC	International Standard Industrial Classification
ITA	Information Technology Agreement
JSS	Sunda Strait Bridge
KORUS	The Republic of Korea-US FTA
KPPU	Commission for Supervision of Business Competition
LPI	Logistic Performance Index
MERCOSUR	Common Market of the South
MFN	Most Favored Nation

MNCs	Multi National Companies
MOU	Memorandum of Understanding
MP3EI	Master Plan for the Acceleration and Expansion of Indonesia's Economic Development
MPAC	Master Plan for ASEAN Connectivity
MRA	Mutual Recognition Arrangement
MTC	MERCOSUR Trade Commission
NAFTA	North American Free Trade Agreement
NDG	Narrowing the Development Gap
NKEA	National Key Economic Areas
NSEC	North-South Economic Corridor
NTB	Non-Tariff Barriers
NTC	National Telecommunications Commission
NT-CTC	Non-Tariff Comprehensive Trade Costs
NTM	Non-Tariff Measures
NUS	National University of Singapore
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development
PBG	Pan-Beibu Gulf Economic Region
PC-TAS	Trade Analysis System using Personal Computer
PEZA	Philippine Economic Zone Authority
PPP	Public-Private Partnership
PRA	Professional Regulatory Authority
PTA	Preferential Trade Arrangement
R&D	Research and Development
RES	Regional Economic Studies
RETA	Regional Technical Assistance
RFPE	Registered Foreign Professional Engineer
ROCE	Return on Capital Employed
ROI	Return on Investment
ROO	Rules of Origin
ROW	Rest of the world
RSCS	Regional Social and Cultural Studies
RSPS	Regional Strategic and Political Studies

RTA	Regional Trade Agreement
RVC	Regional Value Content
SCR	Sectoral Coverage Ratio
SEC	Southern Economic Corridor
SEDC	State Economic Development Corporations
SEOM	ASEAN Senior Economic Officials Meeting
SeTi	Service Provider for the Telecommunication Industry
SEZs	Special Economic Zones
SIJORI	Singapore-Johor-Riau
SITS	Sumatra Investment and Trade Survey
SLORC	State-owned Economic Enterprises Law
SMEs	Small and Medium-sized Enterprises
SOEs	State-owned Enterprise
SPS	Sanitary and Phytosanitary Measures
SPT	Saigon Post and Telecom
SRIs	Strategic Reform Initiatives
SRZs	Subregional Economic Zones
TAI	Thai Automotive Industry
TDRI	Thailand Development Research Institute
Telmex	Mexican telecommunications monopoly Telefonos de Mexico
TRAINS	Trade Analysis Information System
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
UPS	United Parcel Service of America
USTR	United States Trade Representative
VISHIPEL	Viet Nam Shipping Telecommunication
WHO	World Health Organization
WHT	withholding tax
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

THE CONTRIBUTORS

Myrna S. Austria is a Full Professor at the School of Economics, De La Salle University, Manila.

Sanchita Basu Das is an ISEAS Fellow and Lead Researcher (Economic Affairs) at the ASEAN Studies Centre, ISEAS, Singapore.

Manu Bhaskaran is a Partner and Member of the Board, Centennial Group, Singapore.

Locknie Hsu is an Associate Professor of Law at the Singapore Management University, Singapore.

Albert G. Hu is an Associate Professor at the Department of Economics, National University of Singapore.

Supunnavadee Jitdumrong is currently studying at the London School of Economics. She was a trainee at Thailand Development Research Institute (TDRI), while co-authoring the chapter.

Ashish Lall is an Associate Professor at the LKY School of Public Policy, National University of Singapore.

R. Ian McEwin is the Managing Partner of Competition Consulting Asia and a Visiting Professor of Law at Chulalongkorn University, Bangkok.

Jayant Menon is the Lead Economist at the Office of Regional Economic Integration, Asian Development Bank.

Helen E.S. Nesadurai is an Associate Professor at the School of Arts and Social Sciences, Monash University, Malaysia.

Deunden Nikomborirak is the Research Director of Economic Governance at the Thailand Development Research Institute, Bangkok.

Richard Pomfret is a Professor of Economics at the University of Adelaide, Australia.

Razeen Sally is a Visiting Associate Professor at the Lee Kuan Yew School of Public Policy and Institute of South Asian Studies, NUS; and Director of the European Centre of International Political Economy, Brussels.

Rodolfo C. Severino is the Head of the ASEAN Studies Centre at the Institute of Southeast Asian Studies, Singapore.

Omkar Lal Shrestha was a Visiting Senior Research Fellow at the Institute of Southeast Asian Studies, Singapore, and an officer at the Asian Development Bank.

1

Overview

Rodolfo C. Severino and Jayant Menon

Executive Summary

Although the self-imposed deadline for the realization of the ASEAN Economic Community (AEC) is 2015, it should not be viewed as a hard target. One should not expect 2015 to see ASEAN suddenly transformed, its nature and processes abruptly changed, its members' interests substantially altered. Rather, 2015 should be viewed more as a milestone year — a measure of a work in progress — rather than as a hard target year.

Yet, ASEAN member countries did commit to carry out certain time-bound specific measures that are intended to lead to regional economic integration. While ASEAN should not be called to account for its members' failure to make good on their commitments, any failure to deliver will likely lead to a loss of credibility, putting member countries in danger of falling further behind in the global competition for export markets and Foreign Direct Investment (FDI).

The experts commissioned by the Asian Development Bank (ADB) and the Institute of Southeast Asian Studies (ISEAS) to write chapters on this matter express considerable doubt as to whether the specific measures

committed to in the AEC Blueprint will have been carried out by 2015. One chapter notes ASEAN's failure to do away with NTBs. Another chapter cites the lack of progress in liberalizing intra-regional trade in services, which is becoming increasingly important in Southeast Asia. Still another attributes ASEAN's failure to recover its attractiveness to FDI to the region's inability, whether real or perceived, to integrate its economy. The chapter on competition law and Intellectual-Property Rights (IPR) protection in ASEAN concludes that, although "harmonizing" rules and enforcement measures relative to competition and intellectual property is important for bringing down trade barriers, such harmonization would both be difficult and time consuming. The chapter on subregional zones similarly observes that, although mutual confidence and functioning institutions are essential to transnational endeavors, they take time to build; however, subregional zones can help reduce development gaps and improve connectivity across national boundaries. The chapter on free trade agreements states that ASEAN "has no prospect of coming close to ... (a) single market by the AEC's 2015 deadline — or even by 2020 or 2025". The chapter on dispute settlement underlines the importance of the subject for regional economic integration, declaring that it is essential for an effective mechanism to be in place by 2015 or earlier if the AEC is to be achieved by that year. The study on institutions finds that ASEAN member countries wish to retain as much political autonomy as they can in carrying out their commitments to regional economic integration and that ASEAN lacks the institutions and processes that help governments and societies to recognize the benefits that the AEC presents.

The business survey, the results of which form an integral part of this study, reveals business leaders' marked indifference to the AEC. Will this attitude on the part of business leaders change by 2015?

Nevertheless, the commitments to the various dimensions of an AEC do reflect the value placed by the ASEAN member countries on regional economic integration, and give them something to both invoke and aspire for.

In any case, ASEAN, even now, should start formulating the explanation for the ASEAN Economic Community that it seeks to achieve by 2015.

The Idea of an ASEAN Community: An Overview

1. Introduction

There is a vast and growing literature on various aspects of the ASEAN Economic Community (AEC).¹ Nevertheless, there are gaps in this literature and this volume aims to address one of them. Lacking is a thorough analysis of the barriers and impediments toward realizing the AEC by 2015, and actions required to overcome them, employing a thematic approach, and one that covers economic, institutional, legal and other issues. Recognizing this deficit, the ASEAN Secretariat requested the Asian Development Bank (ADB) for technical assistance to undertake such a study. ADB responded by commissioning the Institute of Southeast Asian Studies (ISEAS) to work together in undertaking such a study. This volume is the result of such a collaboration.

This overview chapter is organized into five sections. Our aim is to set the stage and the context for the thematic chapters that follow. We begin by tracing the evolution of the idea of ASEAN as a Community and its making, including the three pillars that underlie it. This is Section 2. Although all three pillars must play a part in the building of an ASEAN Community, the key pillar, as well as the focus of the study, is the AEC (Section 3). We then move on to reviewing the thematic chapters that form the core of this volume, summarizing their key findings and recommendations. This is Section 4. A final section concludes.

2. ASEAN as Community

In the 1992 Treaty creating the ASEAN Free Trade Area (AFTA), the six older ASEAN member countries agreed to grant preferential tariffs to one another in intra-ASEAN trade, eventually abolish such tariffs altogether, and remove non-tariff barriers (NTBs) to their trade within certain time frames. The ASEAN member countries, increasing in number eventually to ten, subsequently committed themselves to other regional measures for integrating the regional economy. In December 1997, ASEAN's leaders adopted ASEAN Vision 2020, by which year the association would be a "concert" of Southeast Asian Nations, a "community of caring societies" and an "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”.

Throughout the 1990s and early 2000s, the ASEAN member countries concluded agreements signifying their intention of bringing about such an economic region. These included agreements to liberalize trade in services, encourage investments by ASEAN-based investors, strengthen transportation links, harmonize product standards, and promote the conclusion of Mutual Recognition Arrangements (MRAs) — all necessary for integrating the regional economy. Finally, the association adopted the Master Plan for ASEAN Connectivity, which encompasses physical infrastructure, the policy environment, and exchanges of people.

In November 2002, at the ASEAN Summit in Phnom Penh, Prime Minister Goh Chok Tong of Singapore proposed that the ASEAN call its envisioned creation of an integrated regional economy the ASEAN Economic Community (AEC). This suggestion seems to have been motivated by a desire to achieve two things. The first was to impress upon the international business sector and the public at large that ASEAN was serious about integrating the regional economy into a form deeper than a free trade area. The term would evoke the European Economic Community (EEC), the arrangement that was the deepest and most advanced — and intrusive — of all such schemes. The second was to project the notion that community building in ASEAN would entail a political and security dimension, regional cooperation in areas beyond the purely economic, and the creation of a sense of Southeast Asian identity. Community building, after all, had to be comprehensive if it was to be worthy of the name.

A High-Level Task Force (HLTF) on ASEAN Economic Integration was subsequently formed to recommend ways to bring about the AEC. The task force recommended that the rules of origin for preferential tariff treatment be made “more transparent, predictable and standardized” by the end of 2004 and that “substantial transformation” be adopted as the criterion for qualifying as an ASEAN product in terms of origin.

Knowing that it would take more than the abolition of tariffs to integrate the regional economy, the task force urged the removal of NTBs to intra-ASEAN trade by setting up a database of such barriers

by mid-2004 (this has been done, but based on government, rather than business sector, claims), working out by mid-2005 “clear criteria” for designating measures as NTBs, and approving by 2005 a work program for their elimination. It called for the adoption of the World Trade Organization (WTO) agreements on technical barriers to trade, sanitary and phytosanitary measures, import licensing procedures, and customs valuation. The task force recommended the national and regional implementation of the “Single Window” system at customs, which would reduce to one the number of stops necessary to clear shipment through customs. It proposed “clear targets and schedules of services liberalization ... towards free flow of trade in services earlier than 2020” and a “professional exchange” by 2008. In terms of institutions, the task force proposed the establishment of a legal unit in the ASEAN Secretariat, a consultative mechanism for the expeditious resolution of operational trade or investment problems, an ASEAN Compliance Body modelled on the WTO Textile Monitoring Body, and an “enhanced” dispute settlement mechanism. The 2003 ASEAN Summit in Bali adopted all of the HLTF’s recommendations.

2.1 The Making of an ASEAN Community

Upon the proposal of Indonesia, the 2003 Summit also approved the inclusion of an ASEAN Security Community (later renamed the ASEAN Political-Security Community) in the ASEAN Community. In turn, the Philippines successfully pressed for ASEAN’s pursuit of an ASEAN Socio-Cultural Community, which would encompass regional cooperation in areas that are neither strictly political-security nor economic, including the protection of the regional environment, stopping the spread of contagious diseases, combating transnational crime like trafficking in drugs or people, cooperation in responding to natural disasters, and the cultivation of a sense of regional identity. The whole package would eventually make up the building of an ASEAN Community.

In November 2007, ASEAN’s leaders approved a “Roadmap” for the ASEAN Community consisting of a “Blueprint” for each of the three ASEAN Communities, plus the Initiative for ASEAN Integration (IAI) Strategic Framework and IAI Work Plan 2 (2009–15). The IAI is meant to bridge the perceived “development divide” between the six older, and economically more advanced ASEAN members — the five founding states, Indonesia, Malaysia, the Philippines, Singapore and Thailand,

and Brunei Darussalam, which entered ASEAN in 1984 — and the four newer ones — Cambodia (1999), Lao People's Democratic Republic (1997), Myanmar (1997) and Viet Nam (1995). Although the divide has been narrowing, with much higher growth rates in the newer members, the gaps remain quite wide. It is unlikely that the IAI alone,² or donor assistance in general, will be able to remove these gaps; ultimately, the solution must come from within these newer member countries, through trade, investment and other market reforms that facilitate rapid growth and catch-up. Indeed the reforms embedded within the AEC provides the opportunity to accelerate catch-up, if faithfully implemented.

Following the August 2006 recommendation of the ASEAN Economic Ministers, the ASEAN Summit in January 2007 agreed to advance the achievement of the entire ASEAN Community from 2020 to 2015. If aiming for 2020 was ambitious enough, setting 2015 as the target year was even more so. The question then comes to mind: how realistic was the ambition, or even how serious was ASEAN about its community building, including the achievement of an AEC? Presumably if it was recognized that even 2020 was too ambitious, then there is not much lost, and some publicity to be gained, by moving forward a target that was unattainable anyway. (In practical terms, ASEAN in its current stage is caught in this dilemma. It would lose credibility if it set ambitious goals and failed to meet them. On the other hand, it would lose momentum or visibility if it set less-than-ambitious, but realistic, goals.)

This also raises a related question: what makes a community — in this case a regional community of nation-states, each autonomous and sovereign? One could, of course, turn to a definition that describes the European Union (EU) — a community of nation-states in which citizens of EU members can live, work and study anywhere in the region. However, this definition is clearly not applicable to ASEAN, where such a condition, for various reasons, seems to be beyond reach. The current turmoil in the Eurozone is also a timely reminder of the need to set goals that are both realistic and recognize the constraints posed by all kinds of diversity within a regional grouping.

For ASEAN, a more serviceable and attainable definition of community might be a region in which the leadership class and an increasing number of people feel that they belong to one another, and they recognize that their and their respective nations' interests are served by being in the community. In other words, a region that is

politically cohesive and economically integrated, capable of cooperating effectively to deal with regional problems, where personal and national interests are advanced along with the growing cohesion and progress of the region.

To a certain extent, ASEAN has achieved the objectives inherent in this definition, particularly with respect to peace and stability. Except for minor skirmishes between Cambodian and Thai forces over a disputed strip of borderland, and between troops of Myanmar and Thailand at their common border, peace has prevailed in Southeast Asia. By treaty, ASEAN member countries have generally refrained from firing shots at each other in anger, avoided interference in one another's internal affairs despite the presence of the same ethnic groups on their common borders, and settled disputes between them through political negotiation or legal adjudication rather than through armed violence. Eighteen non-ASEAN states have acceded to these norms of interstate behavior in Southeast Asia. The ten ASEAN member countries have reassured one another, through a treaty signed in December 1995, on the development and use of nuclear weapons. They have taken common positions on such regional issues as the 1978 Vietnamese incursion into Cambodia and the political settlement of that issue in 1991, the Indochinese asylum-seekers, and the 1997 Cambodian crisis. In 1993, they arrived at a common ASEAN view of human rights. This ability to formulate common positions has allowed ASEAN to be recognized by the international community as an increasingly influential and credible association capable of contributing substantively to regional, and even global, affairs.

ASEAN members have engaged the major powers in South-east Asian affairs in inclusive, balanced, even-handed, and non-confrontational ways, through various ASEAN-centered forums at several levels, through joint exercises and other cooperative activities, and through schemes like free trade area and economic partnership agreements between ASEAN and external partners. In this way, they have contributed directly to the region's stability.

ASEAN has recognized the growing importance of cooperation in the protection of the regional environment. Its members have been cooperating on environmental education and consciousness-raising and in the development of key indicators for clean air, clean water, and clean land. ASEAN has adopted criteria for marine water quality

and for marine protected and heritage areas. It has been publishing a regional State of the Environment Report.

The haze, produced mostly by the burning of peat and forests in Indonesia, has been one of the leading environmental threats with spillovers to several countries in Southeast Asia. In 1997, ASEAN designated the ASEAN Specialized Meteorological Centre in Singapore to “monitor and assess land and forest fires and the occurrence of transboundary smoke haze affecting” Southeast Asia. Through the Centre’s website, one can pinpoint on any given day where forest and land fires and “hot spots” are in the region. In 2002, Ministers signed the ASEAN Agreement on Transboundary Haze Pollution, which entered into force in November 2003, 60 days after the deposit of the required 6th instrument of ratification. Although Indonesia is not yet a party to the agreement, some of its provisions are being carried out. ASEAN’s members and Secretariat have adopted a zero-burning policy, conducted simulation exercises, and engaged in consciousness-raising activities among local people in fire prone areas. Despite these efforts, however, the haze continues to be a problem in the region, since large commercial interests view the burning of forests and peat lands as a short-term, cost-effective method of clearing land for plantations.

In contrast, dealing with the 2003 SARS pandemic was more of a triumph for ASEAN and ASEAN-centered cooperation. Moreover, all the top leaders were involved in dealing with the pandemic almost from its beginning, ensuring close coordination at the national level.

Many of the institutional arrangements established prior to and in response to SARS continue to address anticipated emergencies like avian influenza. The ASEAN Expert Group on Communicable Diseases was established in 2002 to consolidate bodies dealing with disease surveillance and tuberculosis in the region. An ASEAN Plus Three (the three being the PRC, Japan and Republic of Korea) program called Emerging Infectious Diseases has unprecedented support from Australia.

Since 1993, ASEAN has had a special task force on HIV/AIDS, mandated to increase access to affordable medicine, reduce the HIV vulnerability of migrant workers, anticipate the impact of HIV/AIDS on development, and reduce the stigma and discrimination of people living with HIV/AIDS.

From the abuse of narcotics and trafficking in illicit drugs, ASEAN's concerns with transnational crime have expanded and diversified to include international terrorism, trafficking in people, arms smuggling, money laundering, illegal migration, and piracy at sea. ASEAN has very publicly made clear its opposition to and condemnation of international terrorism, sea piracy, drug- and people-trafficking, and other forms of "non-traditional" security threats. It has done so in joint declarations and/or joint projects with Japan, the PRC, Australia, Canada, the European Union, India, Republic of Korea, New Zealand, the Russian Federation, the United States and Pakistan.

Cooperation on regional responses to natural disasters is a relatively new area for ASEAN cooperation, although parts of Southeast Asia are prone to periodic disasters. Prominent among ASEAN activities in this area are the annual regional exercises simulating responses to chemical spills and explosions as a result of typhoons, volcanic eruptions, earthquakes, tsunamis, and so on. These simulation exercises take place in ASEAN countries on rotation. Similar joint exercises are conducted in the context of the ASEAN Regional Forum. The work that ASEAN has done in leading and coordinating international assistance to Myanmar in the wake of Cyclone Nargis in May 2008 had a seminal character.

Outside governments, more and more political, academic, professional, hobby and sports groups are being organized on an ASEAN basis, especially among the young. This type of person-to-person contact and cross-cultural fertilization, cutting across professions and age groups, must form a critical part of community building.

2.2 The Three-Pillared ASEAN Community

ASEAN members now aim to create an ASEAN Community. The Blueprint for an ASEAN Political-Security Community calls for a "rules-based community of shared values and norms", good governance, human rights, and adherence to the principles of democracy. The ASEAN Charter, which entered into force in December 2008, enshrines these ideals in its preamble, purposes, and principles. Thus, in both the Blueprint and the Charter, ASEAN commits its members in principle to matters that normally pertain to a country's domestic affairs.

The Blueprint suggests ways of intensifying the understanding and appreciation by the people of ASEAN member countries of one another's political systems, cultures and histories. It recommends

measures for building mutual confidence in the region and dealing cooperatively with international terrorism, transnational crime, and other “non-traditional” security threats. Specifically, the Blueprint envisions the establishment of “the ASEAN Maritime Forum”. The forum has already been convened twice, with a third scheduled. The Blueprint urges ASEAN members to consider “the establishment of an ASEAN Institute for Peace and Reconciliation”. Such an institute is now the subject of brainstorming among officials and non-governmental institutions.

The Blueprint for an ASEAN Socio-Cultural Community, over which several disparate ministerial and senior officials forums have responsibility, touches on a wide range of areas. It covers skills acquisition through education and other forms of human resource development, information and communication technology, science and technology, entrepreneurship, poverty alleviation, social safety nets, food security and safety, health, drugs, natural disasters, the environment, ASEAN’s cultural heritage, and the cultivation of a regional identity. By their very nature, almost all of these commitments are for individual states and societies to carry out; the most that ASEAN can do is to convene regional forums and encourage networking among national policy-makers, so that they can learn from one another. The officials drafting the Blueprint must have been under some pressure to include the entire gamut of ASEAN socio-cultural cooperation; ministers and bureaucrats probably insisted that their respective areas have some mention in the document.

Nevertheless, both the ASEAN Political-Security Community and the ASEAN Socio-Cultural Community Blueprints indicate that ASEAN recognizes the value of these areas and norms and affirm the member countries’ commitments to them. The meetings and forums that the Blueprints call for are occasions for building regional networks, formulating regional positions, and cultivating a regional identity.

At the same time, it has to be realized that the so-called “ASEAN Way” of informality, flexibility and incremental progress has served ASEAN well. It has spilled over into ASEAN-centered schemes that are larger than ASEAN, like the ASEAN Regional Forum, ASEAN Plus Three, East Asia Summit and the ASEAN Defence Ministers Plus. Many of ASEAN’s external partners have also stated that the “ASEAN Way” has served them well, too. Unfortunately, attempts to formalize initiatives that were initially pursued using the “ASEAN Way” have

often resulted in disappointment. For example, the ASEAN “Troika” that was formed *ad hoc* to deal with the Cambodian crisis of July 1997 disappeared from existence when ASEAN tried to formalize it by working out, through consensus, its terms of reference.

3. The ASEAN Economic Community

In terms of regional economic integration, and the building of an ASEAN Economic Community, the association has removed, at least on paper, customs duties on most intra-ASEAN trade. It has laid the foundations of regional economic integration by reiterating its members’ pledge to remove NTBs to intra-ASEAN trade. ASEAN members have formally adopted a Customs Code of Conduct, the national and regional “Single Window” systems, the ASEAN Harmonized Tariff Nomenclatures, and the WTO’s mode of customs valuation. They have concluded “framework” agreements on the liberalization of trade in services, investments, goods-in-transit, multi-modal and interstate transport, and information and communication technology. They have agreed on MRAs or their equivalent for three types of goods and seven professions, as well as concluded a “framework” agreement on MRAs. MRAs covering traded goods would avoid duplication in the testing of products at both the exporting and importing ends, while those pertaining to services usually provide for the mutual recognition of professional credentials. Although most of these agreements are shot through with loopholes under the general cover of “flexibility”, and some of them have not been ratified by all ASEAN states, they do manifest ASEAN’s recognition of the desirability of regional economic integration and each member state’s commitment to it.

In general, these commitments are substantially more specific in terms of their nature and timelines than those pledged in the Blueprints for an ASEAN Political-Security Community and an ASEAN Socio-Cultural Community. The latter two Blueprints are riddled with words like promote, strengthen, build up, increase, intensify, advance, encourage, enhance, endeavor, facilitate, improve, work toward, develop, optimize, strive for, and support — clearly, commitments that are less than firm.

In contrast, the Blueprint for an ASEAN Economic Community contains specific commitments to be carried out within definite

timelines. Indeed, it includes a “Strategic Schedule” in the form of a matrix specifying “Priority Actions” to be undertaken over 4 two-year periods from 2008 to 2015.

For example, the “Strategic Schedule” has committed the ASEAN members to the immediate “stand-still and roll-back” of NTBs to intra-ASEAN trade and to the elimination of such barriers over 2010–18. In the Strategic Schedule, the six older ASEAN members have agreed to “operationalize” their respective national “Single Windows” by 2008 and the four newer ones by 2012 and to apply information and communication technology to customs management by 2013. They have decided to carry out by 2015 the MRAs for cosmetics, electrical and electronic equipment, and pharmaceuticals. They have agreed to implement fully the MRAs in the seven service sectors already agreed upon and in others that may be completed before then. They have committed to eliminate or reduce to minimal levels restrictions on investments by 2015. The member countries have pledged to the harmonization of measures to facilitate the movement of investments, the adoption of a regional work plan on competition policy and law, the “full implementation” of the goods-in-transit agreement, the implementation of the ASEAN Multilateral Agreement on Air Services (or “open skies”), and the harmonization of e-commerce legal infrastructure — all by 2015.

The fulfillment of these commitments would promote predictability in ASEAN, as well as strengthen its credibility. Nevertheless, the “Strategic Schedule” is still saddled with loopholes and “flexibility” hedges, full of words and phrases like “minimal”, “where appropriate and possible”, “establish good practices”, and “possibly”. In the light of the conditions hedging the general intention of the agreements, each state retains substantial flexibility and discretion in carrying out its commitments in the Blueprint. Apart from problems posed by such built-in flexibility, more concerning is the failure to implement commitments even when such uncertainty is absent. For instance, the elimination of NTBs has been “required” several times now, the most recent being associated with the CEPT Agreement. Similarly, the agreement to “operationalize” the Single Window by 2008 has clearly not been achieved.

However, prodded by the widespread expectation (in the media, academia and elsewhere) that these commitments will be substantially fulfilled, ASEAN will likely announce around 31 December 2015, the

achievement of the ASEAN Economic Community, as promised. Hardly any international organization or meeting admits failure or even a shortfall. In any case, 2015 will certainly not see ASEAN suddenly transformed, its nature and processes abruptly changed, its members' national interests substantially altered. Rather, 2015 should be viewed more as a milestone year than as a hard target year. It should be used as a measure of a work in progress.

Nevertheless, in their Blueprint for an ASEAN Economic Community, ASEAN's member countries have committed themselves to certain time-bound specific measures that could lead to the integration of the regional economy. While ASEAN should not be called to account for its members' failure to accomplish every single one of their commitments, any failure to deliver will likely lead to a loss of credibility, putting member countries in danger of falling further behind in the global competition for export markets and FDI.

4. Summary and Recommendations of Thematic Chapters

It was in order to assess the likelihood of the realization of the AEC and examine the obstacles, political or otherwise, to its achievement that the Asian Development Bank (ADB) invited the Institute of Southeast Asian Studies (ISEAS) to conduct a study of these matters, including actions deemed necessary for achieving the AEC.

ISEAS and ADB commissioned specialists with a profound knowledge of Southeast Asia and Southeast Asian economic integration, to examine how far ASEAN has gone in carrying out the more significant commitments and identify the reasons why ASEAN or its members have succeeded or failed in achieving each of them. They would recommend actions to take in order to create the AEC, some envisioned in the Blueprint, others not.

The study covers non-tariff barriers or measures (Myrna Austria), trade in services (Deunden Nikomborirak and Supunnavadee Jitdumrong), investments (Manu Bhaskaran), competition policy and the protection of intellectual property rights (Ashish Lall and Robert Ian McEwin), subregional cooperation (Richard Pomfret and Sanchita Basu Das), agreements with external partners on free trade areas or comprehensive economic partnerships (Razeen Sally), dispute settlement (Hsu Locknie), and institutions (Helen Nesadurai). Most of the writers

are among the world's leading authorities on ASEAN economic integration.

Because regional economic integration is meant to stimulate and facilitate trade and investment, the opinions of businesses operating or interested in operating in the region are an important factor in the assessment of the AEC's prospects of achievement and of its relevance to particular businesses' current or prospective operations. Albert Hu Guangzhou of the Department of Economics at the National University of Singapore, with the help of consultants in nine of the ten ASEAN countries, conducted the survey and analysed its results.

This volume is basically a compilation of the findings and insights of the experts.

4.1 Business Views

The results of the business survey is presented in Chapter 10. Its principal finding is that the level of awareness of AEC 2015 on the part of many business decision-makers is low. In other words, the business decision-makers surveyed were not even aware of the region's official commitments on AEC 2015. The survey attributes this lack of awareness to the fact that not much actual regional economic integration was taking place or at least to the firms' non-involvement in any such integration. The survey also finds that the main barriers to greater intra-ASEAN trade were the different regulatory standards, excessive regulation, and the lack of information. Perhaps surprisingly, fully a third of the respondents cited tariffs as a barrier. Either they were unaware of the preferential tariff rates and, in most cases, of the zero tariffs supposed to be enjoyed by intra-ASEAN trade, or customs authorities were imposing tariffs on intra-ASEAN traded goods despite the agreements arrived at. This finding, however, is consistent with various surveys pointing to very low utilization rates of AFTA or other preferences. Finally, the survey reveals that government agencies are businesses' primary source of information on AEC 2015.

4.2 Non-tariff Barriers

NTBs, most of them behind-the-border measures, are probably the most formidable impediments to the achievement of a "single market and

production base". Thus, the finding in this chapter is perhaps one of the most important in terms of realizing the AEC.

The author of the chapter, Myrna S. Austria, Professor of Economics and Vice-Chancellor for Academics at De La Salle University in the Philippines, assesses the progress in implementing actions in the AEC Blueprint to address NTBs in the region and examines the NTBs affecting the integration of the sectors designated as "priority" in the Blueprint. She cites the recommendations on NTBs of the HLTF on ASEAN Economic Integration: (i) a database of non-tariff measures by mid-2004; (ii) criteria to identify measures that are classified as barriers to trade by mid-2005; (iii) a work program for the removal of the barriers by 2005; and (iv) the adoption of the WTO agreements on Technical Barriers to Trade, Sanitary and Phytosanitary Measures, and Import Licensing Procedures, and the development of implementation guidelines for these agreements by the end of 2004.

After assessing the implementation of each of these commitments and analysing the reasons for delays, she concludes that there has been "little progress" on reducing NTBs to intra-ASEAN trade. NTBs, in her opinion, have replaced tariffs as "protective measures". She identifies some of the factors that have contributed to the slow progress in addressing NTBs. Foremost among these factors is the difficulty in identifying which among the NTBs are effective barriers to trade. Government regulations, procedures, and administrative requirements, she points out, have evolved over the years in response to developments in each member country.

She stresses that NTBs could undermine the economic integration process and the realization of the AEC by 2015, concluding that "ASEAN is far from being a single production base" because of the obstacles posed by NTBs to intra-ASEAN trade. She observes, "Protectionism continues to prevail among the member economies in the ASEAN region after the 2008/2009 economic global downturn."

Austria concludes her assessment by saying that economic integration will continue but will be "limited to economies which are able to address the NTBs and the supply-side capacity constraints. It will also be limited to highly integrated production networks."

She makes several recommendations. One of them is to involve the private sector in identifying NTBs and subject all non-tariff measures to a "compliance review" in order to ensure that they are transparent and non-discriminatory and in order to minimize trade restrictiveness.

Another is to establish a web-based facility in reporting, monitoring and eliminating NTBs. This measure would increase transparency and compliance with government regulations and with administrative procedures and requirements. Yet another recommendation is the harmonization of product standards and the conclusion of effective MRAs. In addition, technical assistance to strengthen human and institutional capacities for setting standards is required. The last recommendation is the facilitation of trade, particularly in agriculture. This would entail improving infrastructure, removing institutional rigidities and bottlenecks, and, in general, strengthening agriculture's connectivity to the manufacturing sector and eventually to the global supply chain.

4.3 Services

The authors of the chapter on services, Deunden Nikomborirak and Supunnavadee Jitdumrong of the Thailand Development Research Institute, rightly point to the growing importance of services in the economies of most ASEAN member countries, as a share not only of GDP but also of employment. They demonstrate that the larger the share of services in a country's GDP, the higher the per-capita GDP of that country (with the exception of oil-rich economies like Brunei Darussalam's). Therefore, they argue, the liberalization of intra-ASEAN trade in services is crucial to the economic integration of the region. Yet, they observe that even the commitments in the AEC Blueprint are not sufficient for this purpose, much less in the rounds of negotiations that have been conducted under the ASEAN Framework Agreement on Services (AFAS). The authors quote Jenny Corbett of the Australian National University, "AFAS is not particularly liberalizing compared with GATS (WTO's General Agreement on Trade in Services) commitments."

The authors contend that the seven existing MRAs for specific professions are too riddled with loopholes to have any impact on the regional movement of professionals in those fields. Whatever liberalization has been done of trade in services in the region has not fully carried out the commitments in the AEC Blueprint in this regard.

The authors point out that the bulk of services liberalization has been achieved through unilateral policy initiatives, rather than

negotiated under AFAS or GATS. They argue that such liberalization, therefore, might best be achieved unilaterally, as part of the effort to advance the economic interest of individual member countries.

Logically, the question might be asked: why not just abolish AFAS? An answer that has been proffered is that regional bodies, specifically ASEAN, rarely do away with their creations. The replacement of the Vientiane Action Programme with the Roadmap for an ASEAN Community by the ASEAN leaders in March 2009 was a rare occurrence. Moreover, regional or global commitments serve as safeguards against backsliding or going back on measures undertaken in unilateral liberalization.

The authors note that, despite the commitments made by ASEAN countries under AFAS, GATS and bilateral agreements, statutory limitations on foreign equity holdings, restrictions on land ownership, and impediments to professional or labor mobility across national boundaries continue to work against the fulfillment of these commitments.

The authors suggest that the ASEAN Secretariat promote the notion that the service sectors in most ASEAN countries are inherently inefficient by “benchmarking” them against those in countries, preferably also in ASEAN, where the services trade is more exposed to competition. This assumes, of course, that political decision-makers place greater value on efficiency and the economy as a whole than on the political support of those whose livelihoods and other interests are protected by the current restrictions on services trade. To apply countervailing pressure on policy-makers in this regard, the authors suggest that all, including the media and the academic community, be enlisted in pushing the liberalization agenda.

In relation to this, it would be best to entrust neither the Secretariat nor any other intergovernmental body with the politically sensitive task of identifying “those who benefit from the current protection”. Research institutes and other academic bodies might be more willing to undertake the job with the necessary objectivity. However, as is often the case, efforts have to be made to obtain for this purpose funding that is independent of government or foreign control.

The authors have other suggestions. One is for ASEAN to undertake the liberalization of trade in services by concentrating on groups of services rather than focusing on “isolated” individual sectors. Another

is to consider the “dominant role” of state enterprises in service sectors that “may foreclose any effective competition in the market”. Another suggestion is the prescription of “standard rules” governing licensing and other regulatory regimes. Yet another is to replace “built-in flexibilities” with the postponement for certain member countries of implementation “to a pre-specified date”. The authors rightly point out that such “flexibilities” render unnecessary any blanket preferential treatment for the four newer ASEAN members. Moreover, the service sectors of these countries are, in general, already relatively open, partly on account of the commitments that they made in acceding to WTO and/or in concluding bilateral trade agreements with the United States and partly because of their lack of capital or expertise or both.

The authors predict that “the AEC is unlikely to make any meaningful difference to ASEAN services trade in the foreseeable future. However, very few people recognize this fact and still anticipate a massive tide of cross-border investment and movement of labor in 2015. Perhaps the myths surrounding the AEC will help shake up the dormant and well protected service sector to face greater competition from outside.”

They add that “the rather unambitious liberalization goals and lax implementation in services trade established in the AEC reflect the unwillingness of ASEAN member countries to open up their cosseted and, at times lucrative, service sector. In the absence of political will, it will be difficult to envision an integrated ASEAN service market in the foreseeable future. Many studies have revealed that almost all past service-sector liberalization in ASEAN can be attributed to unilateral policy moves rather than regional commitments.”

4.4 Investment

In Chapter 4, Manu Bhaskaran, Director and CEO, Centennial Asia Advisors, underlines some basic but often glossed-over truths. One is that most ASEAN policy-makers see the value of FDI in economic development. The second is that Southeast Asian countries as a group have been receiving a diminishing share of investments flowing to other developing countries, particularly to the PRC and India, or to the world at large. Neither domestic nor foreign investments in Southeast Asia have recovered even to the levels before the 1997–98 crisis. A

third truth is that estimated returns-on-investment in isolation are not the sole “determinant” of investment decisions. For ASEAN, most of whose members are open and linked to the rest of the world, the economic situation in major markets, the political risks of investing in ASEAN, and the ease of doing business in each member country are also important factors. Improving the business climate, that is, reducing “country risks”, for which investors generally require a premium, is the primary responsibility of the individual state rather than that of a regional association like ASEAN. A final truth is that investments in ASEAN have been generally market-driven rather than determined by intergovernmental agreements or other government decisions, some provisions of which may, in fact, hinder investments.

Bhaskaran observes that the AEC, if realized, could expand economies of scale for investors in Southeast Asia and lead to a more efficient allocation of resources. The AEC Blueprint, according to him, has the advantage over previous ASEAN investment agreements in being more comprehensive and in encouraging member countries “to show progress in key areas”. However, he also acknowledges that 2015 as a target year may not be realistic.

Bhaskaran asserts that despite the optimistic outlook engendered by the adoption of the AEC, it has failed to stimulate a “rebound” in investments in Southeast Asia; instead, it has induced scepticism. Bhaskaran cites the results of the business survey conducted for this study, which reveals a pronounced lack of awareness of the AEC on the part of business decision-makers. Moreover, a number of obstacles, mostly domestic, continue to hamper the integration process in ASEAN. These include vested interests seeking continued government protection from regional competition, historical animosities, territorial disputes, mutual suspicions, and the cultural diversity of the people inhabiting the region.

Summarizing the investment policy of each ASEAN member country, Bhaskaran affirms that, before the adoption of the AEC Blueprint, “efforts to promote investment in ASEAN have been marked by a proliferation of initiatives which have had little success”. He describes each of those initiatives and attributes their failure to their lack of “enforceability”, the existence of exemptions, and the ease with which ASEAN members could “delay or opt out of implementing certain measures”.

Bhaskaran concludes that intergovernmental agreements are not sufficient in attracting investments. More important is the business climate in each country, including improvements in the ease of doing business. The most formidable obstacles to FDI, according to him, are those posed not by government policies but by their application and implementation. This form of “country-specific flaws” is a barrier to investments that the AEC Blueprint has failed to address.

The chapter ends with several recommendations. The first is an obvious one, which is for individual ASEAN countries not only to improve their investment climates and other conditions, including shortening the time it takes to open and close businesses and pay taxes, but also to make good on their commitments to regional economic integration, thus creating “scale economies”. Educational campaigns on the benefits of integration have to be mounted.

Another recommendation would resuscitate the “ASEAN brand”, which had previously been a major selling point for the region. Part of this is the revival of a sense of opportunity and the promise of high returns, intangible factors that characterized the Southeast Asian economy and image in the past. ASEAN must behave like a single market. It should hold up existing joint investments between ASEAN companies as subjects for expansion or emulation. Specific measures could be taken: common company registration, reasonably easier movement of people around the region, the free flow of goods, a unified stock exchange, strong national investment-promotion agencies, and so on.

A recommendation worthy of close attention is that, instead of pursuing region-wide endeavors, ASEAN should consider focusing on “bite-sized regional integration”, again for possible expansion or replication. Examples are less-than-region-wide projects like the Singapore-Malaysia Iskandar project in Johor Bahru, the Malaysian city that adjoins Singapore, and the ADB-supported Greater Mekong Subregion development program, involving five ASEAN members on the lower reaches of the Mekong River plus Yunnan and Guangxi Zhuang in southern PRC. Other examples are the East ASEAN Growth Area among Brunei Darussalam, Eastern Indonesia, East Malaysia, and the Southern Philippines (BIMP-EAGA), the Growth Triangle among Indonesia, Malaysia and Thailand (IMT-GT), and projects designed to advance the development of the four newer ASEAN members — Cambodia, Lao People’s Democratic Republic,

Myanmar and Viet Nam (see also chapter by Pomfret and Basu on subregionalism).

Another recommendation is an ASEAN push for regional connectivity, including high-speed rail links and inter-island bridges. (The problem here is how to fund them.) Still another is to hold up a few prominent development endeavors like Malaysia's Economic Transformation Programme, Indonesia's Master Plan, Singapore's pharmaceutical industry, and Thailand's automotive sector.

The recommendations pertinent to regional investment agreements, including provisions of the AEC Blueprint, are to shorten the exclusion and sensitive lists to minimal proportions and to make better use of existing agreements rather than devise new ones.

4.5 Competition Policy and IPR Protection

The chapter covering competition policy and the protection of intellectual property rights was jointly prepared by Ashish Lall, Professor at the Lee Kuan Yew School of Public Policy in the National University of Singapore, and Robert Ian McEwin, managing partner of Competition Consulting Asia LLP and Visiting Professor of Law at Chulalongkorn University in Bangkok.

Like the AEC Blueprint, the authors opt squarely for the concept of competitiveness as the promotion of free and fair competition within each country in Southeast Asia rather than Southeast Asia's competitiveness with the rest of the world; in other words, individual nations' anti-monopoly policies.

An entire chapter has been dedicated to competition policy and IPR protection, since both have the same goal of improving the business environment within a country. Both promote price, product and production-process competition, thus lowering production and transaction costs and encouraging an efficient allocation of resources and improved consumer welfare. Effective IPR protection also helps foster competition among firms, leading to greater product and process innovation and making consumers better off. Although the AEC Blueprint bears the commitment of leaders and officials to integrate the regional economy, the joint study underlines the fact that both competition policy and IPR protection are essentially national in application.

The chapter points out that, although "full economic integration would necessarily mean the same IP and competition laws similar to

(those of) a single country”, and although “harmonizing both rules and enforcement (pertaining to competition policy and IPR protection) is an important element of reducing trade barriers”, only coordination and cooperation, rather than uniformity, would be possible in ASEAN. In the light of the widely different levels of development among member countries and their often clashing national interests (among other factors), even these would be difficult to achieve; in any case, their achievement would take considerable time.

Reviewing the anti-competition provisions of laws in ASEAN countries and similar arrangements in other regions, specifically the North American Free Trade Agreement (NAFTA), the Mercado Común del Sur (MERCOSUR) and the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA), the chapter cites considerable benefits from the harmonization of regional standards, particularly “in terms of the development of a regional market”. The problem here, however, is in implementation, enforcement, and the uniform treatment of domestic and foreign firms.

The chapter recommends the further consideration, in terms of ASEAN’s goals, of dispute settlement mechanisms for cross-border competition and IPR conflicts (see Chapter 8 by Hsu), anti-dumping measures (including their replacement by competition law), and the important issue of how export cartels and export subsidies should be dealt with.

4.6 Subregional Arrangements

The chapter on subregional cooperation and connectivity in Southeast Asia, by Richard Pomfret, Professor of Economics at the University of Adelaide in Australia, and Sanchita Basu Das, lead researcher on economic affairs at the ASEAN Studies Centre of the Institute of Southeast Asian Studies in Singapore, begins by declaring that “progress has been slow” toward regional economic integration. NTBs to intra-ASEAN trade, it points out, have not been removed. Negotiations on liberalizing trade in services are much too slow. Thus, the authors observe, ASEAN is more ten “disparate markets” than a single integrated market. Moreover, “a wide economic disparity divides the ASEAN-6 ... from ASEAN’s four newer members”.

The chapter describes and analyses the Initiative for ASEAN Integration (IAI) and four Subregional Economic Zones (SRZs) in the region — the Singapore-Johor-Riau (SIJORI) zone, the Greater Mekong

Subregion (GMS), the Indonesia-Malaysia-Thailand Growth Triangle (IMT-GT), and the Brunei Darussalam-Indonesia-Malaysia-The Philippines East ASEAN Growth Area (BIMP-EAGA). The chapter affirms and seeks to demonstrate that subregional cooperation helps in improving region-wide connectivity and narrowing the development divide within ASEAN.

The chapter annexes very useful maps of the four SRZs. It observes that SIJORI is driven largely by the private sector. It is, however, uncertain as to how much the SIJORI area's growth can be attributed to its status as a SRZ and how much to "market-driven development". On the other hand, the chapter finds that the "private sector's role in the GMS has been minor" and that "the main drivers of action" there have been the PRC and Thailand, while the poorer nations have derived little benefit from it.

In the case of IMT-GT, the authors are at a loss to determine "how much dynamism has been created by the SRZ structure". It finds that, in this case, only the Indonesia-Malaysia power link and the Melaka-Dumai ferry project directly promote subregional connectivity; the other priority projects are national in scope. Similarly, in terms of the IMT-GT economic corridors, the authors contend that "the only truly SRZ features" pertain to the Malaysia-Thailand cross-border trade and the two ferry routes across the Straits of Melaka.

The authors find that the impact of BIMP-EAGA on the development of the area that it encompasses "has been limited", with "limited concrete achievements". They point out that, for whatever reason, central rather than local governments administer the SRZ, which may represent a weakness in its concept and structure.

The authors stress that, while the four SRZs covered are marked by great diversity, any SRZ program takes a long time to achieve its goals; for one thing, it requires much time to build mutual confidence and establish functioning institutions, both of which are essential to transnational endeavors. At the same time, the authors urge the broadening of the concept of development beyond GDP *per capita*, to include the incidence of poverty, life expectancy, literacy, public expenditures on health and education, and "soft" and "hard" infrastructure.

In any case, the authors affirm that subregional zones can help reduce development gaps and improve connectivity across national boundaries. However, the Indonesian decision to create a duty-free zone in Batam and Singapore's efficient facilities, both national

measures, were crucial to whatever success SIJORI had, showing the critical importance of political and financial support from governments for the development of SRZs. The authors also point out that the fulfillment of ASEAN commitments in the AEC Blueprint and the Master Plan on ASEAN Connectivity could help develop the “soft infrastructure” as well as the “hard infrastructure” needed by SRZs to be successful.

One of the SRZs’ main purposes, narrowing the development divide within ASEAN, is shared by the IAI scheme. The IAI seeks to mobilize the resources of the older ASEAN members and other sources of assistance to help the newer ASEAN members develop and thus enable them to enjoy the benefits of regional economic integration. But, as noted earlier, the IAI or even the SRZs cannot serve as substitutes for domestic reforms, particularly in trade and investment. In any case, the experiences, particularly of BIMP-EAGA and IMT-GT, bear some lessons on ways to reduce the development divide.

The authors point out, however, that assessing the impact on development of an area’s status as a SRZ is made harder by the lack of data specifically on the area that the SRZ covers, the difficulty of discerning how much success or failure can be attributed to the zone’s status, and the role of ADB in each. The authors suspect, nevertheless, that much of SIJORI’s development — and presumably that of the other SRZs — would have happened even without identifying it as a SRZ and that the growth of the GMS countries has owed more to unilateral and bilateral measures than to their status as belonging to a SRZ. In a number of ways, however, developing the areas in the SRZs and ASEAN economic integration could reinforce each other through infrastructure, trade and investment facilitation, and the necessary domestic reforms.

The authors urge that, in the activities of the SRZs as well as of ASEAN, emphasis be placed on developing the newer and less-developed ASEAN members, one of the principal objectives of regional economic integration and of the AEC. They propose that these activities be purposefully aimed at that objective, with “innovative” ways of financing, such as public-private partnerships, being explored.

4.7 External FTAs

Authored by Razeen Sally, Director of the European Centre of International Political Economy in Brussels, the chapter on the free

trade agreements (FTAs) that ASEAN has entered into — the 1992 AFTA agreement, the ASEAN+1 FTAs, and those between individual ASEAN members and non-ASEAN partners — comes to several conclusions. One is that these agreements represent a shift from the unilateral liberalization of trade and foreign direct investment, which resulted in Southeast Asia's rapid development in the 1980s and 1990s, to preferential liberalization, which has *not* led to further external opening or domestic reform. Another is that the FTAs are "weak" and "trade-light". By these, the author means that, while the agreements commit the parties to eliminating tariffs on trade among themselves, they do not address regulatory and other NTBs, like product standards and mutual recognition arrangements, services, investment, intellectual property rights, government procurement, or the movement of business people, which are all more important than tariffs for regional economic integration. Sally points out that AFTA has made "scant progress" on regulatory and other NTBs to intra-ASEAN trade. AFAS commitments are "sometimes barely stronger" and "sometimes weaker" than those in WTO's GATS. It also cites the delay in the implementation of the ASEAN Single Window and in the harmonization of technical regulations and product standards. ASEAN, the author notes, is not meeting its deadlines for the abolition of NTBs to intra-ASEAN trade in goods. "Implementation is the biggest deficit", Sally concludes.

Sally asserts that the FTAs that ASEAN has concluded hardly promote regional economic integration or ASEAN's integration with the wider Asia or the global economy. They certainly will not help achieve the AEC by 2015. There is "no serious prospect" for regional FTAs actually to deepen economic integration. He states, "Given ASEAN's track record, it has no prospect of coming close to an EU-style single market by the AEC's 2015 deadline — or even by 2020 or 2025." Despite public perceptions, however, ASEAN has never really aspired to be an "EU-style single market".

After briefly analysing each of ASEAN's FTA with individual partners, Sally observes that "real" commitments "rarely go beyond tariff elimination: commitments on services, investment, government procurement and standards are weak to non-existent", attributing this to the region's different stages of development, divergent levels of protection, competing producer-interests, a history of intra-regional

conflict, the “lack of a culture of cross-border cooperation”, and “geopolitical divisions” (traits not unique to Southeast Asia by any means). He urges “modest, incremental reforms”, which would be more achievable than “grand designs”, like region-wide FTAs that are pushed from the top.

Finally, Sally advocates, as a “first priority”, the revival of the unilateral liberalization of trade and FDI and behind-the-border reforms. This, he indicates, would be a more realistic step than “ambitious new initiatives and grand designs for regional integration, which invariably promise much but deliver little”.

4.8 Dispute Settlement

The chapter by Hsu Locknie, Professor of Law at the Singapore Management University, reviews the current Dispute Settlement Mechanisms (DSMs) in ASEAN, mechanisms that she considers as the “most relevant to the efforts to accelerate the realization of the AEC”.

The author discusses at length the ASEAN Protocol on Enhanced Dispute Settlement Mechanism and other DSMs related to ASEAN economic agreements. Specifically, she compares the Protocol with the WTO Understanding on Dispute Settlement, after which the Protocol is explicitly patterned, but with significant departures.

Among her more important observations are that not all “unresolved disputes” as defined in the Protocol adopted in 2010 are “referable” to the ASEAN Summit; that ASEAN’s Enhanced Dispute Settlement Mechanism (EDSM) currently has “weak financial and institutional support”; and that ASEAN members would rather refer their trade and investment disputes to the WTO than to the ASEAN bodies provided for in the ASEAN Charter (which entered into force in December 2008) and other agreed ASEAN instruments.

Reflecting shortcomings of ASEAN DSMs, Hsu makes some practical recommendations: (i) give ASEAN members no choice but to use the ASEAN Protocol; (ii) invoke customary international law and other, similar “principles” as in Article 3 of the WTO Understanding; (iii) adopt time-limit and confidentiality provisions; (iv) adopt provisions for representation on the DSM’s Appellate Body; (v) assist any least developed ASEAN member country involved in economic disputes in navigating the intricacies of ASEAN dispute settlement mechanisms; (vi) adopt working procedures or a code of conduct for the Appellate Body; (vii) improve the ASEAN website, particularly its

links to a page on dispute settlement, so as to promote transparency and confidence, including information on the members of the Appellate Body; (viii) conduct face-to-face familiarization sessions for ASEAN officials and other decision-makers; (ix) encourage the teaching of the ASEAN trade and investment settlement systems; (x) strengthen the staff and funding for the bodies recommended by the HLTF on ASEAN Economic Integration, recommendations adopted by the 2003 ASEAN Summit — the legal unit in the ASEAN Secretariat, the ASEAN Consultation to Solve Trade and Investment Issues, the ASEAN Compliance Body, and the Enhanced Dispute Settlement Mechanism; (xi) upgrade the physical and electronic infrastructure serving the ASEAN Secretariat in Jakarta and the availability and adequacy of translation services for DSM purposes; and (xii) dispel the notion that ASEAN decisions are not based on rules but, rather, are always political in nature.

Quoting the WTO's Dispute Settlement Understanding, Hsu points out that the WTO's dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements". While acknowledging that the actual use of the ASEAN DSM is not assured by 2015, she declares that "it should certainly be an objective to ensure that an operationally ready, structurally comprehensive and easily navigable system is in place by then or earlier".

4.9 Institutions

The author of the chapter on institutions, Helen E.S. Nesadurai of the Malaysian campus of Monash University, is quite realistic in discussing the institutional underpinnings of ASEAN economic integration. She observes that, while ASEAN governments have been "forthcoming" in "initiating ambitious plans and programmes", they fail "to meet set targets", preferring "relatively limited institutional structures ... unable to impose stronger discipline on member governments" that do not "adhere to the commitments, action plans and timelines to which they themselves ... earlier agreed".

Nesadurai rightly notes the domestic political considerations that drive or hinder the implementation of regional commitments. The central fact is that governments, in Southeast Asia and elsewhere, are unwilling to support regional institutions strong enough to over-ride their sovereignty. Regional institutions are weak because member countries prefer them that way, insisting on "non-intrusive, inter-governmental

mechanisms for decision making, enforcement and adjudication that emphasize flexibility and consensus". She then asks whether the "flexibility inherent in ASEAN's approach ... is all that undesirable".

In this light, she observes that, "although Southeast Asian policy-makers share a broad commitment to ... national growth and employment as a means to secure and legitimize their rule", they are "constrained by ... other ... priorities" — distributive, nationalist or politico-security. Regional policy-makers also have in common the "close relationship" between them and business sectors, whose political influence more often than not hinders the implementation of state commitments to regional economic integration. However, she adds, the insistence on and practice of flexibility, consensus and the discretionary way of implementation may have saved the AFTA and ASEAN itself from disintegrating.

Strikingly, the chapter points out that domestic opposition to regional economic integration comes not only from firms and industries seeking continued state protection from regional competition but also from groups, including those from civil society and the labor sector, that are sceptical of globalization and regional integration.

The author notes that there are no means at present to compel compliance with AEC commitments. She further argues that, "flexibility" could give member countries a reason or pretext for non-compliance. At the same time, "flexibility" could undermine the association's credibility and the predictability that investors look for in a country or region.

In this light, Nesadurai makes four basic recommendations. One is to reduce "ambiguities" through realistic time-bound commitments, while maintaining the flexibility and decision making by consensus that ASEAN member countries insist upon to ensure the protection of their sovereignty and autonomy.

Another is to improve the effectiveness of existing monitoring and feedback devices through independent and better information. This would show ASEAN policy-makers "that hesitant or lack of compliance with AEC targets is undermining the attractiveness of their respective states as investment locations", so that they voluntarily carry out their AEC commitments. Through more intensive interaction with ASEAN business sectors, ASEAN policy-makers may encounter greater demands for protection and opposition to liberalization. However, such interaction may also elicit pressure for reforms that all

businesses would welcome, such as more efficiency and honesty in customs and the effectiveness of other government services.

Yet another recommendation is for the consideration of “redistributive transfers”, that is, compensation for those deemed to stand losing from regional liberalization, such as the environment, local communities and labor. The final recommendation is to strengthen and streamline the ASEAN Secretariat. One way of doing this, Nesadurai suggests, is to transform the current surveillance office, whose functions may have been taken over by the ASEAN Plus Three Macroeconomic Research Office in Singapore, into an office that monitors the progress of AEC and of regional economic integration in general. But if the Secretariat is deliberately underpowered, then streamlining is more likely to be achieved than strengthening.

5. Conclusions

Commitments to an AEC by 2015 denote ASEAN countries’ conviction that regional economic integration is a desirable measure for improving the lives of their peoples and thus strengthening the legitimacy and positions of power of their leaders. Commitments to the creation of a large regional market are also meant to send signals to the international business community that it would be profitable to trade with and invest in Southeast Asia and the countries in it. However, carrying out those commitments lie in the hands of the individual countries’ national decision-makers, who are often constrained by powerful domestic political forces that hinder their implementation.

In any case, ASEAN has to formulate, before 2015, a credible explanation of what the ASEAN Economic Community is that should have been achieved by the end of 2015.

NOTES

1. The list is extensive but see, for instance, Severino (2006); Hew (2007); Plummer and Chia (2009); Basu Das (2012); Hill and Menon (2012); and literature cited therein.
2. One reason that ASEAN alone cannot deliver the resources required to close these gaps is because, unlike Europe, the better-off members of ASEAN, from which most of the funds would presumably have to come, are either

very small (Singapore and Brunei Darussalam) or relatively small (Malaysia) (see Menon 2012).

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2

Non-Tariff Barriers: A Challenge to Achieving the ASEAN Economic Community¹

Myrna S. Austria

1. Introduction

A significant milestone of economic integration in the ASEAN region is the substantial progress in tariff liberalization, with the average tariff rate now at less than 5%. The achievement in tariff reduction, however, has been marred by non-tariff barriers (NTBs). While the commitment to eliminate NTBs has always been an integral part of the liberalization program of the ASEAN member states, little progress has been made to address them.

There are increasing concerns about NTBs. First, they have replaced tariffs as protective measures for domestic industries (World Bank 2008). Second, the bulk of intra-regional trade transactions among the ASEAN economies is driven by the global production networks of multinational companies in the region.² Efficiency in moving goods across borders has thus become crucial in capturing and creating trade

opportunities arising from the vertical and horizontal operations of these networks (Austria 2004). Third, behind-the-border interventions have increasingly emerged as the new form of protectionism since the recent global economic crisis (Wermelinger 2011). This is also observed with the shifting of growth potentials away from developed countries and toward developing countries.

NTBs could undermine the economic integration process and the realization of the AEC by 2015. Unlike tariffs, whose effect on trade is certain (i.e., direct effect will increase the price of imports), the effects of NTBs are ambiguous. They can be restrictive of trade, some may even promote it. Also, when they come in the form of regulatory measures, they may affect different products and different countries in different ways.

Given that the 2015 target for AEC is fast approaching, it is essential to examine closely the non-tariff issues affecting the economic integration of the region. The objectives of this chapter are as follows: (i) to identify and examine the non-tariff barriers affecting the integration of the priority sectors in the ASEAN region;³ (ii) to assess progress in the implementation of actions in the AEC Blueprint that are meant to address NTBs; (iii) to examine the possibility (or impossibility) of achieving the AEC by 2015; and (iv) to identify policy issues as well as make recommendations to address NTBs in the region.

The chapter is organized as follows. Section 2 examines the definition and conceptual issues surrounding non-tariff barriers. Section 3 summarizes the initiatives included in the AEC Blueprint and in the recent ASEAN Trade in Goods Agreement (ATIGA) to address NTBs in the region and assesses the progress of their implementation. Section 4 presents the data sources and methodology used in the chapter. Section 5 examines NTBs affecting ASEAN economic integration. Section 6 examines more closely the feasibility of 2015 as the target year for the realization of the AEC, identifies policy challenges and makes recommendations to address NTBs. Section 7 presents the summary and conclusions.

2. Non-Tariff Barriers and Measures: Definition and Conceptual Issues

The term “non-tariff barrier” is often used interchangeably with “non-tariff measure”. According to Bora, Kuwahara and Laird (2002), textbooks

prefer to use the former while GATT and UNCTAD opt for the latter in order to avoid measurement and judgmental problems associated with the term “barrier”.⁴ Broadly defined, non-tariff measures (NTMs) refer to any measure, other than tariffs, that distorts trade. The most theoretically satisfying definition was provided by Baldwin (1970) who defines non-tariff distortions as “any measure (public or private) that causes internationally traded goods and services, or resources devoted to the production of these goods and services, to be allocated in such a way as to reduce potential world income”. There is trade distortion when the price at the border diverges from the domestic price. Hence, NTMs are not limited to measures designed to restrict trade (e.g., quantitative restrictions). In general, distortions include border and behind-the-border measures that arise from government regulatory policies, procedures and administrative requirements which are imposed to serve a particular purpose. They can also include restrictive business practices.

While the pursuit of domestic policy objectives is legitimate, NTMs have the potential to become barriers to trade (NTBs). This could arise when such measures specifically discriminate against imports or foreign firms; when they are imposed explicitly to protect domestic industry; when they are not applied uniformly among trading partners; or, when they include unjustified and/or improper application of sanitary and phytosanitary (SPS) measures and other technical barriers to trade.

NTMs have replaced tariffs as protective measures for domestic industries, as they are often used in products and industries where tariffs have been reduced (World Bank 2008). For example, compliance with technical regulations, such as standards to protect plant, animal and human health, entails additional costs and raises the cost of production for goods destined for foreign markets. They may also disadvantage foreign firms that may have a different set of standards (or none as in the case of developing countries) for their own local markets. All these can restrict trade.

While there are legitimate reasons for regulation, in some instances its application can be so stringent as to become a barrier to trade, especially for developing countries which may lack the capability to comply with the requirements (Wilson 2005; Eddy and Owen 2007). The experience of some countries shows that the application of technical regulations and standards in some instances is stricter than is required

by relevant international certifying bodies (Wilson 2005). Worse, in the absence of an internationally accepted standards or non-adoption of common international standards, differing standards among countries can impose exorbitant compliance costs and, hence, could discourage exports.

It is very hard to evaluate the importance of NTMs to trade. NTMs and their effects on trade are more difficult to measure and quantify than tariffs. Their application is often not transparent and, hence, provides opportunities for discretionary application. While they restrict trade flows, it is difficult to conclude that the outcome is inefficiency; or, when they result in some efficiency gains, whether these are adequate to offset losses from weaker social protection (Eddy and Owen 2007). Finally, where a situation calls for some form of intervention, the question is whether an NTM is the appropriate measure and whether it is applied in a discriminatory manner. Some NTMs may be stronger than is necessary to achieve a particular level of social protection, imposing extra costs on consumers and industries.

2.1 Classification of NTMs

The typology for the classification of NTMs is wide-ranging. Thus far, the UNCTAD Coding System on Trade Control Measures provides the most comprehensive classification of NTMs. These are broadly classified according to the intent or immediate impact of the measures (Bora, Kuwahara and Laird 2002). The broad categories include the following: *para-tariff measures* such as customs surcharges, internal taxes and charges levied on imports, and decreed customs valuation. These measures increase the cost of imports in a manner similar to tariffs. These include *price control measures* such as administrative price fixing of import prices, “voluntary” export restraints and variable charges. These measures are intended to control the price of imports in order to sustain domestic prices for certain products. *Finance measures* such as advance payment requirements, advance import deposits and cash margin requirements are intended to regulate the access to and cost of foreign exchange; they increase the cost of imports in a manner similar to tariffs. *Monopolistic measures* such as single channel for imports grant exclusive rights to one or limited groups of companies.

Technical measures include requirements for product characteristics, labeling, marking, packaging, testing and inspection.

2.2 Trade facilitation-related NTBs

During the past decade, there has been an increasing recognition of behind-the-border issues that have direct impact on the free international flow of goods (World Bank 2010). These sources of the cost of trade are classified as trade-facilitation measures. Broadly defined, they involve the efficiency of transporting traded goods from the exporting firms to the consumers. They may include anything from institutional and regulatory reform to customs and port efficiency. The costs and ease with which goods can move freely from the border to the ultimate consumers in the domestic market (which may include households, firms, and the government) depend largely on country-specific factors, such as trade procedures, transport and telecommunication infrastructure, and logistics services. Because of their adverse impact on competitiveness and market entry, they have emerged as significant barriers to trade.

Non-tariff trade costs associated with unnecessary regulations, poor and inadequate infrastructure, and generally inefficient customs procedures and logistics services involved in moving goods across borders have been found to be substantially higher than those associated with tariffs (World Bank 2010; Duval and Utoktham 2011). This is critical to the ASEAN-5 economies, which are active participants in global production networks. The sustained participation of the region in international production sharing requires trade facilitation measures that would make easy and less costly the vertical and horizontal operations of these networks.

3. ASEAN Initiatives to Address NTMs and NTBs

The commitment to eventually phase out or eliminate NTBs in the region has always been an integral part of the trade liberalization program of the ASEAN member economies in order to increase intra-ASEAN trade. It dates back to 1977 under the Preferential Trade Arrangements (PTA), in which the member economies committed themselves to reducing both tariffs and non-tariff barriers. The commitment was reiterated in the “1987 Memorandum of Understanding on the Standstill and

Rollback on Non-Tariff Barriers among ASEAN Members". With the establishment of AFTA in 1992, the deadline for the elimination of trade barriers was made more definite. However, while the target for tariffs at 0%–5% was achieved earlier than originally planned, in 2002, little progress was made on NTBs. This was not surprising, as there were no detailed implementation plans for the elimination of NTBs in the earlier agreements.

Starting in 2004, however, improvements in ASEAN policy-making were recorded. The High Level Task Force (HLTF) on ASEAN Economic Integration outlined specific recommendations with regards to NTMs. To ensure transparency and eliminate those that are barriers to trade, the HLTF recommended the following (HLTF on ASEAN Economic Integration, 2004):

- a. Establish ASEAN Database of NTMs by mid-2004;
- b. Set clear criteria to identify measures that are classified as barriers to trade by mid-2005;
- c. Set a clear definitive work program for the removal of the barriers by 2005; and
- d. Adopt the WTO agreements on Technical Barriers to Trade and on Sanitary and Phytosanitary and Import Licensing Procedures and develop implementation guidelines appropriate for ASEAN by the end of 2004.

The ASEAN Database on NTMs based on the official notifications of the members was first established in June 2004. Also, the criteria for identifying NTBs were established by the 19th AFTA Council on 27 September 2005:

- *Red Box* — NTMs that are not transparent, discriminatory, without scientific basis, and where an alternative less restrictive measure is available would require immediate elimination.
- *Amber box* — NTMs that are transparent but discriminatory and affect highly traded products in the region that cannot be clearly justified or identified as barriers would be subject to negotiation.
- *Green box* — NTMs that are transparent and non-discriminatory, have no alternative measure, have scientific basis, are imposed for public health or safety or religious or national security reasons, are WTO-consistent and reasonable such as sanitary

and phytosanitary and environmental regulations, are justified and could be maintained.

In August 2006, 20th AFTA Council adopted the roadmap for the integration of the priority sectors. In addition to the recommendations of the HLTF, the roadmap set a work program for the assessment of existing NTMs and identification of NTBs. The elimination of NTBs would be done in three tranches:

- Brunei Darussalam, Indonesia, Malaysia, Singapore and Thailand by 1 January of 2008, 2009 and 2010;
- Philippines by 1 January of 2010, 2011 and 2012;
- Cambodia, the Lao PDR, Myanmar and Viet Nam by 1 January of 2013, 2014 and 2015 with flexibilities up to 2018.

In addition, there would be regular reviews and assessments of NTMs based on the criteria set by the AFTA Council beginning January 2008.

In November 2007, the AEC Blueprint for the elimination of NTBs was issued (ASEAN Secretariat 2007):

- a. Enhance transparency by abiding by the Protocol on Notification Procedures and setting up an effective surveillance mechanism;
- b. Abide by the commitment to a standstill and roll-back of NTBs;
- c. Remove all NTBs by 2010 for ASEAN-5 (Brunei Darussalam, Indonesia, Malaysia, Singapore and Thailand), by 2012 for the Philippines, and by 2015 with flexibilities to 2018 for CLMV, in accordance with the agreed Work Program on NTBs elimination;
- d. Enhance transparency of NTMs; and
- e. Where possible, work toward having regional rules and regulations consistent with international best practices.

The ASEAN member states have recently embarked on a more integrated and holistic approach to ensure the free flow of goods in the region. The ASEAN Trade in Goods Agreement (ATIGA) was signed in 2009. ATIGA consolidates and streamlines all provisions in CEPT-AFTA and other protocols related to trade in goods into one single legal instrument (ASEAN Secretariat 2011a). It entered into force in 2010 and supersedes CEPT-AFTA.

What are the actions required in ATIGA? The ATIGA makes very explicit that a member state should not adopt or maintain any NTM on the exportation and importation of any good to and from any other member state (ASEAN Secretariat 2011a). In areas where NTMs are permitted, each member state should ensure transparency. At the same time, member states shall review the NTMs in the database with a view to identifying NTBs for elimination following the timelines set out in the AEC Blueprint.

3.1 Assessment of Implementation of Initiatives

Little progress has been made in the implementation of the initiatives on NTMs and NTBs. This subsection of the chapter will examine their implementation (or non-implementation).

ASEAN NTM Database. The ASEAN NTM Database is a compilation of notifications submitted by the member states and will form part of the ASEAN Trade Repository. The notification is a list of NTMs each member state imposes on its imports according to HS Code and NTM type. First, the notification details vary significantly among the member countries. In some cases, the notification provides the relevant national legislation or regulations for the NTMs and the ministry/department in charge of the implementation. Most, however, do not provide the purpose of the NTMs or the manner of their implementation; or if they do, these are not clear and precise. The information is crucial in determining whether the NTMs are justifiable and necessary and, hence, should be permitted.

Second, the database is not up-to-date. As of February 2012, the database includes 2009 for Indonesia, Malaysia, Myanmar, the Philippines, Singapore and Thailand; 2010 for Brunei Darussalam, Cambodia and Viet Nam; and 2011 for Lao People's Democratic Republic. Thus, it may not serve the purpose of providing timely and accurate information on the state of NTMs and NTBs in the region.

Third, the database is not web-based; but rather a separate Excel file for each member country. The mechanism makes compliance with prescribed regulations difficult because the facility is not user-friendly. It makes comparison across countries, sectors and products very difficult, if not nearly impossible, considering the number of tariff lines involved. But more importantly, it does not allow the various

stakeholders, particularly the businessmen community, to report as well as monitor the resolution of any NTBs they encounter. Complaints from exporters or private sector can serve as the best criterion for eliminating NTMs. These stakeholders are in the best position to tell how different NTMs could act as barriers to trade.

Fourth, the database does not make an inventory of NTMs that have been eliminated as NTBs. This makes monitoring of progress in the elimination of NTBs impossible.

Identification and elimination of NTBs. Limited progress has been made here. There is lack of common definitions and approaches in identifying NTBs from among the NTMs because of conflicting perceptions of individual firms across the member countries. This is due to the wide variety of purpose for the same NTM across them.

Likewise, the inadequate information on the justification of the NTMs (whether legitimate or not) and their enforcement (whether uniformly across trading partners, etc.) make it also impossible to identify which of the NTMs are barriers to trade (NTBs). In the absence of this critical information, the NTMs can be easily used to protect domestic industries or applied discriminately; and thus become NTBs.

It is interesting to note, however, that during the ASEAN Economic Ministers Meeting in August 2011, the Ministers agreed to start with three priority sectors, including automotive, electronics and textile, in identifying NTMs that may serve as barriers to trade in these sectors (Economic Ministers Statement, August 2011). This is an important step in this direction. The Economic Ministers agreed that dialogues with regulators and the private sector will be undertaken toward identifying the NTMs that hamper the flow of goods in the region.

Standards and regulations. Some progress has been achieved in this area. ASEAN's approach is to align its standards and regulations with international standards acceptable at the multilateral level. Harmonization of standards has been completed for electrical appliances (58 standards); electrical safety (71 standards); electromagnetic components (10 standards); and rubber-based products (3 standards). Progress is underway for pharmaceuticals (ASEAN Secretariat 2011b). The harmonization of standards for the other priority sectors is still on-going.

On the other hand, harmonization of technical regulations has been completed for the cosmetics and electrical and electronics sectors. The harmonization of standards for automotive, medical devices, traditional medicines and health supplements is still underway (ASEAN Secretariat 2011b).

Overall assessment. The slow progress in the implementation of initiatives to address NTMs and NTBs could be caused by a combination of factors. First, identifying and eliminating NTBs from among the NTMs are often not straightforward tasks as some of the government regulations have evolved over time in response to political-economic developments in the ASEAN economies. Second, the initiatives require willingness and commitment of regulators of each economy to collaborate. The commitment to a standstill and roll-back of NTBs has been there since 1987. The lack of progress provides evidence of the weak political support to address NTBs.

Third, the development divide among the member economies constrain them to deliver the milestones for the various initiatives. There could be a variety of purpose among the economies in using a particular NTM; thus, achieving a consensus for their elimination can be a long drawn-out process.

Finally, supply-side capacity constraints, as shown by the differences in the infrastructures for standards and conformance of the member countries, can make the harmonization and alignment of standards and regulations slow, if not difficult, to achieve.

4. Data Sources

An analysis of existing non-tariff barriers in the ASEAN region could present considerable problems on data availability. The study draws from various online databases.

Global Trade Alert. This online database <www.globaltradealert.org> provides information in real time on state measures that are likely to discriminate against commercial interests of countries during the current global economic downturn. The initiative was inspired by the pledge of the G20 countries not to initiate any measure that would raise new barriers to trade and investment. While the commitment was done by

the G20, the database includes a broader set of countries. State measures include trade policy instruments and domestic regulations as long as there is discrimination against foreign commercial interests.

ESCAP Trade Cost Database. This online database <www.unescap.org/tid/artnet/trade-costs.asp> was developed by ESCAP-ARTNet in support of its research program on trade facilitation. The database includes measures of bilateral trade costs of Asia-Pacific countries and their trading partners. The measure is comprehensive, as it captures not only international transport costs and tariffs but also other components, such as direct and indirect costs associated with completing trade procedures or obtaining necessary information.

Logistics Performance Index Database. The LPI database <<http://go.worldbank.org/0X5BB50CW0>> is based on a worldwide survey of operators on the ground (consisting of global freight forwarders and express carriers) covering 150 countries. The LPI is a multi-dimensional assessment of logistics performance rated on a scale between one (worst) and five (best).

The index consists of both qualitative and quantitative measures that indicate the logistics “friendliness” of the countries in which these global operators operate and with which they trade. It has six (6) components: (i) efficiency of the customs clearance process; (ii) quality of trade- and transport-related infrastructure; (iii) ease of arranging competitively priced shipments; (iv) competence and quality of logistics services; (v) ability to track and trace consignments; and (vi) frequency with which shipments reach the consignee within the scheduled or expected time.

ASEAN NTM Database. The primary databases on NTMs are the UNCTAD Trade Analysis Information System (TRAINS) and the ASEAN NTM Database. This study, however, used the latter, as data from TRAINS are not updated.⁵ The incidence of NTM is measured by frequency ratio and import coverage ratio (World Bank 2008; OECD 2005; Deardoff and Stern 1997). The frequency ratio is measured as the percentage of tariff lines subject to a given NTM to total tariff lines in a priority sector.⁶ On the other hand, import coverage ratio is the share of the value of imports of tariff lines subject to a given NTM to the total value of imports in the priority sector. For this study, the 4-digit

HS Code was used, instead of the 8-digit (which was adopted by the ASEAN as common scheme for AHTN). The latest notifications in the ASEAN NTM Database were hardly disaggregated at the 8-digit level for all the member economies.

The 2008 value of intra-ASEAN imports was used. This was the most appropriate year to use since most of the notifications in the ASEAN NTM Database were made either January or February 2009. Data source for the value of imports was UNCTAD PC-TAS (Trade Analysis System using Personal Computer). Also, the import values were calculated only for the ASEAN-5 (Indonesia, Malaysia, the Philippines, Singapore and Thailand) because the PC-TAS did not include the CLMV (Cambodia, Lao People's Democratic Republic, Myanmar and Viet Nam).

5. Analysis of NTMs and NTBs in the ASEAN Region

5.1 Non-Tariff Barriers in the ASEAN Region

Protectionism continues to prevail among the member countries in the ASEAN region after the 2008/2009 economic global downturn. This comes in the form of state measures that discriminate against foreign commercial interests in the region. They are discriminatory, as they are not applied uniformly across all the members as shown by the list of these NTBs in Appendix Table 1.

Among the ASEAN member countries, these discriminatory measures are most prevalent in Indonesia with 48 measures affecting 388 tariff lines and Viet Nam with 15 measures affecting 927 tariff lines (see Table 2.1).

Among the discriminatory measures, non-tariff barriers at the border and behind-the-border are the most prevalent policy tool for the ASEAN-6 (see Figure 2.1). NTBs at the border include import bans, import subsidies, NTBs not elsewhere classified (such as non-automatic import licensing, new procedures for importation, additional requirements for importation, etc.), quotas, sanitary and phytosanitary measures, and technical barriers to trade (see Appendix Table 1). On the other hand, there is a wide array of NTBs behind the border such as state aid measures, public procurement requirements, trade finance, export taxes and restrictions and investment measures (see Appendix Table 1).

TABLE 2.1
State Measures by Type, ASEAN-6

	Indonesia	Malaysia	Philippines	Singapore	Thailand	Viet Nam
Total number of measures	57	8	11	7	18	26
Number of measures classified (green)	9	2	7	0	9	11
Number of measures in database classified (amber)	18	3	3	3	5	0
Number of measures in database classified (red)	30	3	1	4	4	15
Number of tariff lines affected by red measures	388	29	1	0	28	927

Notes:

Green — indicates the measure is either:

- Announced and involves liberalizing on a non-discriminatory (i.e., MFN) basis; or
- The measure has been implemented and is found (upon investigation) not to be discriminatory; or
- The measure has been implemented, involves no further discrimination, and improves the transparency of a jurisdiction's trade-related policies.

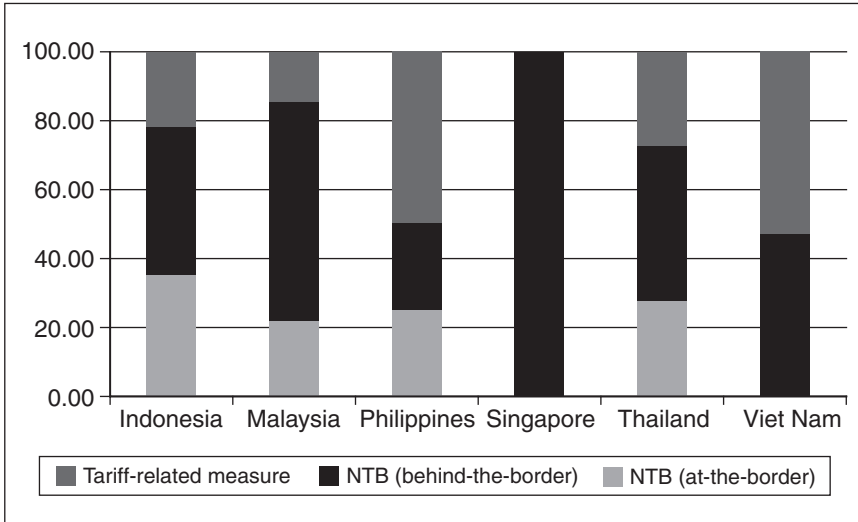
Red — indicates the measure is implemented and almost certainly discriminates against commercial interests.

Amber — indicates the measure is either:

- Implemented and may involved discrimination against foreign commercial interests; or
- Announced or under consideration and would (if implemented) almost certainly involve discrimination against foreign interests.

Source: <www.globaltradealert.org> (downloaded 10 March 2012).

FIGURE 2.1
State Measures Considered Discriminatory



Source: <www.globaltradealert.org> (downloaded 10 March 2012).

5.2 Non-Tariff Measures

The NTMs prevailing in the region are potential NTBs given the lack of information regarding their enforcement.

a. Agro-based sector

Non-automatic licensing and technical regulations are used by all member states in the agro-based sector, although in varying degrees (see Table 2.2). In terms of frequency ratio, incidence of non-automatic licensing is highest in Indonesia (39.58%), Malaysia (79.17%) and Myanmar (43.75%). On the other hand, technical regulations are used most extensively in Brunei Darussalam (51.39%), Indonesia (76.39%) and Malaysia (78.47%).

Among the member countries, Indonesia and Thailand have the most regulations in place (i.e., almost all NTM types are used). However, the import coverage ratios for both countries are less than 50%, except for technical regulations in Indonesia, which are high at 93% (see Table 2.3). Import coverage ratio is also high for Malaysia for both non-automatic licensing (89.25%) and technical regulations (90.78%).

TABLE 2.2
NTM Incidence Based on Frequency Ratio, Agro-based Sector, by Country, ASEAN

NTM Type	Brunei Darussalam	Cambodia	Indonesia	Lao PDR	Malaysia	Myanmar	Philippines	Singapore	Thailand	Viet Nam
1400 Tariff Quota Duties							10.42		8.33	2.08
2300 Internal Taxes and Charges on Imports			31.94				6.94	2.08		3.47
3100 Administrative Pricing			4.17							
5100 Automatic Licensing	0.69		6.25		0.69			28.47		4.17
6100 Non- Automatic Licensing	4.86	7.64	39.58	0.69	79.17	43.75	12.50	8.33	6.94	
6110 License with no specific ex-ante criteria									2.08	
6170 Prior authorizing for sensitive products									1.39	
6200 Quotas			0.69							

TABLE 2.2 (Cont'd)

NTM Type	Brunei Darussalam	Cambodia	Indonesia	Lao PDR	Malaysia	Myanmar	Philippines	Singapore	Thailand	Viet Nam
6300 Prohibition	9.03		0.69	1.39				1.39		
6370 Prohibition (from the Philippines) for sensitive products								1.39	1.39	1.39
6700 Selective Approval of Importers			6.94						4.86	
7100 Single Channel for Imports					2.78					1.39
7100 Monopolistic Measures-Single Channel for Imports			2.78							
8100 Technical Regulations	51.39	7.64	76.39		78.47	11.81	11.81	0.69	2.08	28.47
8110 Product Characteristic Requirements									13.89	
8130 Labeling Requirements			32.64						0.69	

8140 Packaging Requirements		2.08		
8150 Testing, Inspection, Quarantine Requirements	24.31	2.08	18.06	
8200 Pre-shipment Inspection				
8900 Technical measures - properly slautered	4.17	2.78	0.69	
7110 Monopolistic Measures-Single Channel for Imports	3.47			
6370 Prohibition (from the Philippines) for sensitive product			1.39	1.39

Source: Author’s calculations.

TABLE 2.3
Import Coverage Ratio, by Type of NTM and Country, Agri-based Sector

NTM Type	Indonesia	Malaysia	Philippines	Singapore	Thailand	ASEAN-5
1400 Tariff Quota Duties			6.84		32.18	9.70
2300 Internal Taxes and Charges on Imports	34.50		15.37	12.22		11.71
5100 Automatic Licensing	0.59	0.03		8.93		1.67
6100 Non-Automatic Licensing	35.66	89.25	1.23	0.78	28.44	39.10
6110 License with no specific ex-ante criteria					4.68	1.37
6170 Prior authorizing for sensitive products					0.34	0.99
6200 Quotas						0.01
6300 Prohibition				0.48		0.08
6370 Prohibition for sensitive product					23.11	6.78
6700 Selective Approval of Importers	0.95				10.82	3.43
7100 Single Channel for Imports		1.40				0.33
7110 Monopolistic Measures-Single Channel for Imports	0.24					0.06

8100 Technical Regulations	92.96	90.78	1.23	0.01	2.95	46.93
8110 Product Characteristic Requirements					37.01	10.86
8130 Labeling Requirements	34.94				0.07	9.21
8140 Packaging Requirements				12.22		2.06
8150 Testing, Inspection, Quarantine Requirements	4.23		0.07		31.38	10.32
8900 Technical measures nes	0.00			12.25	0.11	2.09

Source: Author's calculations.

Overall, the share of imports in the agro-based sector subject to NTMs is highest in Indonesia (93.82%) and Malaysia (89.29%) (see Table 2.4). It is interesting to note, however, that NTMs are highly concentrated in a few products in the ASEAN-5, as shown by the share in total value of imports subject to NTMs of the top five (5) commodities. For Indonesia, the top five commodities accounted for 73.87% of the total value of imports. These are palm oil (HS 1511), cocoa beans (HS 1801), coconut (copra) and palm kernel (HS 1513), cigar, cheroots (HS 2402), and extracts and essences (HS 2101).

For Malaysia, the top commodities accounted for 43.0% of total imports. These are palm oil (HS 1511), animal or vegetables fats and oils (HS 1516), malt extract, food preparations of flour (HS 1901), bread, pastry and cakes (HS 1905), and undenatured ethyl alcohol (HS 2208).

For the Philippines, the top five products accounted for 26.6% of total imports. These were sugar confectionary (HS 1704), cigar and cheroots (HS 2402), locust beans and seaweeds (HS 1212), unmanufactured tobacco (HS 2401), and other manufactured tobacco and tobacco manufactured substitute (HS 2403).

For Singapore, the top five commodities accounted for only 17.37% of total imports. These were meat of swine (HS 0202), milk and cream (HS 0402), edible products of animal origin (HS 0410), cigar cheroots (HS 2402), and other manufactured tobacco and tobacco manufacture substitute (HS 2403).

For Thailand, the top five commodities accounted for 34.96% of total imports subject to NTMs. These were rice (HS 1006), palm oil and its fractions (HS 1511), malt extract and food preparations (HS 1901), waters including mineral waters (HS 2202), and beer made from malt (HS 2203).

b. Fisheries Sector

There are no NTMs reported for the fisheries sector in the Philippines, Lao People's Democratic Republic, Myanmar and Viet Nam (see Table 2.5). On the other hand, the incidence is 100% for technical regulations in Cambodia, Indonesia and Malaysia. The import coverage ratios of Indonesia, Malaysia and Singapore also show that each of the NTMs reported affected 100% of the imports in the fisheries sectors of these countries (see Table 2.6).

TABLE 2.4
Share of Imports with NTMs, by Sector, by Country, ASEAN-5

Sectors	Indonesia	Malaysia	Philippines	Singapore	Thailand	ASEAN-5
Agro-based	93.82	89.29	23.36	21.61	53.91	66.22
Fisheries	100.00	100.00		100.00	28.94	82.35
Healthcare	61.12	4.18		71.35	17.89	44.74
Rubber-based		12.38			0.98	1.72
Wood-based	90.17	95.90				49.01
Textiles and Garments	60.48	8.64			8.86	16.97
Information Communication and Technology	99.03	23.64	84.06	83.46		64.84
Electronics	100.00	81.32	1.57	29.56	21.41	40.94
Automotives	79.67	82.80	99.99	96.19	54.33	70.48
TOTAL	85.22	46.39	62.37	71.70	27.49	58.66
PRIORITY SECTORS						

Source: Author's calculations.

TABLE 2.5
NTM Incidence Based on Frequency Ratio, Fisheries Sector, by Country, ASEAN

NTM Type	Brunei Darussalam	Cambodia	Indonesia	Malaysia	Singapore	Thailand
5100 Automatic Licensing	57.14				100	
6100 Non-Automatic Licensing				100		
8100 Technical Regulations		100	100	100		
8110 Product Characteristic Requirements						14.29
8150 Testing, Inspection, Quarantine Requirements						14.29
8900 Technical Measures nes (certification)						14.29

Source: Author's calculations.

TABLE 2.6
Import Coverage Ratio, by Type of NTM and Country, Fisheries Sector

NTM Type	Indonesia	Malaysia	Singapore	Thailand	ASEAN-5
5100 Automatic Licensing			100		12.35
6100 Non-Automatic Licensing		100			24.56
8100 Technical Regulations	100	100			64.88
8110 Product Characteristic Requirements				28.94	5.12
8150 Testing, Inspection, Quarantine Requirements	100			28.94	45.43
8900 Technical measures nes				28.94	5.12

Source: Author's calculations.

An analysis of specific commodities shows that the NTMs are applied differently by the member states. For Indonesia, fish, fresh and chilled (HS 0302) and fish, frozen, excluding fish fillets (HS 0303) together accounted for about 6% of the total value of imports. For Malaysia, 35% of imports with NTMs are accounted for by crustaceans (HS 0306). For Singapore, one-third of total imports with NTMs are fish, frozen or chilled (HS 0303). On the other hand, only one commodity in Thailand is subject to NTM, i.e., crustacean (HS 0306).

c. Healthcare Sector

Incidence of non-automatic licensing is more than 90% in Brunei Darussalam (see Table 2.7). The same NTM type affects about 35% of tariff lines in Cambodia and Singapore. On the other hand, incidence of prohibition is 86% in Singapore and Indonesia and 36% in Cambodia and Brunei Darussalam.

TABLE 2.7
NTM Incidence Based on Frequency Ratio, Healthcare Sector, by Country, ASEAN

NTM Type	Brunei	Darussalam	Cambodia	Indonesia	Lao PDR	Malaysia	Singapore	Thailand	Viet Nam
2300 Internal Taxes and Charges on Imports				7.14					
5100 Automatic Licensing					28.57				7.14
6100 Non-Automatic Licensing			35.71			4.00	35.71		
6170 Prior authorizing for sensitive products		92.86						7.14	
6200 Quotas				14.29					
6300 Prohibition		35.71	35.71	85.71			85.71		
6370 Prohibition for sensitive products									7.14
8100 Technical Regulations		35.71		35.71		7.14		7.14	64.29
8130 Labeling Requirements				71.43				7.14	
8150 Testing, Inspection, Quarantine Requirements				35.71				7.14	
8900 Technical Measures n.e.s								7.14	
6370 Prohibition for sensitive products									7.14

Source: Author's calculations.

Technical regulations affect 36% of tariff lines in Brunei Darussalam and Indonesia and 64% in Viet Nam. Incidence for labeling requirements and testing, inspection, quarantine requirements is also high in Indonesia, at 71.4% (see Table 2.7).

In terms of import coverage ratio, the value of imports affected by the identified NTMs is relatively small, except for prohibition in Singapore (71.4%) and Indonesia (61.1%), and labeling requirements in Indonesia (56.2%) (see Table 2.8).

TABLE 2.8
Import Coverage Ratio, by Type of NTM and Country,
Healthcare Sector

NTM Type	Indonesia	Malaysia	Singapore	Thailand	ASEAN-5
2300 Internal Taxes and Charges on Imports	1.52				0.15
6100 Non-Automatic Licensing		4.18	25.69		12.78
6170 Prior authorizing for sensitive products				0.59	0.15
6200 Quotas	4.88				0.47
6300 Prohibition	61.12		71.35		39.54
8100 Technical Regulations	27.72	0.31		17.31	7.09
8130 Labeling Requirements	56.24			0.59	5.51
8150 Testing, Inspection, Quarantine Requirements	27.72			0.59	2.79
8900 Technical measures nes				0.59	0.15

Source: Author's calculations.

In terms of products, the bulk of the value of imports affected by NTMs is accounted for by only a few products. For Indonesia, medicaments (HS 3004) and beauty or make-up preparations (HS 3304) accounted for 35.4% of the value of imports. For Singapore, 35.9% of imports is accounted for by medicament nesoi (HS 3004) and beauty or make-up preparations (HS 3304).

d. Rubber-based Sector

The rubber-based sector is hardly affected by NTMs. Only Malaysia, Thailand and Viet Nam have reported NTMs which include non-automatic licensing, technical regulations, and prohibition for sensitive products. Only a small percentage of the tariff lines is affected (see Table 2.9). This is also reflected in the value of imports (see Table 2.10 and Table 2.4).

TABLE 2.9
NTM Incidence Based on Frequency Ratio, Rubber-Based Sector,
by Country, ASEAN

NTM Type	Malaysia	Thailand	Viet Nam
6100 Non-Automatic Licensing	12.50		
8100 Technical Regulations			12.50
6370 Prohibition for sensitive products		6.25	

Source: Author's estimates.

TABLE 2.10
Import Coverage Ratio, by Type of NTM and Country,
Rubber-Based Sector

NTM Type	Malaysia	Thailand	ASEAN-5
6100 Non-Automatic Licensing	12.38		1.14
6370 Prohibition for sensitive product		0.98	0.58

Source: Author's estimates.

e. Wood-based Sector

Only three NTMS are used relatively intensively in the wood-based sector. These are automatic licensing in Brunei Darussalam; non-automatic licensing in Malaysia; and prohibition in Indonesia (see Table 2.11). Nonetheless, their effect on imports is very high. That is, 96% of the total value of imports of Malaysia is affected by non-automatic licensing (see Table 2.12), and 85% of the total value of imports of Indonesia is affected by prohibition.

TABLE 2.11
NTM Incidence Based on Frequency Ratio, Wood-Based Sector,
by Country, ASEAN

NTM Type	Brunei Darussalam	Indonesia	Lao PDR	Malaysia	Viet Nam
5100 Automatic Licensing	36.59			2.44	2.44
6100 Non-Automatic Licensing			4.88	80.49	
6300 Prohibition		51.22	2.44		
7100 Single Channel for Imports					2.44
8100 Technical Regulations		2.44		17.07	2.44

Source: Author's calculations.

TABLE 2.12
Import Coverage Ratio, by NTM type and Country,
Wood-Based Sector

NTM Type	Indonesia	Malaysia	ASEAN-5
5100 Automatic Licensing		5.86	1.50
6100 Non-Automatic Licensing		95.90	24.54
6300 Prohibition	85.05		23.09
8100 Technical Regulations	5.11	36.83	10.81

Source: Author's calculations.

In general, high percentages of the total value of imports of Indonesia (90.2%) and Malaysia (96%) are affected by NTMs (see Table 2.4). However, they are concentrated in only a few products. For Indonesia, 60.4% of the total value of imports is accounted for by only two commodities (uncoated paper and paperboard, HS 4802, and paper and paperboard, HS 4810). On the other hand, 39% of the total value of imports of Malaysia is accounted for by wood sawn, etc. (HS 4407) and toilet paper and similar paper (HS 4818).

f. Textiles and Garments Sector

Only Indonesia, Malaysia, Thailand and Viet Nam have reported NTMs (see Table 2.13) in this sector. The incidence of automatic licensing is high in Indonesia at 71.3% and it accounts for 60.5% of the country's total value of imports (see Table 2.14).

TABLE 2.13
NTM Incidence Based on Frequency Ratio, Textiles and
Garments Sector, by Country, ASEAN

NTM Type	Indonesia	Malaysia	Thailand	Viet Nam
5100 Automatic Licensing	71.29		19.92	
6100 Non-Automatic Licensing		5.94		
6170 Prior authorizing for sensitive products		1.98		
6300 Prohibition	0.99			
8100 Technical Regulations		4.95		
6370 Prohibition for sensitive products category				65.35

Source: Author's calculations.

TABLE 2.14
Import Coverage Ratio, by Type of NTM and Country, Textiles and
Garments Sector

NTM Type	Indonesia	Malaysia	Thailand	ASEAN-5
5100 Automatic Licensing	60.48		8.86	15.27
6100 Non-Automatic Licensing		3.23		0.64
6170 Prior authorizing for sensitive products		5.41		1.07
6300 Prohibition	0.29			
8100 Technical Regulations		2.78		0.55

Source: Author's calculations.

g. ICT Sector

Indonesia, Malaysia and Singapore have more NTMs in place than the other member economies (see Table 2.15) in this sector. The most common NTMs in these countries are non-automatic licensing, prohibition and technical regulations. Incidence is relatively high in these NTMs in Indonesia and Singapore. Incidence is high in prior authorization for sensitive products in Malaysia (40.7%) and prohibition for sensitive products in Viet Nam (29.6%).

On the other hand, only technical regulations affect the Philippine imports. About 66.7% of the country's tariff lines are subject to technical regulations (see Table 2.15). These tariff lines accounted for 84.1% of the country's total imports of ICT products (see Table 2.16).

The import coverage ratio shows that almost 100% of the total value of imports of Indonesia is subject to non-automatic licensing and prohibition (see Table 2.16). For Singapore, prohibition and technical regulations account for a high percentage of the total value of imports (see Table 2.16).

TABLE 2.15
NTM Incidence Based on Frequency Ratio, Information and Communication Technology Sector,
by Country, ASEAN

NTM Type	Brunei Darussalam	Indonesia	Lao PDR	Malaysia	Myanmar	Philippines	Singapore	Thailand	Viet Nam
5100 Automatic Licensing	18.52	18.52					7.41	3.70	14.81
6100 Non-Automatic Licensing	7.41	81.48	3.70	25.93	3.70		3.70		
6170 Prior authorizing for sensitive products				40.74					
6300 Prohibition		85.19		3.70	3.70		66.67		
8100 Technical Regulations				18.52		66.67	66.67		
8200 Pre-Shipment Inspection		66.67							
6370 Prohibition for sensitive products									29.63

Source: Author's calculations.

TABLE 2.16
Import Coverage Ratio, by Type of NTM and Country, Information and Communication Technology Sector

NTM Type	Indonesia	Malaysia	Philippines	Singapore	ASEAN-5
5100 Automatic Licensing	38.82			4.28	4.36
6100 Non-Automatic Licensing	98.29	13.22		2.68	8.67
6170 Prior authorizing for sensitive products		15.61			3.10
6300 Prohibition	99.03	2.59		83.46	56.08
8100 Technical Regulations			84.06	83.46	55.71
8200 Pre-Shipement Inspection	64.68	12.60			5.40

Source: Author's calculations.

In general, high percentages of the total value of imports of ICT of Indonesia, Malaysia, the Philippines and Singapore subject to NTMs (see Table 2.4). In terms of products, electronic integrated circuit (HS 8542) accounted for 76.7% and 39% of total Philippine and Singapore total imports, respectively.

h. Electronics Sector

In electronics, the NTMs with high incidences are automatic licensing for Indonesia; non-automatic licensing for Indonesia and Malaysia; prohibition for Indonesia and Singapore; technical regulations for Malaysia, the Philippines and Singapore; and prohibition for sensitive products, nes for Viet Nam (see Table 2.17). Only technical regulations affect Philippine imports.

In terms of import coverage ratio, 100% of the imports of Indonesia are subject to automatic licensing and non-automatic licensing (see Table 2.18). On the other hand, 81.32% of Malaysia's imports are subject to non-automatic licensing and technical regulations. While the percentage of tariff lines subject to NTM in the Philippines is relatively high (85.7%), the percentage is very small in terms of the value of imports (1.57%) (see Table 2.18).

In general, the percentages of imports subject to NTMs are high for Indonesia (100%) and Malaysia (81.3%) (see Table 2.4). About 30% of imports of Singapore are subject to NTMs. On the other hand, less than 2% of the Philippine imports are subject to NTMs.

In terms of specific products, automatic data processing machines (HS 8471) and air or vacuum pumps (HS 8414) account for about 77% of the value of imports for Indonesia. On the other hand, automatic data processing machines (HS 8471) alone accounted for 61% of Malaysia's imports with NTMs.

i. Automotive Sector

The incidence of NTM in the automotive sector is high in terms of additional taxes and charges (Singapore), automatic licensing (Brunei Darussalam and Malaysia), non-automatic licensing (Indonesia and the Philippines), prohibition (Singapore), technical regulations (Singapore) and prohibition for sensitive products, nes (Viet Nam) (see Table 2.19).

TABLE 2.17
NTM Incidence Based on Frequency Ratio, Electronics Sector, by Country, ASEAN

NTM Type	Indonesia	Lao PDR	Malaysia	Philippines	Singapore	Thailand	Viet Nam
2300 Internal Taxes and Charges on Imports							14.29
5100 Automatic Licensing	85.71						
6100 Non-Automatic Licensing	100.00	28.57	71.43				
6300 Prohibition	71.43				42.86		
6370 Prohibition for sensitive product nes						14.29	71.43
8100 Technical Regulations			71.43	85.71	42.86		
8200 Pre-Shipments Inspection	42.86						

Source: Author's calculations.

TABLE 2.18
Import Coverage Ratio, by Type of NTM and Country, Electronics Sector

NTM Type	Indonesia	Malaysia	Philippines	Singapore	Thailand	ASEAN-5
5100 Automatic Licensing	99.99					6.62
6100 Non-Automatic Licensing	100.00	81.32				24.71
6300 Prohibition	53.08			7.01		6.08
6370 Prohibition for sensitive product					21.41	5.25
8100 Technical Regulations		81.32	1.57	22.55		26.50
8200 Pre-Shipment Inspection	1.45					0.10

Source: Author's calculations.

TABLE 2.19
NTM Incidence Based on Frequency Ratio, Automotives Sector, by Country, ASEAN

NTM Type	Brunei Darussalam	Indonesia	Lao PDR	Malaysia	Philippines	Singapore	Thailand	Viet Nam
2200 Additional Taxes and Charges						92.86		
2300 Internal Taxes and Charges on Imports		28.57						7.14
5100 Automatic Licensing	64.29		28.57	57.14				21.43
6100 Non-Automatic Licensing	21.43	64.29	28.57		92.86			
6170 Prior authorizing for sensitive products				7.14			14.29	
6300 Prohibition			7.14			92.86		
7120 Sole Importing Agency		28.57						
8100 Technical Regulations		28.57				92.86		
8110 Product Characteristic Requirements							7.14	
6700 Selective Importers	28.57							
5200 Automatic Licensing (Import Monitoring)				42.86				
6370 Prohibition for sensitive product nes							7.14	57.14

Source: Author's calculations.

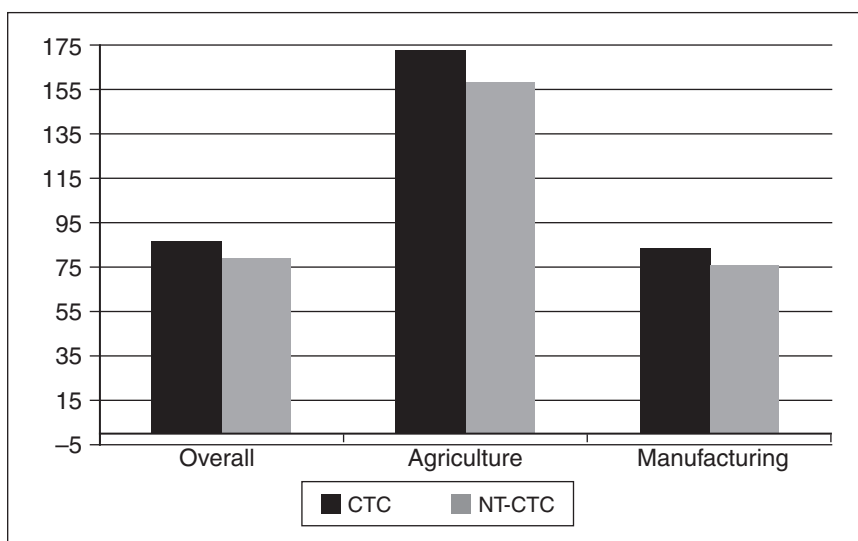
The import coverage ratios for these NTMs are also very high, ranging from 70% to 100% (see Table 2.20). This is also confirmed in Table 2.4 with the high percentage of imports subject to NTMs.

The NTMs are concentrated in only two products, motor cars and other motor vehicles (HS 8703) and parts and accessories of motor vehicles (HS 8708). These products account for 78% of the total imports for Indonesia; 66% for Malaysia; 99% for the Philippines; 39% for Thailand; and 47% for Singapore.

5.3 Non-Tariff Trade Costs

The increasing use of non-tariff barriers in the region is also reflected in the estimates of comprehensive trade costs. Intra-regional aggregate and sectoral trade costs in the region show that less than 10% is accounted for by tariffs (see Figure 2.2). As discussed in the previous

FIGURE 2.2
Intra-regional Aggregate and Sectoral Trade Costs, ASEAN-4, 2007–09



Notes: 1. Trade costs are expressed in terms of tariff equivalents.

2. ASEAN-4 includes Indonesia, Malaysia, Thailand and the Philippines.

3. CTC: Comprehensive Trade Costs

NT-CTC: Non-tariff Comprehensive Trade Costs

Source: Duval and Utoktham (2011).

TABLE 2.20
Import Coverage Ratio, by Type of NTM and Country, Automotives Sector

NTM Type	Indonesia	Malaysia	Philippines	Singapore	Thailand	ASEAN-5
2200 Additional Taxes and Charges				96.19		17.33
2300 Internal Taxes and Charges on Imports	37.75					5.23
5100 Automatic Licensing		73.66				3.88
5200 Import Monitoring		71.44				3.76
6100 Non-Automatic Licensing	79.67		99.99			18.91
6170 Prior authorizing for sensitive products		6.70			42.90	23.94
6300 Prohibition				96.19		17.33
6370 Prohibition for sensitive product					11.43	6.29
7120 Sole Importing Agency	37.75					5.23
8110 Product Characteristic Requirements					4.24	2.33
8900 Technical measures nes				96.19		17.33

Source: Author's calculations.

section, these costs include international transport costs and tariffs as well as trade facilitation measures, such as logistics infrastructures and those associated with completing trade procedures or obtaining necessary information. Procedural and other administrative requirements can delay exports and imports at the border and, hence, raise the cost of business. The finding suggests that government and private sector efforts should be directed toward reducing the non-tariff components of costs in the region.

At the sectoral level, intra-regional trade costs in the agriculture sector are twice as high as the intra-regional trade costs in the manufacturing sector (see Figure 2.2). This shows that trade facilitation efforts in the region have been highly concentrated in the manufacturing sector. This is consistent with the fact that intra-regional trade is driven by the operations of production networks.

Overall, non-tariff extra-regional trade costs of the ASEAN-4 with East Asia-3 and the United States are lower than their intra-regional trade costs (see Table 2.21). The statistics suggest that trade efforts in the region are focused more at reducing trade costs with these regions than within ASEAN.

It is interesting to note, however, that intra- and extra-regional non-tariff costs have declined between 2001–03 and 2007 and 2009 (see Table 2.21). This is true, both at the aggregate and sectoral levels. Overall, intra-regional non-tariff costs went down by 9.2%. Likewise, the decline is much higher in agriculture (–4.8%) than in manufacturing (–1.3%). The numbers show that the region has made significant progress in reducing non-tariff trade costs, not only among themselves but also with their trading partners outside the region.

The performance of the ASEAN-4, however, is still below that of the East Asia. Intra-regional non-tariff costs among the PRC, Japan and Republic of Korea (47%) is much lower than the ASEAN-4 (79%). Even the reduction between 2001–03 and 2007–09 is much higher. This confirms that trade facilitation efforts in East Asia-3 are much better than in the ASEAN-4.

5.4 Trade Facilitation as NTB: An Emerging Concern

The Logistic Performance Index (LPI) shows a wide gap in the trade facilitation measures and logistics infrastructure among the economies

TABLE 2.21
Non-tariff Intra-regional and Extra-regional Trade Costs,
ASEAN-4 and East Asia-3
(Tariff equivalents, in %)

Region/Sector	ASEAN-4	AUS-NZL	EA-3	EU-3	United States
A. ASEAN					
Overall	79 (-9.2)	90 (-11.8)	73 (-5.2)	97 (-4.9)	77 (4.1)
Agriculture	158 (-4.8)	135 (-15.6)	132 (-10.8)	182 (-3.2)	103 (-9.6)
Manufacturing	76 (-1.3)	91 (-4.2)	71 (-1.4)	95 (0.0)	77 (10.0)
B. East Asia-3					
Overall	73 (-5.2)	78 (-15.2)	47 (-20.3)	70 (-19.5)	53 (-13.1)
Agriculture	132 (-10.8)	120 (-17.2)	103 (-1.9)	176 (-12.4)	83 (-23.1)
Manufacturing	71 (-1.4)	82 (-8.9)	45 (-21.1)	69 (-17.9)	53 (-11.7)

Notes:

- a. Trade costs may be interpreted as tariff equivalents.
- b. Numbers in parenthesis are percentage changes in trade costs between 2001–03 and 2007–09.
- c. ASEAN-4 includes Indonesia, Malaysia, the Philippines and Thailand; AUS-NZL includes Australia and New Zealand; EA-3 includes the PRC, Japan and Republic of Korea; EU-3 includes France, Germany and the United Kingdom.

Source: Annex 4 to 6 of Duval and Utoktham (2011).

in the region. Singapore ranked second in the overall LPI among 150 countries with a score of 4.09 (see Table 2.22). Malaysia, the Philippines and Thailand are within the top 50; Indonesia and Viet Nam are within the top 100. As discussed earlier, inadequate and poor quality of infrastructure as well as cumbersome procedures and requirements have been increasingly recognized as barriers to trade.

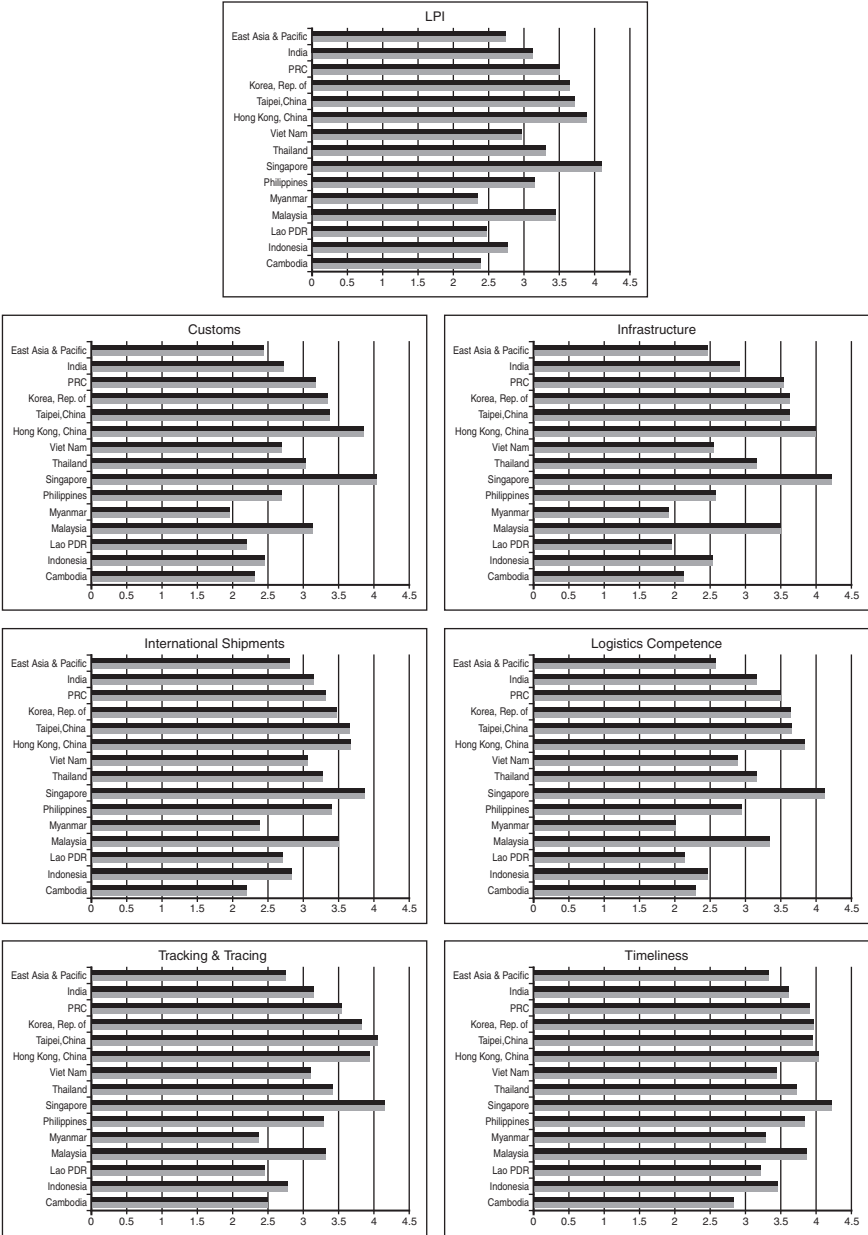
Except for Singapore, East Asian economies performed better than the ASEAN countries in the overall LPI and its six components areas of customs, infrastructures, international shipments, logistics competence, tracking and tracing, and timeliness (see Figure 2.3). Among these areas,

TABLE 2.22
Logistics Performance Index 2010, Country Rankings

Countries	LPI	Customs	Infrastructure	International Shipments	Logistics Competence	Tracking and Tracing	Timeliness
Cambodia	129	95	114	146	118	111	132
Indonesia	75	72	69	80	92	80	69
Lao PDR	118	113	132	97	137	113	89
Malaysia	29	36	28	13	31	41	37
Myanmar	133	146	134	131	148	129	82
Philippines	44	54	64	20	47	44	42
Singapore	2	2	4	1	6	6	14
Thailand	35	39	36	30	39	37	48
Viet Nam	53	53	66	58	51	55	76
Hong Kong, China	13	8	13	6	14	17	26
Taipei,China	20	25	22	10	22	12	30
Korea, Rep. of	23	26	23	15	23	23	28
PRC	27	32	27	27	29	30	36
India	47	52	47	46	40	52	56

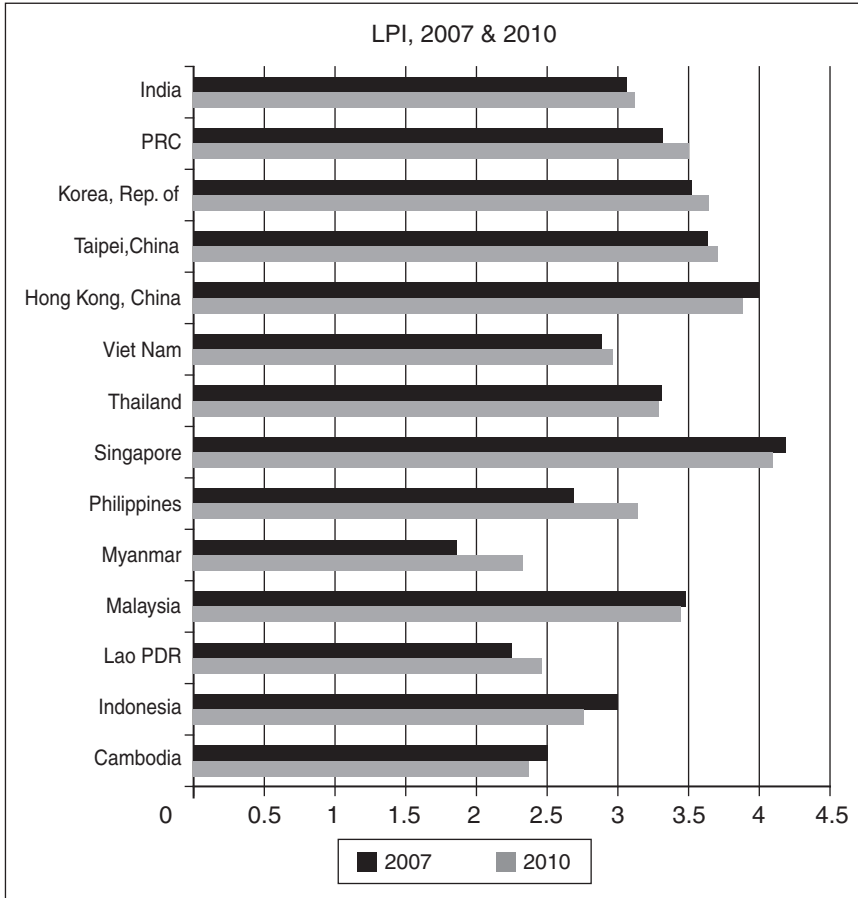
Source: <<http://go.worldbank.org/88X6PU5GV0>>.

FIGURE 2.3
Logistics Performance Index 2010 and Its Components



Source: <<http://go.worldbank.org/88X6PU5GV0>>.

FIGURE 2.4
Logistics Performance Index, ASEAN, India, and Northeast Asia,
2007–10



Source: <<http://go.worldbank.org/88X6PU5GV0>>.

ASEAN performed the highest in timeliness and tracking and tracing; and relatively low in logistics competence and infrastructure.

Among the ASEAN economies, the Philippines and Myanmar registered the highest improvement in logistics performance between 2007 and 2010, with the former registering an increase of 0.45 and the latter 0.47 (see Figure 2.4).

In terms of country performance, the scorecards of Cambodia, Lao People's Democratic Republic and Myanmar are lower than the average of the Asia and Pacific region (see Figure 2.5). This is true in almost all the area components of LPI. This confirms the poor logistics infrastructure and trade facilitation efforts of these economies.

Substantial improvements are registered in individual trade facilitation indicators. The average time for completing trade procedures in the ASEAN region went down by 25% between 2005 and 2010 compared to 21% in Northeast Asia (see Table 2.23). The highest improvement were registered by Cambodia (–51%), the Lao PDR (–32%) and Thailand (–41%).

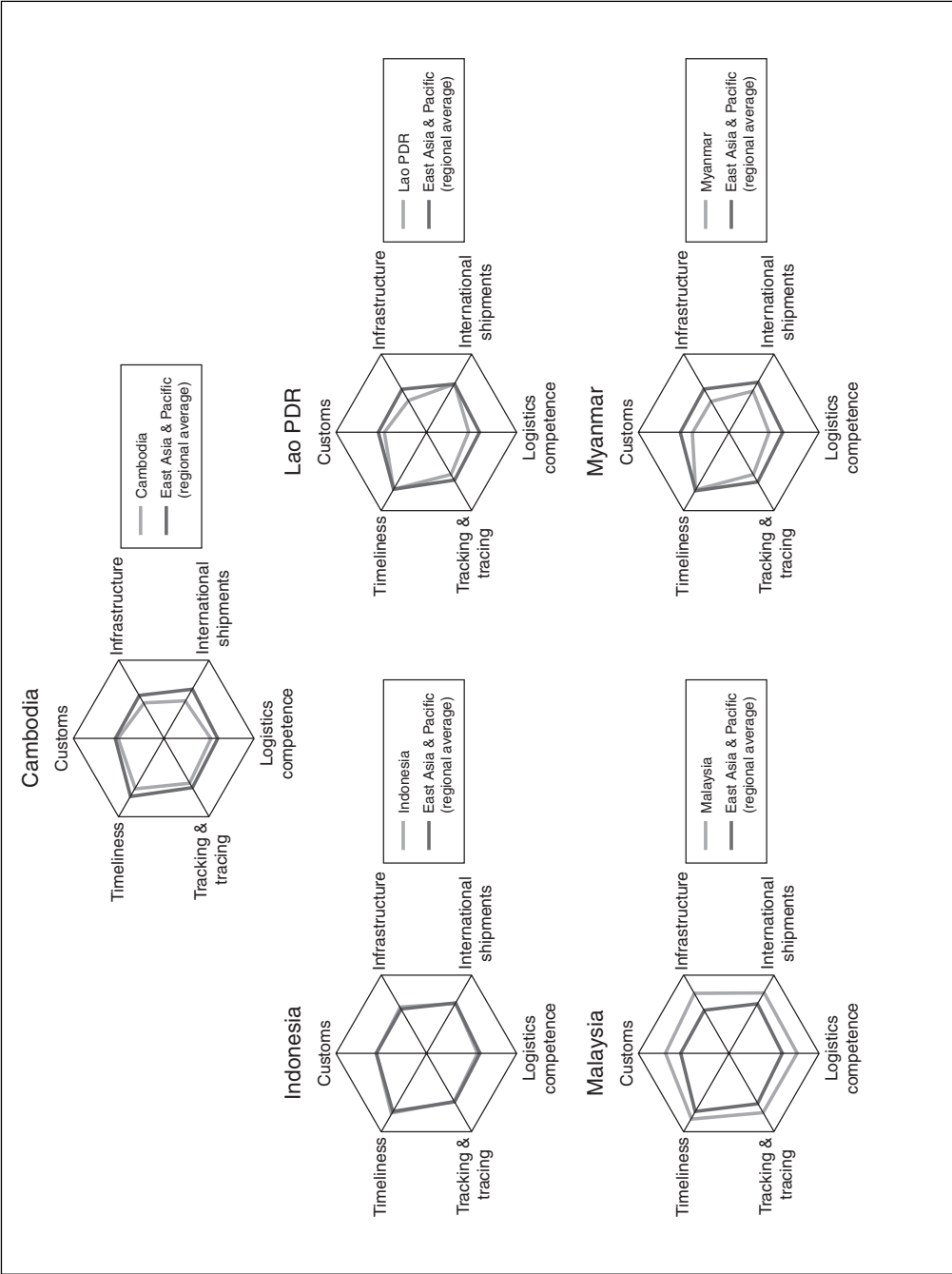
Similarly, the cost of completing trade procedures in the region decreased by 9.7%, with the highest decline registered by the Philippines (–20.4%), Thailand (–31.9%) and Viet Nam (–29.8%) (see Table 2.23).

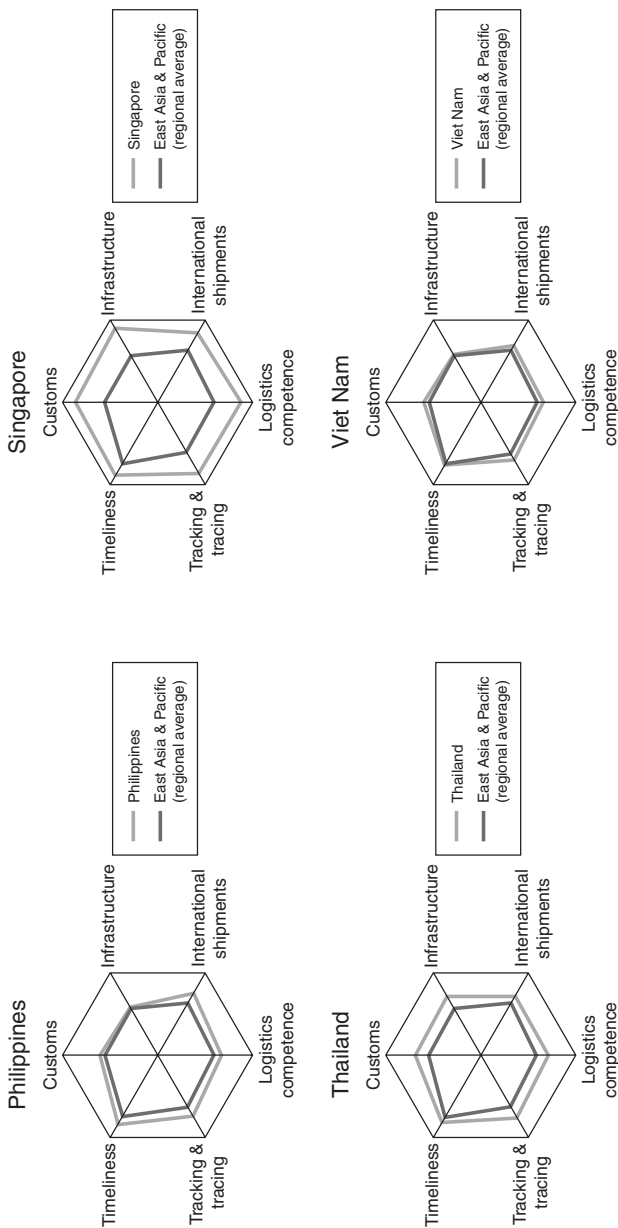
TABLE 2.23
Trade facilitation indicators, ASEAN and East Asia, 2005 and 2010

	Time for Completing Trade Procedures (Days)			Cost of Completing Trade Procedures (2000 Constant United States Dollar)			Import-Export Facilitation Bias 2010	
	2005	2010	% Change	2005	2010	% Change	Time Basis	Cost Basis
Southeast Asia	29	21	–25.2	701	633	–9.7	1.0	1.1
Brunei Darussalam		23			528		0.8	1.1
Cambodia	49	24	–51.0	675	633	–6.3	1.2	1.2
Indonesia	28	24	–14.5	531	538	1.3	1.4	0.9
Lao PDR	72	49	–31.9	1,353	1,539	13.7	1.0	1.1
Malaysia	16	16	0.0	356	355	–0.1	0.8	1.0
Myanmar								
Philippines	18	15	–17.1	696	554	–20.4	0.9	1.1
Singapore	4	5	12.5	341	353	3.7	0.8	1.0
Thailand	23	14	–41.3	822	560	–31.9	0.9	1.3
Viet Nam	24	22	–8.5	674	474	–29.8	1.0	1.2
Northeast Asia	23	19	–20.9	907	815	–10.1	1.0	1.0
China, People's Republic of	21	23	7.1	309	412	33.5	1.1	1.1
Hong Kong, China	15	6	–63.3	370	483	30.7	0.8	1.0
Korea, Rep. of	12	8	–37.5	792	623	–21.3	0.9	1.0

Source: UN-ESAP (2011).

FIGURE 2.5
Scorecard, LPI, 2011, ASEAN





Source: <<http://go.worldbank.org/88X6PU5GV0>>.

Despite the substantial improvement, the logistics gap persists. The performance of individual ASEAN countries pales in comparison with Singapore, which is consistently a logistics top performer. For example, in 2010, the time for completing trade procedures in Singapore was just 24% of the average of the region; and the cost of completing trade procedures was only 56% of the average of the region (see Table 2.23).

A region-wide business survey in ASEAN done by Eddy and Own (2007) indicates the customs clearance process as the primary concern of the business sector. The complexity of the refund process is perceived as a having serious impact on trade compared to other measures. Likewise, the declaration of goods is considered lengthy. Unofficial fees hinder trade as these are requested at least occasionally to facilitate customs clearance and license application and renewal, and to expedite testing and inspection process in customs. The unofficial fees not only increase the costs of doing business in the region but it also lengthens the import process itself.

6. ASEAN Economic Community by 2015?

The AEC aims to establish ASEAN as a single market and production base with free flow of goods. However, it is 3 years into the 2015 deadline, and ASEAN is far from being a single production base. Economic activities are far from being linked seamlessly across the region. While tariff rates have been progressively reduced over the past two decades, non-tariff barriers, both at the border and beyond the border, have yet to be seriously addressed. These include NTMs that are discriminatory, diverse product standards, weak enforcement of government regulations, and the “logistics gap” among the economies. All these comprise a substantial portion of the total costs of trade in the region.

The analysis of the chapter shows the lack of effective implementation of the actions in the AEC Blueprint to address NTBs in the region. The Blueprint provides a mechanism for monitoring progress. However, there is apparent lack of political will to implement the commitments. The divergent development stages among the member economies also restrain the newer members from moving at the same pace as the older ASEAN members and make them more reluctant to give up their national policies.

Economic integration will continue, but it will be limited to economies which are able to address the NTBs and the supply-side capacity constraints. It will also be limited to highly integrated production networks. Individual economies will exploit their comparative advantages and increase their specialization to be able to take part or remain in the global supply chain.

6.1 Policy Recommendations: Dealing with NTBs

Common definition of and approaches to identifying NTBs. The ASEAN government regulators and private sector should work toward a common definition of NTBs and common approaches of identifying NTBs. The private sector (exporters, importers, traders, etc.) is in the best position to identify the NTBs from among the NTMs they face at the border and behind the border.

Given the very slow progress in identifying NTBs from among the NTMs, a critical step is to subject all existing NTMs to a compliance review to ensure that they are transparent, non-discriminatory, and minimizes trade restrictiveness.

To mitigate the increase of NTBs, any new notification or modification of existing technical regulations should be subjected to a regulatory impact analysis before it is accepted as an NTM.

Web-based facility for reporting, monitoring and eliminating NTBs. This is critical to increasing transparency and compliance with government regulations and administrative procedures and requirements. The establishment of the ASEAN Trade Repository (ATR) is a welcome step in this direction. Established under ATIGA, the *ASEAN Trade Repository* will contain trade-related information such as (i) tariff nomenclature; (ii) MFN tariffs and preferential tariffs offered under ATIGA and other agreements of ASEAN with its dialogue partners; (iii) rules of origin; (iv) non-tariff measures; (v) national trade and customs laws and rules; (vi) procedures and documentary requirements; (vii) administrative rulings; (viii) best practices in trade facilitation applied by each Member State; and (ix) list of authorized traders of Member States (ASEAN Secretariat 2011a).

The model for the ATR is still being worked out. It is recommended that the ATR should include an NTB notification system, which would allow policy-makers, government officials, exporters/importers, traders and analysts to report discriminatory measures. But at the same time,

the system should allow for easy follow-up of reported and identified NTBs and NTMs for better monitoring and surveillance.

To lower the chance of NTMs becoming NTBs, the NTMs should be tagged as those consistent with WTO agreements and international standards. Each NTM should also be linked to the relevant regulations or legal texts in the interests of transparency.

The facility should also allow for online inventory to enable tracking of progress in the elimination of NTBs. The NTM and NTB database should also be harmonized with existing international databases such as the UNCTAD-TRAINS. Beyond monitoring and surveillance, the facility should be able to generate downloadable reports for use by researchers; the private sector for strategic business planning; and by policy-makers as inputs for future trade negotiations.

Harmonization of national standards. The best way to deal with technical barriers to trade is the harmonization of standards and mutual recognition agreements. This is to ensure that the standards are not country-specific and that they are not beyond internationally recognized standards. While work has started in this area, the number of sectors and products covered is very small. Thus, member states should fast track standards harmonization and MRAs to cover other products in the priority sectors.

Likewise, a massive information dissemination campaign should be undertaken for the standards that have been harmonized and MRAs that have been reached in order to increase awareness among the stakeholders.

Strengthening of human and institutional capacities. The key to compliance with standards and technical regulations is for the private sector and relevant industry associations to work with national institutions to strengthen national standards setting. At the same time, technical assistance should be provided to firms to help them meet technical standards. Technical assistance becomes crucial during the adjustment process to new standards and conformity assessments.

Strengthening of trade facilitation measures in agriculture. The analysis in the previous section shows that both tariff and non-tariff trade costs in the ASEAN region are higher in the agriculture sector than in the manufacturing sector. This helps explain why the region is not competitive in agriculture. Given that the majority of the poor

in the region are in the agriculture sector, strengthening trade facilitation measures in the sector will help address poverty in the region. Addressing infrastructure constraints and institutional rigidities and bottlenecks in the sector would strengthen its connectivity to the manufacturing sector and eventually to the global supply chain.

7. Summary and Conclusion

Non-tariff barriers in the ASEAN region have become a major concern for the realization of the AEC by 2015. Achievements to date have not matched the commitments made in 2009 in the Roadmap for the AEC. NTBs both at the border and beyond the border have not been adequately addressed. NTBs at the border include import bans, import subsidies, non-automatic licensing, new procedures for importation, additional requirements for importation, and technical barriers to trade. NTBs beyond the border include state aid measures, public procurement requirements, investment measures, and trade facilitation-related measures, such as inadequate and poor quality of logistics infrastructure and cumbersome procedures and requirements. These NTBs comprise a substantial portion of the total trade costs in the region. While there has been a decline in non-tariff trade costs over the past decade, the performance of the region is still below that of the PRC, Republic of Korea or Japan (East Asia-3).

The analysis of the chapter points to a number of factors that contribute to the slow progress in the implementation of the initiatives to address NTBs. These include the difficulty in identifying the NTBs from among the NTMs, as some of the government regulations have evolved over time in response to political developments in the member countries; the development divide among the members, thus achieving a consensus to identifying and eliminating the NTBs can be a long drawn-out process; and supply-side capacity constraints.

Economic integration in the region will continue, but it will be limited to the economies that are able to address the NTBs. This chapter identified policy recommendations in dealing with NTBs. These include: (i) common definition and approaches of identifying NTBs; (ii) a web-based facility for reporting, monitoring and eliminating NTBs; (iii) the harmonization of standards; (iv) strengthening of human and institutional capacities; and (v) strengthening of trade facilitation measures, particularly in the agriculture sector.

APPENDIX TABLE 1
Non-tariff Barriers that Discriminate Against Commercial Interests, ASEAN

Country	Type of Measure		Program	No. of Affected Tariff Lines	Affected ASEAN Countries	Classification
	NTB (Behind-the-border)	Bail out / state aid measure				
Indonesia			State aid for footwear manufacturers	6	Malaysia, the Philippines, Singapore, Thailand, Viet Nam	Amber
			State aid to state-owned sugar firms	7	Malaysia, the Philippines, Singapore, Thailand, Viet Nam	Red
			State support for aircraft manufacturer	1	Singapore, Thailand	Red
	NTB (Behind-the-border)	State-controlled company	State support for aircraft manufacturer	1	Singapore, Thailand	Red
	NTB (Behind-the-border)	Export taxes or restriction	Export tax on cacao beans	1	Malaysia	Red
			Levies export tax on crude palm oil	1	Brunei Darussalam, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Viet Nam	Red

			Domestic market obligation (DMO) for mineral and coal producers	9	Cambodia, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Viet Nam	Red
			Limiting rubber exports to 915,000 tons during 2009	26	Cambodia, Lao People's Democratic Republic, Myanmar, the Philippines, Singapore, Viet Nam	Red
			Export controls on rattan	1	Singapore	Red
	NTB (at the border)	Import ban	Import ban on shrimp	1	Malaysia, Singapore	Red
			Restrictions on film imports	1	Malaysia, Singapore, Thailand	Red
	NTB (at the border)	Import subsidy	Import duty exemptions of imported goods and materials for the production of goods/services	28	Malaysia, the Philippines, Singapore, Thailand, Viet Nam	Amber
	NTB (Behind-the-border)	Investment measure	FDI in the mining sector			Red

APPENDIX TABLE 1 (Cont'd)

Country	Type of Measure		Program	No. of Affected Tariff Lines	Affected ASEAN Countries	Classification
	NTB (at the border)	Non tariff barrier (not otherwise specified)	List of products subject to non-automatic import licensing	15	Malaysia, the Philippines, Singapore, Thailand, Viet Nam	Red
			Determination of list of entry point (selected seaports) for certain food products	14	Malaysia, the Philippines, Singapore, Thailand	Red
			New procedures for the import of steel and iron products into Indonesia		Malaysia, the Philippines, Singapore, Thailand, Viet Nam	Red
			Additional requirements to import over 500 products	67	Malaysia, the Philippines, Singapore, Thailand, Viet Nam	Red

		Stricter regulation on fruit and vegetable imports	14	Malaysia, Myanmar, the Philippines, Thailand, Viet Nam	Red	
	Sanitary and Phyto-santiary Measure	Stricter regulation on fruit and vegetable imports	14	Malaysia, Myanmar, the Philippines, Thailand, Viet Nam	Red	
NTB (at the border)						
		Application of ban on foreign ships operating in Indonesian waters		Singapore	Red	
NTB (Behind-the-border)						
		New restrictions on postal services			Red	
		New regulation stipulating that exporters of certain products must be supported by letters of credit issued by domestic banks	13	Thailand	Red	

APPENDIX TABLE 1 (Cont'd)

Country	Type of Measure		Program	No. of Affected Tariff Lines	Affected ASEAN Countries	Classification
	NTB (Behind-the-border)	Public procurement	Local content requirement for energy service contractors			Red
			Government procurement legislation			Red
			Buy national circular			Red
	NTB (at the border)	Quota (including tariff rate quotas)	Import quota on live beef imports	1		Red
			Increased import tariffs on medicines, cosmetics and energy efficient lights	9	Malaysia, the Philippines, Singapore, Thailand, Viet Nam	Red
	NTB (at the border)	Technical Barrier to Trade				

				Mandatory labeling of wide range of imported goods	81	Malaysia, the Philippines, Singapore, Thailand, Viet Nam	Red
Malaysia	NTB (at the border)	Import Subsidy	Trade implications of the 2011 Budget	44	Brunei Darussalam, Myanmar, Indonesia, the Philippines, Singapore, Thailand, Viet Nam	Amber	
	NTB (Behind-the-border)	Migration Measure	Trade implications of the 2011 Budget	44	Brunei Darussalam, Myanmar, Indonesia, the Philippines, Singapore, Thailand, Viet Nam	Amber	
	NTB (Behind-the-border)	Trade Finance	Trade implications of the 2011 Budget	44	Brunei Darussalam, Myanmar, Indonesia, the Philippines, Singapore, Thailand, Viet Nam	Amber	
	NTB (Behind-the-border)	Export subsidy	Trade implications of the 2011 Budget	44	Brunei Darussalam, Myanmar, Indonesia, the Philippines, Singapore, Thailand, Viet Nam	Amber	
	NTB (Behind-the-border)	Investment Measure	Services Export Fund				
	NTB (Behind-the-border)		Services Export Fund				
			Trade implications of the 2011 Budget	44	Brunei Darussalam, Myanmar, Indonesia, the Philippines, Singapore, Thailand, Viet Nam	Amber	

APPENDIX TABLE 1 (Cont'd)

Country	Type of Measure		Program	No. of Affected Tariff Lines	Affected ASEAN Countries	Classification
	NTB (Behind-the-border)	Trade Finance				
			Services Export Fund			Amber
	NTB (Behind-the-border)	Export taxes or restriction	Malaysia, and Thailand: limiting rubber exports to 915,000 tons during 2009	26	Brunei Darussalam, Myanmar, the Philippines, Singapore, Viet Nam	Red
	NTB (at the border)	Import Ban	Review of National Auto Policy	3	Indonesia, the Philippines, Singapore, Thailand, Viet Nam	Red
	NTB (at the border)	Non-tariff barrier (not otherwise specified)	Review of National Auto Policy	3	Indonesia, the Philippines, Singapore, Thailand, Viet Nam	Red

	NTB (Behind-the-border)	Migration Measure		Policies toward the employment and replacement of foreign workers			Brunei Darussalam, Indonesia, the Philippines, Singapore	Red
Philippines	NTB (at the border)	Import Ban		Motor vehicle development program	7		Indonesia, Malaysia, Singapore, Thailand, Viet Nam	Amber
	NTB (Behind-the-border)	Investment Measure		Motor vehicle development program	7		Indonesia, Malaysia, Singapore, Thailand, Viet Nam	Amber
	NTB (at the border)	Trade defence measure (AD, CVD, safeguard)		Provisional safeguard on steel angle bars for 200 days	1			Amber
Singapore	NTB (Behind-the-border)	Investment measure		Increased stamp duty for foreign property buyers				Red
				Changes to EntrePass regulation				Red

APPENDIX TABLE 1 (Cont'd)

Country	Type of Measure	Program	No. of Affected Tariff Lines	Affected ASEAN Countries	Classification
	NTB (Behind-the-border)	Migration measure			
		Further raise of minimum salary levels for foreign workers		Indonesia, Malaysia, Thailand	Amber
		Increase in foreign worker levy from 2012		Indonesia, Malaysia, Thailand	Amber
		Increased levies on S Pass permits		Indonesia, Malaysia, Thailand	Amber
		Increased mandatory medical insurance for foreign employees		Indonesia, Malaysia, Thailand	Red
		Skills Program for Upgrading and Resilience			Red

Thailand	NTB (Behind-the-border)	Consumption subsidy	Strategy to raise local consumption			Amber
	NTB (Behind-the-border)	Investment measure	Strategy to raise local consumption			Amber
			Investment incentives for regional operating headquarters			Red
	NTB (Behind-the-border)	Export subsidy	Investment incentives for regional operating headquarters			Red
	NTB (Behind-the-border)	Export taxes or restriction	Limiting rubber exports to 915,000 tons during 2009	26	Cambodia, Lao People's Democratic Republic, Myanmar, the Philippines, Singapore, Viet Nam	Red
	NTB (at the border)	Import subsidy	Promotion of machinery upgrades to counter the strengthening Baht	92	Malaysia, the Philippines, Singapore, Viet Nam	Amber

APPENDIX TABLE 1 (Cont'd)

Country	Type of Measure		Program	No. of Affected Tariff Lines	Affected ASEAN Countries	Classification
	NTB (Behind-the-border)	Non-tariff barrier (not otherwise specified)				
Viet Nam			Promotion of machinery upgrades to counter the strengthening Baht	92	Malaysia, the Philippines, Singapore, Viet Nam	Amber
	NTB (at the border)	Trade defence measure (AD, CVD, safeguard)	Safeguard duties (provisional duty) concerning imports of glass block	1		Red
			Introduction of annual reviews of anti-dumping duties	1		Red
	NTB (Behind-the-border)	Competitive devaluation	Fifth devaluation of the Dong	924	Brunei Darussalam, Cambodia, Lao People's Democratic Republic, Indonesia, Malaysia, Myanmar, the Philippines, Singapore, Thailand	Red

	NTB (Behind-the-border)	Export subsidy	Imposition of export duties on iron ore and concentrates	1		Red
	NTB (Behind-the-border)	Export taxes or restriction	Gold export tax imposed	2	Malaysia	Red
			Increase of export duty on Ilmenite ore and concentrates	1		Red
			Export duty increase on apatite ore commodities	1		Red
	NTB (Behind-the-border)	Investment measure	Restrictions on FDI in state-owned banks			Red
	NTB (Behind-the-border)	Migration measure	Restrictions on the recruitment of foreign staff			Red

Source: <www.globaltradealert.org>.

NOTES

1. Dr Myrna S. Austria is Full Professor at the School of Economics, De La Salle University, the Philippines. She is also the Vice-Chancellor for Academics of the same university. She would like to acknowledge the excellent research assistance provided by Joseph Dollison and Rosemin Laguerta.
2. Global Production Network (GPN) is a production scheme where the labor-intensive segments of technologically complex production are separated from the capital- and skill-intensive segments and are located in developing countries, linked through international subcontracting or outsourcing arrangements.
3. These sectors include agro-based products, fisheries, healthcare products, rubber-based products, wood-based products, textile and garments, electronics and ITC, and automotive products.
4. According to Bora, Kuwahara and Laird (2002), the term measure “encompasses all trade policy instruments even though their restrictiveness or effects, if any, may vary between countries applying the measures or at different points in time in a specific country; for example, if the world price of a product rises above the domestic support price, a variable levy would not be applied, although the mechanism remains in force. A quota may be greater than import demand, implying no restrictiveness.”
5. The latest data available for TRAINs are as follows: 2001 for Malaysia and Singapore; 2003 for Brunei Darussalam and Cambodia; 2004 for Lao People’s Democratic Republic, Myanmar and Viet Nam; 2006 for Indonesia; 2008 for the Philippines and Thailand.
6. The frequency and import coverage ratios provide important information about the scale of standard-setting activity and the types of NTMs in the priority sectors. However, neither provide information on the possible deterrent effects the NTMs may have upon pricing and quantity decisions of exporters (Deardoff and Stern 1997). Likewise, both measures do not differentiate the restrictiveness of the different NTMs. A sector may have a large number of applicable standards, but they may have only limited effects on trade. Another sector may have only a single regulation in place, but that measure imposes significant costs on producers and exporters.

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3

ASEAN Trade in Services

Deunden Nikomborirak and
Supunnavadee Jitdumrong

1. Introduction

ASEAN has made a remarkable achievement in liberalizing trade in goods through the ASEAN Free Trade Agreement (AFTA) where tariffs on virtually all imports within ASEAN have been reduced to zero, bar a few sensitive items since 2010 for the six earlier members. The progress made in liberalizing trade in services, however, has not been as impressive. Liberalization efforts in services in the past have been focused on two areas: the promotion of trade services by using the GATS approach of request and offer of liberalization by service sector and the promotion of flows of skilled labor through the establishment of Mutual Recognition Arrangements (MRAs) of professional services. After several rounds of negotiations and eight commitment packages since the ASEAN Framework Agreement on Trade in Services (AFAS) was established in 1995, the region has failed to liberalize services trade between member countries. Commitments made thus far are marginal to those already made in the WTO. As for MRAs, although several have been signed since 2005, their actual impact on

promoting greater flows of professional services within the region is at best negligible.

At the 9th Summit in October 2003, ASEAN announced its intention to create an **ASEAN Community** based upon three pillars: the ASEAN Security Community, the ASEAN Economic Community and the ASEAN Socio-Cultural Community. The ASEAN Economic Community (AEC) envisions regional economic integration by 2015. In 2007, the 13th ASEAN Summit adopted the ASEAN Economic Community Blueprint (AEC Blueprint), a coherent master plan guiding the establishment of the ASEAN Economic Community 2015. The AEC Blueprint would establish ASEAN not only as a single market, but also as a single production base which requires the free flow of the factors of production, including capital and skilled labor.

This chapter seeks to assess the progress ASEAN has made thus far in liberalizing services trade within the region according to the milestones and targets stipulated in the AEC Blueprint. The first section provides an overview of the relative importance of the service sector to ASEAN economies. The second section describes the service trade negotiation modality and liberalization commitments made thus far under the AFAS as well as those prescribed in the AEC Blueprint. Section three examines the extent to which ASEAN member countries have met the liberalization milestones prescribed in the AEC Blueprint. The fourth section examines whether and to what extent ASEAN member countries have exploited and benefited from regional services trade and investment privileges on the basis of the collection of publicly available secondary data. The fifth section identifies remaining barriers to the free flow of services within the region that need to be “put on the table” in order to effect greater services trade and investment within the region. The last section will provide recommendations on how ASEAN may move forward to prompt member countries to open up their service sectors in order to be able to achieve the regional economic integration goal of the ASEAN community.

2. The Role of the Service Sector and Services Trade in ASEAN Economies

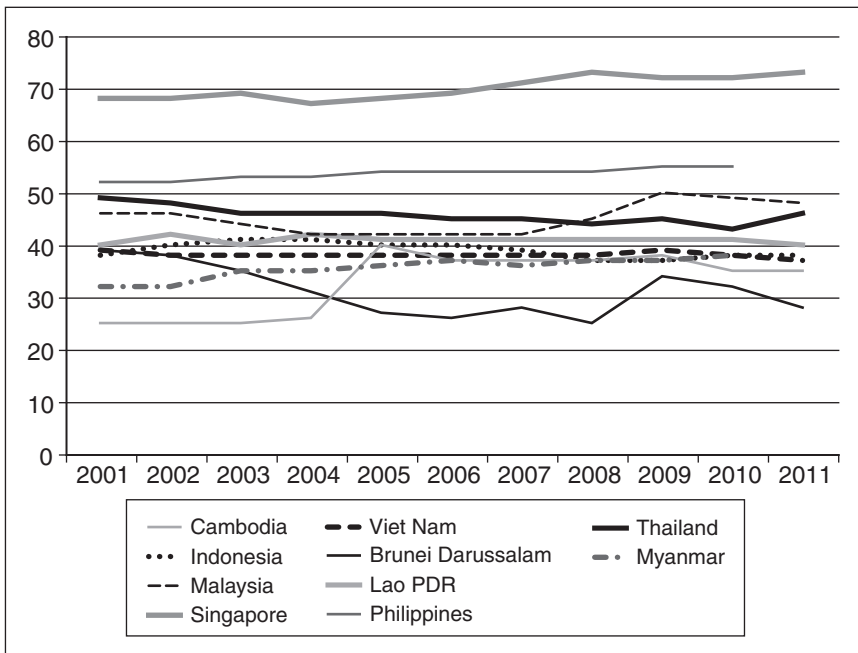
2.1 GDP Share of Service Sector out of a Country's Total GDP

The size of the services trade share of a country's Gross Domestic Product (GDP) varies according to the stage of economic development

and the structure of the particular economy. However, in general, the contribution of the services trade to GDP tends to be higher in developed economies than in developing countries due to changes in both the production and consumption patterns. Wages in developed countries tend to be high, such that industries need to shift from the labor-intensive production of manufacturing goods to the skill-intensive provision of services. At the same time, higher income leads to greater expenditure on personal services, such as health, education and tourism. This general observation seems to hold in the case of ASEAN as well.

As can be seen in Figure 3.1, Singapore, a member country with the highest GDP per capita, also shows the highest ratio of services trade to GDP, which is in the nineties. The figures for Malaysia and

FIGURE 3.1
Service Sector GDP Share for ASEAN Countries
(1980–2009)



Source: Myanmar's data is not available. Data from World Bank's website: <data.worldbank.org>.

Thailand, the second and third ranked in terms of GDP per capita, are in the distant thirties. Member countries in the lower income group such as Lao People's Democratic Republic, the Philippines and Viet Nam show ratios of less than 20%. Brunei Darussalam is an exception. As an oil rich country, services trade remains rather insignificant for the economy despite its high per-capita GDP.

Up until the Asian financial crisis in 1997, ASEAN countries as a whole saw the percentage of services trade to GDP increasing, especially in the case of Singapore. Singaporean figures for the percentage of services out of GDP increased significantly from a little over 60% in 1980 to over 90% in 2009. Other ASEAN member states' services GDP shares went up throughout the 1980s and 1990s. In 2000s, however, the growth of services trade as a share of GDP has been stagnant, even after the AFAS was launched in 1995.

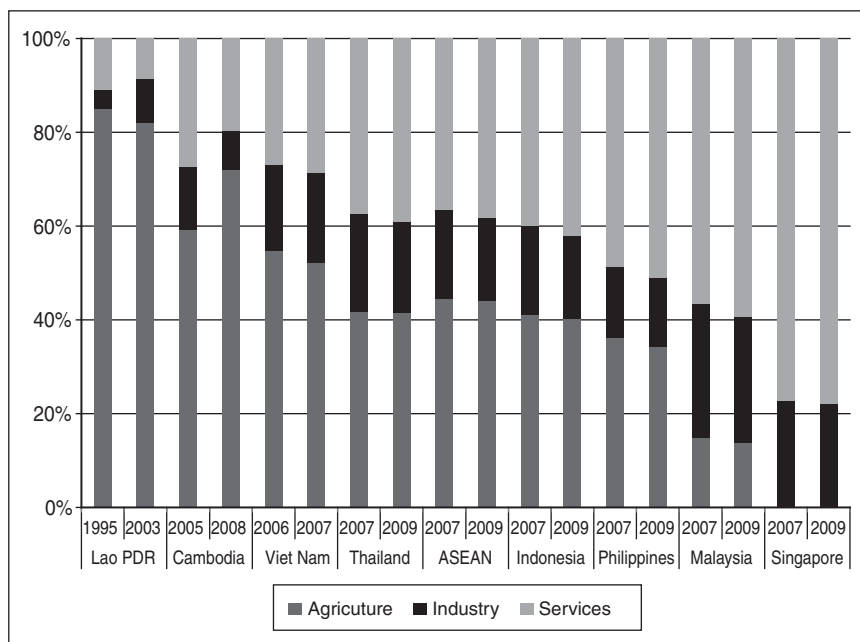
The low and stagnant services trade share to GDP among ASEAN countries, bar Singapore, does not do justice to the fact that service sector contributes to a significant share of the country's income and employment.

2.2 Employment Shares of Service Sector out of ASEAN Countries' Total Employments

As an emerging market, the structure of the ASEAN economies has been, in general, shifted from agriculture to industry and services. As a result, employment in the service sector has been rising in the 2000s. Data from the 2008 International Labour Organization (ILO) shows that, bar Lao PDR, the employment share of the service sector for all ASEAN countries increased from 2000 to 2006, as shown in Figure 3.2.

Bar Lao PDR, low and lower-middle income ASEAN countries, that are, Viet Nam, Cambodia, the Philippines, and Indonesia, all experienced rising service sector employment share. This illustrates the importance of the service sector to all ASEAN member countries regardless of the level of economic development. Moreover, the International Labour Organization (ILO)'s Annual Report, which addresses the Labour and Social Trends in ASEAN in 2008, shows that during 2006 to 2007, the service sector trumps the agriculture and manufacturing sectors in terms of the absolute number of additional workers employed, as shown in Table 3.1. In terms of percentage growth, however, the industrial sector still trumps the service sector,

FIGURE 3.2
Sectoral Employment Share of ASEAN and Its Member Countries,
2000–06



Notes: ASEAN* regional figures exclude Myanmar and Brunei Darussalam. The starting and ending years are 2000 and 2006, respectively, except for the following countries: Cambodia (2000, 2005); Lao PDR (1995, 2003).

Source: International Labour Organization's Annual Report: *Labour and Social Trends in ASEAN 2008*.

TABLE 3.1
Employment by Sector and Share of Total Employment
by Sector of ASEAN, 2006–07

	Agriculture	Industry	Services
Employment growth ('000s)	2,235	2,484	3,163
Employment growth (%)	1.9	5.1	3.3
Share of total employment	44.5	19.0	36.5

Source: International Labour Organization's Annual Report: *Labour and Social Trends in ASEAN 2008*.

indicating that economic expansion in the ASEAN region as a whole is still driven by manufacturing industries. Nevertheless, the service sector, which tends to be labor intensive, has significant implications for the region's employment. Thus, higher growth in the service sector can make non-trivial contribution to member countries' employment and hence, income.

3. Liberalization Commitments

As mentioned earlier, the liberalization of trade in services ASEAN lags well behind that of trade in goods. This is not surprising. The negotiation modality is based on that established by the GATS, which has not been very successful on garnering liberalization commitments from member states, in particular developing economies.

This section will describe in detail the services trade liberalization commitments in ASEAN thus far. This section can be divided into two parts. The first part describes liberalization commitments in opening up services trade through rounds of negotiations under the AFAS and in promoting mobility of professional services within the region through the establishment of MRAs. The second part examines past and future liberalization commitments designed to support the envisioned integration of the region into a single production base in the year 2015 as spelled out in the AEC Blueprint.

3.1 ASEAN Framework Agreement in Services

ASEAN has completed several rounds of negotiation under AFAS, which is based on the request-and-offer approach as in the GATS. Under such an approach, WTO members choose in which sectors to offer binding commitments in response to requests from other WTO Members. Commitments are made in schedules opening up only the sectors included — this is known as the “positive list” or “bottom-up” approach. The agreement is not reached until all members are satisfied with the totality of the package being offered. This does not prevent any country from making commitments unilaterally or liberalizing autonomously at any time. This approach, which lacks clear liberalization targets, has not been successful in fostering “offers” to liberalize from member countries that do not wish to open up their service sectors to foreign competition in the WTO. The same goes for AFAS.

TABLE 3.2
ASEAN Achievements in Services Trade Negotiation (1995–2011)

Package of Services Commitments	Signed	Modality
1st Package (Round 1)	Dec 1997	Request and offer approach
2nd Package (Round 1)	Dec 1998	Request and offer approach
3rd Package (Round 2)	Dec 2001	Common subsectors (if minimum 4 countries => multilateralize)
4th Package (Round 3)	Sep 2004	Modified common subsectors/ (if minimum 3 countries => multilateralize but ASEAN minus X)
5th Package (Round 4)	Dec 2006	same as above
6th Package (Round 4)	Nov 2007	same as above
7th Package (Round 5)	Feb 2009	Negotiation according to AEC Blueprint
8th Package (Round 5)	Due to be completed in August 2011	same as above
9th package	2013	same as above
10th package	2015	Attainment of the AEC liberalization targets

As can be seen in Table 3.2, ASEAN has completed seven packages of commitments to liberalize services trade thus far. But negotiations for the past 15 years have resulted only in marginal liberalization of trade services in ASEAN. Corbett (2008)¹ noted that:

The broad conclusion here is that AFAS is not particularly liberalising compared with GATS commitments (Stephenson and Nikomborirak, 2002; Vo and Bartlett, 2006; Roy et al, 2006; Fink and Molinuevo, 2007) and that most regional PTAs do not add significant new liberalising elements over GATS (Ochiai et al, 2007). Since AFAS does not go much beyond the GATS it is, therefore, not providing much impetus to liberalising services trade within ASEAN.

UNESCAP (2009) quantified commitments made in AFAS compared to those made in the GATS. Table 3.3 illustrates the Sectoral Coverage Ratio (SCR) of AFAS commitments. SCR is defined as the ratio of GATS + AFAS sectoral coverage in the numerator and the GATS sectoral coverage in the denominator. That is, the larger the ratio, the more advanced are the commitments made in the AFAS than those made in the GATS. The minimum ratio, which is one, indicates that concessions made in the regional forum under the AFAS are not any more advanced than those made in the multilateral forum under the GATS.

As can be seen, except for Brunei Darussalam, Myanmar and the Philippines, the SCR figures for member countries are marginally greater than one. The low SCR scores for Cambodia and Viet Nam, however, can be explained by their already advanced liberalization commitments made in WTO (due to their relatively late accession) rather than their unwillingness to open up their service sectors at the regional level. Table 3.3 shows quantitative indicators of individual ASEAN countries' GATS commitments index.² As mentioned earlier, Cambodia and Viet Nam obtain the highest scores of 49.08 and 30.15, respectively.

TABLE 3.3
Liberalization Commitment in Services Trade under AFAS
Compared with Those Made in the WTO

	(1) GATS Commitment	(2) SCR (WTO + AFAS)/AFAS	(3) (1) * (2)
Brunei Darussalam	4.35	3.38	14.70
Cambodia	49.08	1.21	59.38
Indonesia	9.52	1.56	14.85
Lao PDR		—	
Malaysia	25.40	1.26	32.00
Myanmar	4.94	3.00	14.82
Philippines	14.08	3.03	42.66
Singapore	22.66	1.09	24.69
Thailand	19.73	1.35	26.63
Viet Nam	30.15	1.09	32.86
ASEAN av.	13.0	1.58	20.53

Source: GATS commitment index compiled from the World Trade Indicator, the World Bank Trade Indicators (2008) and SCR scores from UNESCAP (2009).

Brunei Darussalam and Myanmar made very little concession in the GATS, while larger ASEAN economies, such as Indonesia, the Philippines, Thailand, Malaysia and Singapore, receive scores that range from the lowest at 9.52 for Indonesia to the highest at 25.4 for Malaysia. For these countries, bar the Philippines, AFAS commitments are only marginal to those made in the WTO, as the SCR figures are between 1.09 for Singapore and 1.56 for Indonesia. ASEAN average SCR score is only 1.58. Although Brunei Darussalam and Myanmar made greater concessions in the AFAS than those made in the GATS, their commitments in the GATS were negligible to begin with, such that commitments in the AFAS, too, were marginal. As a result, the net liberalization indicators (shown in column 3) for these two countries remain rather low compared with those of other member countries. Only the Philippines made meaningful progress in liberalizing her services trade under AFAS.

3.2 Mutual Recognition Agreements (MRAs)

The AEC addresses the importance of MRAs and completes as well as implements MRAs, enabling the qualifications of professional services suppliers to be mutually recognized by signatory Member States, hence, facilitating easier movement of professional services providers in the ASEAN region.³ It should be noted that MRAs do not result in the unrestricted flow of foreign professionals as domestic rules and regulations would still apply.

As of July 2011, ASEAN has concluded seven MRAs as shown in Table 3.4. However, each MRA is different:

1. MRAs on *engineering* and *architecture* provide recognition for registered ASEAN professionals by providing harmonized standards and qualifications. Member states that would like to participate must notify the ASEAN Secretary General.
2. The MRA on *nursing*, on the other hand, was not as ambitious. It was designed to strengthen professional capabilities by promoting the exchange of expertise, experience and best practices.
3. MRAs on *accountancy* and *surveying services* lay down the broad principles and framework for negotiating bilateral and multilateral MRAs.
4. MRAs on *medical* and *dental* professionals are based on bilateral registration processes. Member states that wish to defer the implementation must notify the ASEAN Secretary General.

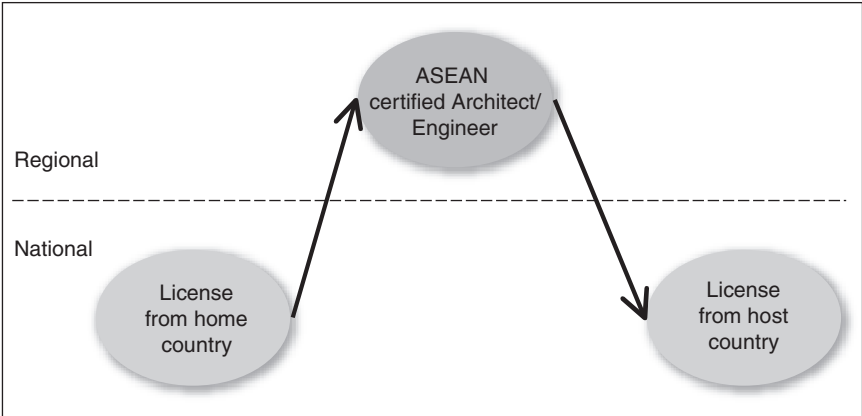
Among the MRAs, only those governing the architecture and engineering professions prescribe eligibility of the ASEAN Chartered Professional Engineer (ACPE) or ASEAN Architect (AA) to apply for a license in another member country. Eligible persons must hold a professional license from the professional regulatory body in their

TABLE 3.4
ASEAN MRAs (2005–11)

MRA on sector	Detail
Engineering services	Signed on 9 December 2005 in Kuala Lumpur, Malaysia
Nursing services	Signed on 8 December 2006 in Cebu, the Philippines
Architectural services, surveying qualification	Both signed on 19 November 2007 in Singapore.
Medical Practitioners, Dental Practitioners, and Accountancy Services	All signed on 26 February 2009 in Cha-am Hua Hin, Thailand.

Source: Data from Association of Southeast Asian Nations <<http://www.asean.org/>>.

FIGURE 3.3
Registration of ASEAN Engineers and Architect According to the MRAs



home countries. If they pass the standard qualification to become ACPE or AA as certified by the domestic professional regulatory body — i.e., the Council of Engineers and Architects — then the application will be submitted to the ASEAN Chartered Professional Engineers Coordinating Committee (ACPECC) or the ASEAN Architect Council. When the application is approved, the professionals are allowed to work as “Registered Foreign Professional Engineer (RFPE)” in another ASEAN country as seen in Figure 3.3. Permission to work, however, will be subject to domestic rules and regulations. This can pose as a major barrier to the movement of professionals within the region. For example, most ASEAN countries require nationality or residency to work as professional engineers. Hence, recognized ASEAN architects and engineers are by no means guaranteed the ability to work in another ASEAN country in the absence of member countries’ unilateral move to liberalize the professional labor market.

3.3 The AEC Blueprint

As mentioned earlier, the AEC envisions ASEAN as a single production base which requires the free flow of *goods*, the free flow of *services*, the free flow of *investment*, the freer flow of *capital*, and the free flow of skilled *labor*. To promote the free flow of services, liberalization will be achieved through five more consecutive rounds of negotiations, where remaining restrictions on trade in services are to be removed progressively until 2015, when substantially all restrictions shall be removed. The minimum number of new subsectors⁴ for each round has been spelled out and priority sectors targeted for earlier liberalization have been identified.

According to the AEC Blueprint, the following actions need to be done by the member countries to generate the free flow of services by 2015:

1. Remove substantially all restrictions on trade in four priority sectors — air transport, e-ASEAN, healthcare, and tourism — by 2010 and for all other sectors by 2015.
2. Schedule packages of commitments according to the following parameters:
 - (a) No restrictions for mode 1 (cross-border supply) and mode 2 (consumption abroad), with exceptions due to bona fide regulatory reasons;

- (b) Allow for ASEAN equity participation⁵ of not less than 51% for the four priority sectors in 2008, 70% in 2010; for other sectors, 49% in 2008, 51% in 2010 and 70% in 2015, except for logistics services, the target year for which is 2013;
- (c) Remove other mode 3 (commercial presence) market access limitations by 2015.

These liberalization targets can be summed up in Table 3.5. The AEC Blueprint also calls for the completion of Mutual Recognition Arrangements (MRAs) in architectural services, accountancy services, surveying qualifications, medical practitioners by 2008, and dental practitioners by 2009 and the implementation of MRAs expeditiously according to the provisions of each MRA and identify MRAs for other professional services by 2012 to 2015.

Table 3.5 reveals that service liberalization targets established in the AEC are far from those that are required to support the full economic integration of ASEAN. First, liberalization in mode 3 (commercial presence) envisions only 70% of ASEAN equity share. That is, wholly owned ASEAN foreign companies are still not allowed.

TABLE 3.5
Financial Services Subsectors Identified for Liberalization
by 2015

	Subsectors	Member Countries
Insurance	Direct Life Insurance	Indonesia, the Philippines
	Direct Non-life Insurance	Brunei Darussalam, Cambodia, Indonesia, Malaysia, the Philippines, Singapore and Viet Nam
	Reinsurance and Retrocession	Brunei Darussalam, Cambodia, Indonesia, Malaysia, the Philippines, Singapore and Viet Nam
	Insurance Intermediation	Cambodia, Indonesia, Malaysia, the Philippines, Singapore and Viet Nam
	Services Auxiliary to Insurance	Brunei Darussalam, Cambodia, Indonesia, Malaysia, the Philippines, Singapore and Viet Nam

	Subsectors	Member Countries
Banking	Acceptance of Deposits and Other Repayable Funds from the Public	Cambodia, Lao People's Democratic Republic and Viet Nam
	Lending of All Types	Cambodia, Lao People's Democratic Republic and Viet Nam
	Financial Leasing	Cambodia, Lao People's Democratic Republic and Viet Nam
	All Payment and Money Transmission Services	Cambodia, Lao People's Democratic Republic and Viet Nam
	Guarantee and Commitments	Cambodia, Lao People's Democratic Republic, Myanmar and Viet Nam
Capital Market	Trading for Own Account or for Account of Customers	Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Thailand
	Participation in Issues of All Kinds of Securities	Indonesia, the Philippines (subject to constitutional and legislative limitations)
	Asset Management	Indonesia, the Philippines, Singapore and Thailand
	Settlement and Clearing Services for Financial Assets	Indonesia, the Philippines, Singapore and Thailand
Others	Provision and Transfer of Financial Information, Financial Data Processing and Related Software by Suppliers of Other Financial Services	The Philippines and Myanmar
	Advisory, Intermediation and Other Auxiliary Financial Services	The Philippines, Singapore, Thailand and Viet Nam

Source: 2007 ASEAN Economic Community Blueprint available online at <www.aseansec.org/21161.pdf>.

Second, the liberalization of mode 4 (movement of natural persons) is confined to the movement of professionals only, while unskilled labor is excluded. And even then, the goal established to promote the movement of professional services does not prescribe any liberalization

obligation; rather, it envisions only agreement frameworks to facilitate liberalization, as will be discussed in greater detail later.

Third, The AEC allows for flexibility in complying with these commitments. Section 3 of the Blueprint states that in meeting clear targets and timelines, there should be “pre-agreed flexibilities to accommodate the interests of all ASEAN Member Countries”. This has translated into Section 21(ix) in the free flow of services section which stipulates as follows:

Allow for overall flexibilities,⁶ which cover the subsectors totally excluded from liberalization and the sub-sectors in which not all the agreed parameters of liberalization of the modes of supply are met, in scheduling liberalization commitments. The scheduling of liberalization commitments in each round shall be accorded with the following flexibilities:

- Possibility of catching up in the next round if a Member Country is not able to meet the parameters of commitments set for the previous round;
- Allowing for substituting sub-sectors that have been agreed to be liberalized in a round but for which a Member Country is not able to make commitments with sub-sectors outside the agreed sub-sectors; and
- Liberalization through the ASEAN Minus X formula.

This flexibility provision is nothing but vague. First, it is not clear how the 15% flexibility will be measured and quantified in practice. Second, while the inventory of restrictions to trade in services has been compiled and continuously updated, there has been no disclosure and assessment of this very important database on which the design of the flexibility conditionality is based. Third, while Section 20 of the AEC stipulates that there shall not be “back-loading” of commitments, allowing catching up of commitments will no doubt lead to such a problem. Fourth, it is not clear how a member country can switch out of a prescribed liberalization commitment by substituting with other subsectors not subject to liberalization. Can, say, a member switch out of commitments to open up a priority sector such as telecommunications (e-ASEAN) by making compensatory commitment in a less economically significant service subsector such as leasing or advertisement? If so, what would be the use of specifying “priority sectors”? Finally, the option of “Liberalization through the ASEAN Minus X formula” appears to be saying that if a member country cannot comply with the liberalization

thresholds established and the deadlines established, then it can always opt out. What if X equals 10 and no country fulfills the prescribed commitments? The flexibility clause seems to dilute what is supposed to be “binding” commitments into nothing more than those based on “best effort”.

Financial service sector liberalization is dealt with separately in the AEC Blueprint because of the economic sensitivity of the financial sector and the diverse stages of development of the particular service sector in various member countries. The sector is also negotiated by Finance Ministers rather than Trade and Industry Ministers as is the case of other services.

The distinctive feature of the financial sector liberalization under the AEC is that (1) the liberalization target is extended to the year 2020 instead of 2015 and (2) there is no pre-specified scope of liberalization in terms of both the breadth and the depth of the commitment to be made as member countries are allowed to carve out subsectors they do not wish to open up under the “pre-agreed flexibilities” much like the sensitive list in trade in goods liberalization. However, in this case, the list indicated by member states as appeared in Annex I of the 2007 ASEAN Economic Community, turns out to be a positive rather than a negative one as shown in Table 3.5. This implies that the scope of liberalization would likely be very limited.

Also, there is no minimum commitment required of all member states. For example, none of the original ASEAN-5 member states are willing to open up their banking sector. Interestingly, only CLV countries committed to do so. Perhaps this was because banking sector liberalization was required as part of the liberalization package for Cambodia’s and Viet Nam’s relatively late accession to the WTO (2005 and 2007, respectively). Lao People’s Democratic Republic, which is not yet a member of the WTO, signed a bilateral trade agreement with the US in 2005, which entails liberalization of major service sectors, such as banking and telecommunications. Undoubtedly, the bilateral liberalization can easily extend into a multilateral one. Viet Nam had signed a similar agreement in 2001.

On the other hand, incumbent members with large domestic market and businesses to protect are less willing to open up. For example, Thailand, probably the least progressive member country when it comes to service sector liberalization, made commitments only in the capital market and none in the banking and insurance sectors.

To sum up, the AEC services liberalization target is far from ambitious. Moreover, commitments stipulated in the AEC are not binding, as they are not subject to the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM). This is because Section 72 under Section III on the Implementation of the AEC Blueprint stipulates that the use of the Enhanced Dispute Settlement Mechanism to promote a rules-based community is merely “recommended”. Any indication that liberalization parameters specified in the AEC are subject to the DSM cannot be found anywhere in the Blueprint. The ASEAN Framework Agreement on Trade in Services (AFAS) is, however, binding. Article VII of the particular agreement stipulates that

The Protocol on Dispute Settlement Mechanism for ASEAN shall generally be referred to and applied with respect to any disputes arising from, or any differences between Member States concerning the interpretation or application of, this Framework Agreement or any arrangements arising therefrom.

This means that, if member countries do not translate their liberalization obligations specified in the AEC Blueprint into commitments in the AFAS, then the DSM cannot be invoked.⁷

3.4 Implications for the CLMV Member Countries

The services liberalization roadmap as stipulated in the AEC Blueprint does not offer any privilege to the less developed newer members, namely, the CLMV countries. But the preferential treatment may be unnecessary, given the enormous flexibility already built into the agreement, as mentioned earlier.

Services liberalization under ASEAN is likely to have a limited impact on the CLMV countries simply because these economies are already relatively open compared with those of the original members. This is partly because of the WTO accession conditionality as well as bilateral trade commitments these countries signed with the US earlier.

But fulfillment of trade commitments is certainly not the only reason. In certain service sectors, a minimum rather than a maximum foreign equity share is prescribed, indicating the demand for foreign capital. As small emerging economies, the sheer lack of capital and business expertise also prompts CLMV countries to embrace a relatively pro-liberalization economic stance.

However, in service sectors where there are local incumbent service providers to protect, the policy stance toward liberalization may be more

reserved. For example, in the aviation industry, all CLMV countries have their own national airlines to protect. Thus, they are reluctant to open up their air transportation markets to more advanced ASEAN member countries. In December 2003, Cambodia, Lao People's Democratic Republic, Myanmar and Viet Nam signed a Multilateral Agreement on Air Services that provides for unlimited capacity and traffic rights among them, including fifth-freedom rights.⁸ This agreement benefits mostly Vietnamese carriers (particularly Vietnam Airlines), as they are the subregion's most developed. Vietnam Airlines currently operates fifth freedom services linking Ha Noi to Phnom Penh, Cambodia, via Vientiane, Lao People's Democratic Republic.

4. Compliance with the AEC Blueprint

ASEAN's decision to abandon the request-and-offer approach to negotiating services trade liberalization agreements in favor of an approach that provides for clear quantitative liberalization targets and milestones as prescribed in the AEC Blueprint is laudable. However, the built-in flexibility which is both vague and broad undermines the attainment of the free flows of services as envisioned in the AEC Blueprint in the year 2015. This section will examine to what extent member countries have met the services trade liberalization milestones as stipulated in Section 21 of the AEC Blueprint and summarized in Table 3.5 in the previous section. Specifically, this section will examine whether member countries have amended domestic laws or regulations to allow ASEAN equity shares that are not less than the threshold levels shown in Table 3.6.

TABLE 3.6
Service Sector Liberalization Targets Set by the AEC Blueprint

Sectors	Targets
<i>Priority Sectors:</i>	
e-ASEAN, Healthcare and tourism services	70% – 2010
Logistics and other service sectors	51% – 2010
Construction	51% – 2008

4.1 Priority sectors: Tourism

In 2002, the 8th ASEAN Summit in Cambodia adopted the ASEAN Tourism Agreement (ATA) with the following objectives:

1. Facilitating travel into and within ASEAN;
2. Enhancing cooperation in the tourism industry to improve its efficiency and competitiveness;
3. Reducing restrictions to trade in tourism and travel services;
4. Establishing an integrated network of tourism and travel services to maximize the complementary nature of the region's tourist attractions;
5. Promoting ASEAN as a single tourism destination;
6. Enhancing mutual assistance in human resources development and training; and
7. Creating favorable conditions for public and private sector partnerships.

These objectives provide the scope of the ASEAN Tourism Strategic Plan 2011–2015 (ATSP), which was adopted by the ASEAN Tourism Ministers in January 2011.

The main aim of the ATSP is, by 2015, ASEAN will provide an increasing number of visitors to the region with authentic and diverse products, enhanced connectivity, a safe and secure environment, and increased quality of services, while at the same time ensuring a higher quality of life and opportunities for residents through responsible and sustainable tourism development by working effectively with a wide range of stakeholders.⁹

From ATA and ATSP's objectives, one can identify the major components of tourism sector to be hotels and lodging, the main services provided to tourists, and air transportation, which facilitates travel and intra-regional connectivity. This section will discuss only hotels and lodging since air transport service is itself a priority sector that will be addressed in greater detail in Section 3.3.

In terms of foreign equity ownership, tourism is a priority service sector where ASEAN member countries have mostly complied with the AEC Blueprint and the ATA objectives to allow higher foreign equity share limits than other priority sectors. As of July 2011, with the exception of three member countries, namely, Indonesia, the Philippines, and Thailand, ASEAN member states allow over 70% foreign ownership in their hotel and lodging services as can be seen

in Table 3.7. However, certain member countries, namely, Cambodia, Indonesia, the Philippines, and Thailand, impose more stringent foreign share participation for non-luxury hotels in order to protect small local

TABLE 3.7
Foreign Equity Participation Policies in the Tourism Sectors
of ASEAN Countries

Country	Regulations Related to Hotel Lodging Services
Malaysia	100% of foreign equity is allowed for hotels, restaurant services (for 4 and 5 star hotels). ¹⁰
Philippines	Foreign equity participation of up to 40% is allowed in hotel and lodging services. 100% of foreign equity participation is allowed in restaurant operations that are incidental to the hotel business. For restaurants in general, up to 100% foreign equity participation allowed for enterprises with a paid-up capital of US\$2.5 million or more. Enterprises with capital below US\$2.5 million cannot hold any equity. ¹¹
Indonesia	Maximum of 51% foreign ownership is allowed in 1–2 star hotels. For other accommodation services, maximum of 49% foreign ownership is allowed (maximum of 51% foreign ownership is allowed if partnering with Micro, Small, Medium Enterprises and Cooperatives fulfilling the criteria as meant in Law Number 20 of 2008 of Indonesia). 51% of foreign ownership is allowed for restaurants in Talam island, and 49% for other restaurants (51% foreign ownership is allowed if partnering with UMKMK). ¹²
Thailand	Up to 49% of foreign equity participation is allowed. ¹³
Lao PDR	100% of foreign ownership is permitted in hotels and restaurants. For joint ventures, at least 30% foreign capital is required. ¹⁴
Cambodia	There is no restriction for foreigners to engage in 3 star/or higher hotel business, except the number of foreign employees working in a firm is subject to Cambodian Labor Law.
Brunei Darussalam	100% foreign ownership is allowed in tourism sector.
Myanmar	100% foreign ownership is permitted in hotels and tourism sector. If it is a joint venture, foreign capital must be at least 35% of the total equity capital.
Singapore	There are no restrictions regarding foreign equity participation in hotels.
Viet Nam	There is no limitation on foreign ownership but other conditions may apply on branching, customers, etc. ¹⁵

providers. Also, certain member countries impose more restrictive foreign equity participation for restaurant services, which are incidental to the hotel and lodging service. If so, relaxing foreign equity restrictions only for hotels and lodging and not for incidental services would be futile in attracting foreign investment.

4.2 Priority Sector: e-ASEAN

The e-ASEAN initiative is envisioned as a holistic electronic action plan based on existing work in ASEAN, especially the ASEAN Information Infrastructure (AII), Electronic Commerce, Telecommunications, and other relevant sectors such as Trade, Tourism, Science, and Technology. Integration of regional ICT trade and production would promote technological advancement in key service sectors that are pillars of the development of the ASEAN economy. ASEAN Leaders signed the e-ASEAN Framework Agreement at the ASEAN Informal Summit in Singapore in 2000.¹⁶ It has the following six main thrusts:

1. Establishment of ASEAN information infrastructure;
2. Growth of electronic commerce;
3. Liberalization of trade in ICT products, ICT services and investments;
4. Facilitation of trade in ICT products and services;
5. Capacity building and e-society;
6. E-Government.

Liberalization of trade in ICT products has already reached an advanced stage with tariff reduction under both the AFTA and the Information Technology Agreement (ITA) under the WTO, which has eliminated all import duties on a wide range of information technology products since 1997. Among its main thrusts, the liberalization of ICT services and investment is probably most challenging as it requires a change in member countries' foreign investment rule. As of July 2011, most ASEAN member states still have restrictive regulations for foreigners holding equity in local telecom companies as shown in Table 3.8.

As seen in Table 3.8, many ASEAN member states restrict foreign equity participation in their telecommunications sectors to a minority share. Only Singapore, Lao People's Democratic Republic, Cambodia, and Myanmar, allow wholly foreign owned operations. But even then, only Singapore boasts a highly competitive telecom market. Certain member countries still struggle with the dominance of state enterprises

TABLE 3.8
Foreign Equity Ownership in Telecommunication Industry in ASEAN

Country	Policy on Foreign Equity Ownership in Telecommunications
Thailand	Foreign ownership in facilities based services (fixed-line and mobile/wireless infrastructure) is restricted to a maximum of 49% by the Telecommunication Act BE 2544/AD 2001.
Malaysia	<p>Foreign companies are entitled to acquire only up to a 30% equity stake in existing fixed line operations as well as in value-added services.</p> <p>New licensing categories were introduced allowing up to 49% foreign equity in suppliers categorized as “application service providers” (but what this category encompasses is unclear).¹⁷</p>
Singapore	Singapore’s telecom industry has been fully liberalized since April 2000. Wholly foreign owned telecom operators may provide facilities-based (fixed line or mobile) or services-based (local, international, and callback) telecommunications services. ¹⁸
Viet Nam	<p>Foreign investors are required to establish joint-venture with local registered telecommunication service providers in Viet Nam.</p> <p>For non facilities-based services, foreign capital contribution is limited to 51% of legal capital of the joint ventures. Three years after accession, a joint venture will be allowed without limitation on choice of partner. Foreign capital contribution is then limited to 65%.</p> <p>For facilities-based services, foreign capital contribution shall not exceed 49%.</p>
Philippines	The Philippine Constitution limits foreign capital participation in telecommunications to a maximum of 40%.
Indonesia	Foreign equity share for mobile telephone companies is limited to 65% and 49% for fixed line networks.
Cambodia	100% foreign equity is allowed.
Lao PDR	100% foreign equity is allowed. To be classified as a foreign investment, the foreign equity ownership share must be at least 30%.
Myanmar	100% foreign equity ownership and joint ventures are allowed. Joint ventures can either come in a form of a partnership or a limited company with any individual, firm, cooperative, or State-owned enterprise of Myanmar. If it is a joint venture, foreign capital must be at least 35% of the total equity capital.
Brunei Darussalam	Investment in telecommunications must be approved by the sector’s regulatory body (Authority for Info-Communication Technology Industry (AiTi)), and foreign equity is capped at 49%. ¹⁹

in the market. For example, the four main telecom services providers in Viet Nam are all state enterprises. They are Viettel, the Military Electronic Telecommunications Company, the Hanoi Telecom, the Vietnam Shipping Telecommunication (VISHIPEL), the Saigon Post and Telecom (SPT) and the Electricity Telecommunication Company (ETC).²⁰ In Lao PDR, although there are many joint ventures where foreign partners hold majority equity shares in the licensed telecom operator, the state still hold a significant share in all operators.

The failure of most ASEAN countries in reaching the milestone of allowing at least 70% foreign (ASEAN) equity by 2010, as stipulated in the AEC Blueprint, indicated that member countries' governments are reluctant to open the lucrative telecom market to foreign investors, or even to domestic private investors in some countries where the state still dominates the market. More worrying is the case of the Philippines, where foreign equity restriction is prescribed not in the law, but in the constitution. It is unclear how the Philippines can comply with the AEC goal of liberalizing the communications sectors.

4.3 Priority Sector: Air Transportation

Among the four priority sectors, air transportation is arguably a sector subject to most restrictive foreign ownership rules. This is not surprising, however, since the nationality of an airline is tied into the bilateral air transport agreements negotiated between the governments of two countries. Article 6 of the 1944 Chicago Convention, which stipulates that air traffic rights — i.e., the right to pick up and drop off passengers in terms of frequency, capacity, transits, etc. — is to be negotiated on a bilateral basis, permitted either party “to withhold or revoke a certificate or permit to an airline where it is not satisfied that substantial ownership and effective control are vested in nationals of either party to this agreement ...”. This indicates that an airline operator that benefits from the air traffic rights secured by the government of a host country may be denied such rights by a third country that is signatory to the bilateral air transport agreement if the operator is considered a foreign entity in the host country. For this reason, foreign equity participation in airlines is often limited to minority or non-controlling shares.

The policies regarding foreign equity ownership in the sector of each ASEAN member state is listed in Table 3.9.

TABLE 3.9
Each ASEAN Member State's Policy on Foreign Equity Ownership
in the Air Transport Sector

Country	Policy Regarding Foreign Equity Ownership in the Air Transport Sector
Malaysia	On 30 June 2009, the Government announced the deregulation of the FIC guidelines; limitations on foreign equity will now be decided by the regulator of the industry. (Previously, maximum foreign ownership of domestic airline companies was set at 30%.)
Thailand	Up to 49% of foreign ownership is permitted.
Singapore	The particular bilateral Air Service Agreement (ASA) that Singapore has with each of over a hundred countries specifies substantial government ownership. ²¹
Indonesia	Foreign operators of scheduled domestic air transport services are required to enter into a joint venture, in which foreign ownership of up to 49% is allowed and foreign airline companies may provide international and domestic passenger based on point-to-point services.
Brunei Darussalam	An airline registered in Brunei Darussalam must be substantially and effectively controlled by Brunei Darussalam interests. The Royal Brunei Airlines, established in 1974, is a wholly-owned government corporation at present.
Viet Nam	Foreign capital participation in the domestic and international air transportation industries is limited to a maximum share of 49%.
Cambodia	49% of foreign equity is permitted in air transportation services. ²²
Philippines	The Philippine Constitution limits foreign capital participation in transportation to a maximum of 40%.
Lao PDR	100% foreign equity ownership is allowed.
Myanmar	Joint ventures with foreign operators are permitted.

Sources: <http://www.fta.gov.sg/safta/fta_safta_agreement_annex4-i%28b%29.pdf>; Peter Forsyth, John King, Cherry Lyn Rodolfo and Keith Trace, "Preparing ASEAN for Open Sky", REPSF 02/008, Monash International Pty Ltd, February 2004; and "Strategic Directions for ASEAN Airlines in a Globalizing World", downloadable at <www.asean.org/aadcp/repsf/docs/04-008-finalownership.pdf>.

As seen in Table 3.9, besides Lao PDR, all ASEAN economies impose a limit on foreign equity share at less than 50%. Although the Malaysian government announced the deregulation of the FIC guidelines that limitations on foreign equity will now be decided by the regulator of the industry in 2009, not a single foreign operator has been issued a license. The same applied to Lao PDR. Also, in most countries, bar the Philippines, the national airline is majority state-owned. This includes Singapore Airlines, Malaysia Airlines, Royal Brunei Airlines, Garuda Airline (Indonesia), Vietnam Airlines, Cambodia Angkor Air and Thai Airways. Even in Lao People's Democratic Republic, where 100% foreign ownership is permitted in all business sectors, the national airline is wholly state-owned. In the absence of amendments to bilateral air transport agreements that confine the nationality of airline operators to those of the signatory countries and other foreign equity restrictions embedded in various domestic laws, it is unlikely that ASEAN member states will be willing or able to open up their air-transportation sector as stated in the AEC Blueprint by raising the foreign equity participation to 70% in the foreseeable future.

4.4 Priority Sector: Healthcare

The healthcare sector was made a priority sector by ASEAN to be intra-regionally liberalized due to its potential for GDP growth, technology transfer, and the mobility of the medical profession that would lead to better quality of healthcare and the overall welfare in the region. In the healthcare sector, the important services are hospital and medical. Hospital services include hospital, medical laboratory, and ambulance services. Medical services involve medical, dental, and paramedical services. Table 3.10 illustrates regulations on foreign equity in the healthcare sector of each ASEAN country.

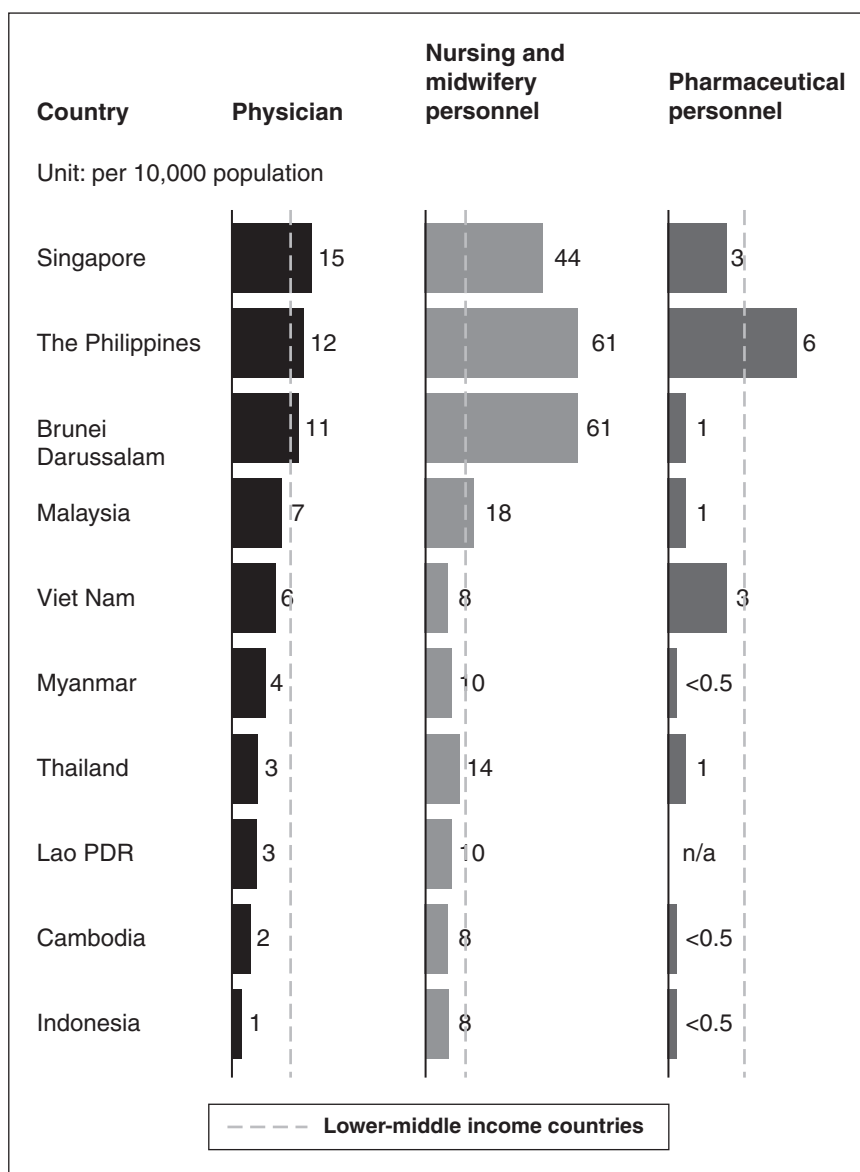
As seen in Table 3.10, Malaysia, the Philippines, Indonesia and Thailand have not raised the foreign equity share limit in certain health services to 70% by 2010 as prescribed by the AEC Blueprint. But relaxing the restrictions on foreign capital participation may have limited impact on cross border investment in health services given the shortage of physicians in the region.

TABLE 3.10
Regulations on Foreign Ownership in the Healthcare Sector
of each ASEAN Country

Country	Regulations
Malaysia	Up to 30% foreign ownership is allowed in the health services (with economic needs test).
Philippines	Foreign equity ownership is limited to 40% for hospitals. Full foreign ownership is allowed for health maintenance organizations.
Indonesia	Foreign equity share limit in hospital services, clinics of specialist doctors clinic laboratories and medical check-up clinics is 67%.
Thailand	Foreign equity ownership is limited to 49%.
Lao PDR	Full foreign ownership is allowed.
Cambodia	Full foreign ownership is allowed in the healthcare sector. However, one of the directors of the foreign owned hospital must be Cambodian
Brunei Darussalam	Foreign equity share permitted up to 70%. ²³
Singapore	Medical services: Full foreign ownership is allowed. Hospital services: Full foreign equity ownership allowed.
Viet Nam	100% foreign owned companies permitted in the healthcare sector (with economic needs test). ²⁴
Myanmar	Foreigners are allowed to hold up to 80% of equity share in private hospitals and clinics.

Figure 3.4 shows the inadequacy of medical professionals in ASEAN. Of all the ten member nations, only Singapore, the Philippines, and Brunei Darussalam, show a number of physicians per 10,000 population greater than the average of that of lower-middle income countries. Even

FIGURE 3.4
Medical Professional Workforce in each ASEAN Country



Source: SCB EIC analysis based on data from World Health Statistics 2010, World Health Organization (WHO).

Malaysia, which is categorized as an upper-middle income country by the World Bank, has a number of physicians per 10,000 population lower than the average of that of the lower-middle income countries. A striking point is how ASEAN countries would come up with strategies to produce medical professionals enough for their own states and the region. As long as a country does not even have sufficient medical professional workforce for itself, it cannot adequately supply the regional medical workforce. Moreover, institutionally, medical professions are the most important wheels that run the hospitals and other medical laboratory settings. And generally, educational institutes producing medical professionals are under the government or the ministry of health's control. Therefore, if there are not enough physicians and nurses, an investment in hospital service sector is inefficient because the private sector cannot fulfill the needs of medical professions by itself. Thus, an inadequacy of medical workforce is one factor impeding an integration of healthcare sectors in the region, besides restrictions on foreign equity in hospital services.

4.5 Overall Progress in Meeting AEC Liberalization Targets

The AEC Blueprint indicates that the service liberalization goals are to be achieved through five consecutive rounds of negotiations until the year 2015. As of today, ASEAN has been working on only one round of negotiation, which produced the 7th service liberalization package in February and the 8th package sometime in August 2011. Comparing commitments made in the 7th package with the milestones as prescribed in the AEC Blueprint, shown in Table 3.11(a), it is clear that every member country, bar Singapore, has fallen behind the liberalization goals in terms of foreign equity participation (mode 3) in 2008 and in 2010. As for mode 1 and mode 2, the AEC envisions no restrictions except for bona fide regulatory reasons. Here, as can be seen in Tables 3.11(b) and 3.11(c), with very few exceptions, members have largely complied with this commitment.

If there is no marked improvement in commitments in the 8th package, then it would be highly unlikely that the region will be able to meet its service investment liberalization goals by the year 2015.

TABLE 3.11(a)
The 7th Service Liberalization Package and AEC Goals (Mode 3)

Subsectors	AEC		AFAS7					Brunei Darussalam (23 Oct 2009)
	Targets	Year	Thailand (18 May 2009)	Malaysia (16 Oct 2009)	Singapore (1 Oct 2009)	Philippines (17 Aug 2010)	Indonesia (9 May 2009)	
E-ASEAN	Mobile telephone service	51% 2008	49%	51%	73.99%*	40%	49%	*****
	Online information and database retrieval	51% 2008	49%	51%	**	***	51%	100%
	Consultancy services related to the installation of computer hardware	51% 2008	100%	100%	100%	40%****	Joint operation through a representative office in Indonesia	–
Healthcare	Hospital services	51% 2008	49%	51%	51%	40%*****	49%	100%
	Medical and dental services	51% 2008	49%	51%	100%	–	49%	100%
	Dental services	51% 2008	49%	51%	100%	–	49%	–
Tourism	Hotel lodging services	51% 2008	49%	51%	100%	100%	100% in Eastern Part of Indonesia and 51% for other areas	It must be a joint venture with local company subject to local regulation.
	Meal serving services	51% 2008	49%	51%	100%	100%*****	51% in Eastern Part of Indonesia only	

Construction	Travel agency and tour operator services	51%	2008	49%	51%	100%	60%	49%	–
	Maritime freight forwarding	51%	2008	49%	51%	100%	40%*****	55%	55%
	Storage and warehouse services for maritime transport	51%	2010	49%	49%	100%	40%*****	49%	49%
Logistics	Maritime cargo handling services	51%	2010	49%	49%	100%	100%	49%	49%
	Freight transportation	51%	2010	49%	49%	100%	40%	49%	–

Notes: * A cumulative total of 73.99% foreign shareholding, based on 49% direct investment and 24.99% indirect investment is allowed.
 ** Foreign companies are required to either set up a local branch of their company duly registered with the Registry of Companies and Businesses in Singapore, or grant a power of attorney to a local agent for the provision of their VAN services in Singapore.
 *** Operation subject to securing of:
 (a) Franchise from Congress of the Philippines and
 (b) Certificate of Public Convenience and Necessity (CPCN) from the National Telecommunications Commissions
 **** 100% foreign equity participation is allowed in the following cases:
 (a) paid-in equity capital is not less than US\$200,000 for domestic market enterprises; or
 (b) paid-in equity capital is not less than US\$100,000 for domestic market enterprises employing at least 50 direct employees; or
 (c) paid-in equity capital is not less than US\$100,000 for domestic market enterprises involving advanced technology as determined by the DOST; or
 (d) the service provider exports 60% or more of its output.
 ***** Up to 100% foreign equity participation is allowed provided: a) paid-in equity capital is at least US\$200,000; or b) paid-in equity must not be less than US\$100,000 for domestic market enterprises employing at least 50 direct employees.
 ***** Enterprises with paid-up capital of US\$2.5 million or more may be wholly owned by foreigners.
 ***** Up to 100% foreign equity participation is allowed, provided that paid-in equity capital is not less than \$200,000, otherwise up to 40% foreign equity participation is allowed.
 ***** 40% foreign equity for construction of locally funded private projects and 100% foreign equity for foreign-funded/assisted internationally-bid construction projects.
 ***** Subject to license by the appropriate regulatory authority and Brunei Darussalam Companies' Act.

TABLE 3.11(b)
The 7th Service Liberalization Package and AEC Goals (Mode 1)

AEC			AFAS7					
Subsectors	Targets	Year	Thailand (18 May 2009)	Malaysia (16 Oct 2009)	Singapore (1 Oct 2009)	Philippines (17 Aug 2010)	Indonesia (9 May 2009)	Brunei Darussalam (23 Oct 2009)
E-ASEAN	Mobile telephone service	No restrictions for mode 1 and mode 2, with exceptions due to bona fide regulatory reasons.	2015 None, other than – traffic shall be routed through gateways in Thailand operated by suppliers duly licensed; – the provision of concerned services shall be agreed by the supplier duly licensed of both ends.	None	Subject to commercial arrangements with licensed operator(s)	Subject to commercial arrangement with licensed operators	None	Subject to commercial arrangements with licensed operator(s)
	Online information and database retrieval			None	*	Only through duly enfranchised and certificated domestic public telecommunications carriers	None	None
	Consultancy services related to the installation of computer hardware		None	None	None	None	None	None
Healthcare	Hospital services		None	None	Unbound	Unbound	None	Unbound due to lack of technical feasibility

Tourism	Medical and dental services	None	None	Unbound	–	None	None
	Dental services	None	None	None	–	None	–
	Hotel lodging services	None	None	Unbound	None	None	None
	Meal serving services	None	None	None	None	None	–
Logistics	Travel agency and tour operator services	Unbound	None	None	None	None	–
	Maritime freight forwarding	Unbound	None	None	None	None	None
	Storage and ware-house services for maritime transport	None	None	None	Unbound	None	None
Others	Maritime cargo handling services	None	None	None	Unbound	Unbound*	None
	Freight transportation	None	None	None	None	None	–
Construction		Unbound	Unbound due to lack of technical feasibility	None	Unbound due to lack of technical feasibility	Unbound*	Unbound due to lack of technical feasibility

Notes: * Provision of VAN services is subjected to licence from the Infocomm Development Authority of Singapore (IDA).

The basic requirements for VAN licence are:

- Foreign companies are required to either set up a local branch of their company duly registered with the Registry of Companies and Businesses in Singapore, or grant a power of attorney to a local agent for the provision of their VAN services in Singapore.
- VAN does not carry traffic which resembles any of the basic telecommunication services.

Table 3.11(c)
The 7th Service Liberalization Package and AEC Goals (Mode 2)

AEC			AFAS7					
Subsectors	Targets	Year	Thailand (18 May 2009)	Malaysia (16 Oct 2009)	Singapore (1 Oct 2009)	Philippines (17 Aug 2010)	Indonesia (9 May 2009)	Brunei Darussalam (23 Oct 2009)
E-ASEAN	Mobile telephone service	No restrictions for mode 1 and mode 2, with exceptions due to bona fide regulatory reasons	2015 None, other than – traffic shall be routed through gateways in Thailand operated by suppliers duly licensed; – the provision of concerned services shall be agreed by the supplier duly licensed of both ends.	None	None	None	None	Subject to commercial arrangements with licensed operator(s)
	Online information and database retrieval			None	None	None	None	None
	Consultancy services related to the installation of computer hardware		None	None	None	None	None	None
Healthcare	Hospital services		None	None	None	None	None	None

Tourism	Medical and dental services	None	None	None	–	None	None
	Dental services	None	None	None	–	None	None
	Hotel lodging services	None	None	None	None	None	None
	Meal serving services	None	None	None	None	None	None
	Travel agency and tour operator services	None	None	None	None	None	None
Logistics	Maritime freight forwarding	None	None	None	None	None	None
	Storage and warehouse services for maritime transport	None	None	None	None	None	None
Others	Maritime cargo handling services	None	None	None	None	None	None
	Freight transportation	None	None	None	None	None	–
Construction		None	None	None	None	None	None

Note: * Mode 1 ‘None, except...’ due to bona fide regulatory reasons: Health and Safety reasons. Foreign professionals who intend to practice in Brunei Darussalam should submit plans of the proposed developments through licensed practicing companies/partnerships/architects in Brunei Darussalam to provide for an entity or a body that will be liable for the development.

5. Exploitation of Trade Privileges

Although negotiations under the AFAS have produced several packages of commitments to liberalize services trade within ASEAN, the margin of liberalization thus far has been minimal. Besides, the ASEAN Secretariat does not have a database on the exploitation of services trade privileges, in particular in investment (mode 3). This lack of enthusiasm to track down intra-regional equity investment in the service sector perhaps can be attributed to both the lack of data at the national level and the insignificance of the privileges accorded by the regional agreement. In addition, domestic restrictions with regard to equity holding, landholding, licensing, etc., continue to pose significant barriers to intra-regional investment in services. Since the AEC does not reach into the behind-the-border issues, it is likely that these barriers will persist in the foreseeable future, making the relaxation of equity holding as prescribed in the AEC futile in attracting regional investment.

As for the promotion of the movement of skilled professionals, seven MRAs have been concluded and signed by ASEAN Economic Ministers (AEM). Among these, only engineering and architectural services provide standardized recognition of skills level of registered ASEAN architects and engineers.

The ASEAN engineering MRA was brought about by the ASEAN Chartered Professional Engineers Coordinating Committee (ACPECC), a regional engineering committee that controls the standardized registration of engineers recognized by the ASEAN member countries. Engineer graduates in ASEAN have to pass the domestic examinations on engineering and obtain domestic licenses of an engineering career before applying through the ASEAN Chartered Professional Engineers (ACPES) to work as Registered Foreign Professional Engineers (RFPES) under the Professional Regulatory Authority (PRA) of each participating ASEAN member country. Table 3.12 shows the data on the number of domestic engineers in ASEAN countries who have been registered as ACPES. As can be seen in the table, only four out of the ten member states have registered ACPES. This is because certain members such as Brunei Darussalam, the Lao People's Democratic Republic, Cambodia and Viet Nam, do not have a proper Professional Regulatory Authority that can register ACPES. Viet Nam, and more recently, Brunei Darussalam, has passed a law establishing such an authority. In the case of Thailand, there has been much delay in passing internal rules

TABLE 3.12
Number of ASEAN Chartered Professional Engineers (ACPEs)
in ASEAN Countries

Country	Numbers of ACPEs
Malaysia	136
Singapore	161
Indonesia	93
Viet Nam	9
Total	399

Source: Data from ACPECC website, <<http://www.acpecc.org/modules/acpes.php>>.

and procedures governing the registration and the licensing of ACPE due partly to legal complications and partly to the Council's reluctance to open up the engineering professional services to foreign nationals.

It should also be noted that the number of ACPEs shown above by no means describes the extent of the flow of professional services across the borders within the ASEAN region. What is required would be the number of ACPEs that actually work in another member country. It is likely that ACPEs will face multiple barriers in obtaining permission to work overseas, because the MRA merely states that ACPEs shall be "eligible" to apply to the Professional Regulatory Authority (PRA) of a host country to be registered as a "Registered Foreign Professional Engineer (RFPE)", as mentioned earlier, and shall be permitted to work as RFPE *subject to domestic laws and regulations*. Indeed, most countries impose restrictions on foreign nationals or non-residents working as professional engineers.

For example, the Thai Engineer Act 1999 does not explicitly impose a nationality requirement for the granting of a professional engineer license. However, the law prescribes that applicants for such a license must be a "regular" or "irregular" member of the Council of Engineers. And, in a separate section of the law, it is stipulated that regular members need to hold a Thai citizenship. Hence, foreign registered engineers qualify only as "irregular" members whose scope and conditionality of work will be subject to the rules and regulations

set by the Council. In Malaysia, foreign engineers may be licensed by the Board of Engineers for specific projects and must be sponsored by the Malaysian company carrying out the project. Normally, the Malaysian company must demonstrate to the Board of Engineers that it cannot find a domestic engineer for the job. In general, a foreign engineer must be a registered engineer in his or her home country, have a minimum of 10 years' experience and have a physical presence in Malaysia for at least 180 days in one calendar year.

Similarly, in architecture, the ASEAN Architect Council (AAC) has been founded as an organization that controls a standardized register of architects in ASEAN. That is, after an architect graduates from a university and obtains a domestic license from the Professional Regulatory Authority (PRA) of his or her country, plus relevant work experience, he or she is then eligible to apply to the ASEAN Architect Council (AAC) to be registered as an ASEAN Architect (AA) in the ASEAN Architect Register (AAR). But again, the permission to work as a foreign registered architect will depend on the domestic laws and regulations of the host member country. And, like in the case of engineers, most countries impose certain restrictions on residency or nationality to become a fully licensed architect. Foreign architects are often allowed to work only on a project basis and even then, in some countries, employers have to submit proof that equivalent national professional is not available.

Currently, there is no registered ASEAN Architect, since the AAC has just begun to function in May 2011.

For other MRAs, the harvesting of the benefits from the agreements has also been very limited. For example, in the case of nursing, although the MRA provides a great opportunity for nurses in the region to acquire experiences in other member countries, they still need to comply with domestic rules and regulations governing the registration of nurses imposed by the national nursing regulatory body. For example, in order for a Filipino nurse to practice in Thailand, the candidate must pass the national licensure exam in the Thai language.²⁵ Since the MRA does not address domestic rules and regulations that may pose barriers to the mobility of foreign nurses, the MRA may prove futile.

As for the surveying profession, the MRA merely provides the enabling framework of broad principles for further bilateral and multilateral negotiations among ASEAN member states. Currently, the ASEAN Federation of Land Survey and Geomatics (AFlag) is

attempting to design a model MRA that can be used for bilateral and plurilateral agreements. However, unlike the legal, accounting and other professions, the definition of the surveying profession services and scope of responsibilities is not yet determined and the service is not yet codified according to the UN's Central Product Classification Code (CPC Code). These factors make an MRA in Surveying most challenging to implement.

The protection of professional services in the ASEAN states pose a limitation to growth in many service sectors be they construction, design, or medical services. In practice, foreign professionals exploit "loopholes" in the law in order to provide services. For example, in Thailand, many foreign engineers, architects, lawyers and accountants are registered as "advisors" rather than professionals. However, in practice, they perform actual professional work. However, they cannot sign legal papers but assign local professionals to do the task instead. While such practices have helped loosen the stringent regime, they pose serious accountability and transparency questions. For example, if a building designed by a foreign engineer were to collapse, the local professional whose signature appears on the legal document would be held responsible. Although the person may have been properly compensated for taking such a risk, the lack of transparency does not contribute to good governance in the profession.

To conclude, the halting progress in liberalizing trade in services in ASEAN due to member countries' lack of willingness to open up their service markets may impede ASEAN's goal of regional economic integration. But even if member states were able to meet all the milestones set in the AEC Blueprint, it remains uncertain whether full integration of the region's economies can be achieved as the breadth and depth of economic liberalization under the AEC are fairly limited, as discussed earlier.

The next section addresses the key behind-the-border restrictions that may pose significant barriers to the free flows of services in the region.

6. Remaining Barriers to Trade in Services

The preceding sections examined the extent to which ASEAN member countries have opened up their economies to investment and movement of professionals across borders within the region in order to attain the

goal of economic integration by the year 2015 as envisioned in the AEC Blueprint. Also, the extent to which member countries exploited the privileges has been assessed. The result indicates that there has been very little progress in the liberalization of trade in services in terms of the lifting or easing of foreign equity participation in local businesses as well as relaxing of restrictions governing the working of foreign professionals in many disciplines, such as engineer and architect. Moreover, the study reveals that even in areas where regional agreements have been able to remove certain obstacles restricting services trade, domestic rules and regulations pose a major hindrance to actual implementation.

The basic factors of production consist of capital, land and labor. An integrated regional economy will require free access to or mobility of these factors. This section will examine in detail the remaining restrictions to the flow of capital, access to landholdings, and the mobility of labor across borders.

6.1 Restrictions on Capital

Capital is crucial for the establishment of operation overseas. Foreign investors often shun investment rules that restrict their equity holding, especially when the restriction implies inability to effectively control and fully benefit from the operation. Most ASEAN member states impose stringent foreign equity participation limits for many key service businesses. Although the AEC prescribes the easing of such restrictions for investors from member countries, the investment barrier remains. A review of the investment regime and policy in the “priority service sectors” as stipulated in the AEC Blueprint reveals that easing the equity share restriction alone may not help in promoting cross-border investment in these sectors due to several remaining obstacles that are “off the negotiating table”.

First, liberalization of a particular service sector independent of other, incidental services can be problematic. For example, if foreign equity restrictions in hotel and lodging have been lifted, but not for restaurants or the provision of beverages, then it would be difficult for an ASEAN investor to take advantage of the particular investment privilege. Therefore, it may be more efficient to concentrate liberalization on a “group of services” rather than on an isolated service sector.

Second, the dominant role of state enterprises in many service sectors may foreclose any effective competition in the market, rendering the

relaxation of foreign equity share futile, as there are no equity shares to be bought. Moreover, most state enterprises hold *de facto* regulatory power, and are subsidized or granted various privileges not enjoyed by their private competitors. Therefore, it may be necessary to discuss the issue of state enterprises and fair competition in the market.

Third, domestic regulation, in particular the licensing regime, may undermine market access. In many of the cases reviewed, the issuance of an operating license is not automatic; rather, it is subject to the economic needs test (such as the health sector in Malaysia) or discretion of the relevant authority, which may not be transparent or predictable. Thus, it may be necessary to prescribe standard rules governing licensing and other regulatory dimensions that affect market access as part of the liberalization package of the particular service sector. For example, to promote effective liberalization of the telecommunications service, the WTO has established a “Telecom Reference Paper”, which prescribes “best practice” in telecom regulations to which over 80 member states are signatories.

6.2. Restrictions on Landholding

A foreign investor may be allowed to wholly own a legal entity to conduct business, but if that legal entity loses its right to own land the second it becomes a foreign entity, then there would be very little incentive for the foreign investor to assume ownership in that particular legal entity.

Many states around the world prohibit foreign natural or legal entities from owning land to prevent an over-heating of the demand for land, which is a resource with fixed supply. Allowing investors from all corners of the world to speculate on land and property would push up land and housing prices beyond the means of local residents and may also cause domestic inflation. Yet, certain countries allow foreigners to own land or property in specified areas or in specified activities — i.e., land ownership may be allowed when it is incidental to foreign direct investment.

In ASEAN, Brunei Darussalam, Lao PDR, Myanmar, the Philippines, Singapore, Thailand, and Viet Nam, impose restrictions on foreigners owning land. Foreigners often resort to leasing land for a maximum period of time permitted by law, which varies across countries. Table 3.13 shows the information on each ASEAN state’s landholding restrictions.

As can be seen, certain member countries, such as Myanmar, imposed very strict rules on holding land, limiting the leasing of any immovable property to only 1 year. To facilitate direct investment within the region, it may be necessary to negotiate the terms and conditions of landholding with a view to their harmonization. For example, ASEAN investors may be allowed a longer lease than other investors, or to own land used for production sites.

TABLE 3.13
ASEAN Member States' Restrictions on Land Ownership

Member States	Detail
Brunei Darussalam	Companies are allowed to lease land for their industrial activities. Land with facilities is available for industry, agriculture, agro forestry and aquaculture for a lease term of 10–30 years and are extendible.
Indonesia	Under the 1960 Basic Agrarian Law and the Presidential Decree No. 34/1993 concerning the land cultivation right (HGU) and the right of building on land (HGB) is given to legal entities domiciled in Indonesia including foreign companies and can be used as a collateral or transferred to a third party until the government approval.
Lao PDR	Foreign investors and nationals are not permitted to own land in Lao PDR but can lease land for 20 to 30 years from the government or from private entities. Foreign investors can transfer these leases to others and can own, transfer and dispose of improvements or buildings on leased land.
Malaysia	Foreigners are allowed to acquire land and buildings for business and residential purposes. Foreigners can also buy industrial land. Industrial estates are mostly developed by the State Economic Development Corporations (SEDC). Industrial estates are also developed by other government authorities and by the private sector. Ownership of industrial land developed by SEDCs are usually on leasehold basis, ranging from 30 to 99 years.
Myanmar	Foreigners cannot own land but can lease it for periods up to 30 years, or more if approved by MIC, from the

Member States	Detail
	<p>government. According to Immovable Property Restriction Law (1987), a foreign natural or legal entity cannot lease any immovable property from the private sector for a period exceeding 1 year at a time.</p>
Philippines	<p>In principle, only Filipinos and/or companies with domestic equity share of not less than 60% can own land. A foreign company establishing a joint venture with the National Development Corporation can also own land. Foreign companies may enter into service agreements with the Energy Development Board for the exploration, development, and exploitation of energy resources, or with the national or local government.</p>
Singapore	<p>In principle, foreign companies lease land from the government. The lease term, initially 30 years can be extended to 60. Foreigners can buy real estates only on Sentosa Island.</p>
Thailand	<p>Under the Land Code, non-Thai individuals and companies are generally not allowed to own land. However, foreign companies promoted by the Board of Investment and oil concessionaires are entitled to land ownership. Moreover, the Land Code provides for non-Thai individuals or companies to own land by the virtue of treaty provisions or by ministerial permission. Although Thailand restricts foreign ownership of land, foreigners may hold total leasehold interest in Thai land and house leases. Thailand lease law allows a 30-year maximum lease period, with the possibility of renewing the lease for additional 30-year periods.</p>
Viet Nam	<p>Foreign individuals and enterprises are not entitled to land ownership. However, enterprises with foreign-owned capital are allowed to lease land to implement their investment projects.</p> <p>The land lease duration depends on duration of a project and shall not exceed 50 years. However, pursuant to regulations made by the Standing Committee of the National Assembly, the Government may, on a project by project basis, grant a longer duration but the maximum duration shall not exceed seventy (70) years.</p>

TABLE 3.13 (*Cont'd*)

Member States	Detail
Cambodia	Although Cambodia restricts foreign ownership of land, foreigners may hold total interest in Cambodian land and house leases. Cambodia lease law allows a 99-year maximum lease period. Cambodia registered companies with majority Cambodian ownership are able to buy land in Cambodia. In the past it has been common for foreign national to acquire an interest in Cambodian land as minority shareholders in a Cambodian majority company. The Cambodia Investment Board (CIB) and the Cambodia Development Council (CDC) sponsored companies – Foreign companies with CDC and CIB privileges can own or lease land and build a factory in Cambodia.

Sources: <<http://www.aseansec.org/>>.

6.3 Restrictions on Mobility of Professionals

Although production requires not only professional workers, but also unskilled and semi-skilled workers, issues surrounding immigration are normally sensitive. Therefore, this report shall concentrate only on the movement of professionals, which has been the focus of several MRAs that have been signed thus far.

Section 4 reveals that ASEAN MRAs have not had any impact on the movement of professionals within the region because domestic rules and regulations in most member countries impose restrictions on foreign professionals. ASEAN MRAs merely establish standard qualifications of the particular profession; they do not guarantee permission to work in another ASEAN country. As a result, the mobility of professionals in ASEAN will depend on unilateral moves by the member countries to change domestic rules and regulations to facilitate the licensing of foreign professionals. In this regard, ASEAN governments would need to announce and communicate clear policy direction with regard to the liberalization of professional services; otherwise, professional bodies may be reluctant to amend their rules to allow greater competition in their own profession.

It may be necessary for ASEAN to begin to negotiate about the rights of ASEAN registered professionals in practicing in an ASEAN

country other than their own. These rights may be limited in the beginning. That is, they need not be equivalent to the rights enjoyed by local professionals. For example, the scope of the allowed practice may be limited to certain specific area of expertise.

7. Summary and Policy Recommendation

This chapter makes four important discoveries. First, the service sector liberalization goals established in the AEC are far from ambitious, with partial liberalization of foreign equity share in mode 3 and no concrete liberalization commitment in mode 4. Second, liberalization parameters specified under the AEC Blueprint are not binding, as they are not subject to the dispute settlement mechanism. Even then, the specified implementation process stipulated in the document remains vague, with multiple flexibilities, some of which are opaque, further diluting the already limited liberalization goals in 2015. Third, actual implementation is far behind the milestones established in the AEC, perhaps because of the flexibility clause that permits back-loading of liberalization commitments and the non-binding nature of the liberalization goals. Fourth, foreign equity limitation, the only liberalization parameter being negotiated in services liberalization thus far, is not the only major barrier to services trade. Rights to hold land, hire foreign professionals and obtain a business permit, are just as crucial for the decision to establish commercial presence overseas.

With these discoveries, the AEC is unlikely to make any meaningful difference to ASEAN services trade in the foreseeable future. However, very few people recognize this fact and still anticipate a massive tide of cross-border investment and movement of labor in 2015. Perhaps the myths surrounding the AEC will help shake up the dormant and well-protected service sector to face greater competition from outside.

The authors are of the opinion that the rather unambitious liberalization goals and lax implementation in services trade established in the AEC reflect the unwillingness of ASEAN member countries to open up their cosseted and at times lucrative, service sector. In the absence of political will, it will be difficult to envision an integrated ASEAN service market in the foreseeable future. Many studies have revealed that almost all past service-sector liberalization in ASEAN can be attributed to unilateral policy moves rather than regional commitments.

Perhaps to push the service liberalization agenda forward the ASEAN Secretariat would need to build an effective coalition supporting the liberalization agenda by demonstrating the inherent inefficiency of the existing service sector in ASEAN countries. For example, the cost and quality of certain services, such as banking or telecommunications, in highly protected service sectors in certain ASEAN countries can be benchmarked against those in countries where such services have been liberalized and exposed to competition. The comparison would be most effective if the benchmark case were another ASEAN member country, say, Singapore, that has unilaterally liberalized the specific service market. This inefficiency would then need to be translated into foregone economic growth in order for the lay person to appreciate its significance. Consumers and small businesses are not the only likely advocates; the media and academics will also need to come on board to effectively push the liberalization agenda.

At the same time, it would also be important to identify the opponents of liberalization — i.e., those who benefit from the current protection in order to understand the political economy of the liberalization of services trade. For example, in many member countries, state enterprises operating in various vital service sectors such as telecommunications, energy, and even banking, enjoy the exclusivity and the monopoly profits afforded by protection. As less developed economies tend to rely heavily on revenues generated from SOEs engaged in lucrative businesses to fill their fiscal coffers, they are thus reluctant to liberalize. Hence, one cannot discuss the issue of liberalization without first addressing monopolization and the role of state enterprises. It may be necessary for ASEAN to first consider more elementary steps before jumping to the liberalization of cross-border investment. This task can be easily handled by academics, but the ASEAN Secretariat may provide the necessary funding to launch these studies.

Indeed, the legal, institutional, political or economic rationale for protection is likely to be diverse across different service sectors. Perhaps it would be more effective if ASEAN concentrated on sector-specific liberalization, much like what took place in the WTO with the specific services annexes. The sector-specific negotiation can be done in parallel with the existing broad-based request-and-offer modality based on the GATS. However, the commitments to be made in the specific

service sector would be carefully tailored in keeping with the unique legal, political and economic context and be more stringent (similar to the WTO Agreement on Basic Telecommunications, which includes a Reference Paper on Telecommunications addressing the regulatory aspect of liberalization). There should also be no built-in flexibilities that serve to “water down” the commitments in order to ensure effective liberalization. However, the implementation time frame may be made more accommodating by allowing certain member countries to postpone implementation to a pre-specified date. Given the highly sensitive nature of service sector liberalization, dealing with a single — or a few — sector(s) may be more palatable to liberalization-averse policy-makers.

NOTES

1. Jenny Corbett, “Services Trade Liberalization in the ASEAN Economic Community and Beyond”, Australian National University and the Productivity Commission of Australia Research Council, Canberra, 2008.
2. The GATS commitments index ranges from 0 (unbound or no commitments) to 100 (completely liberalized) for 155 service subsectors as classified by GATS in the four modes of trade in service. A simple average of the subsectoral scores was used to generate aggregate sectoral scores.
3. <<http://www.asean.org/6626.htm>>.
4. There are in total 128 services subsectors based on the WTO GATS W/120 classification.
5. Note that according to Article 6 in AFAS, the definition of “ASEAN investors” includes legal person owned or controlled by non-ASEAN persons which are “engaged in substantive business operations” in an ASEAN country. Therefore, a company registered under the laws of an ASEAN country is also entitled to the offered under AFAS. This definition is consistent with that used in the GATS.
6. The 15% figure for overall flexibility will be reviewed upon the completion of the inventory of limitations in 2008.
7. See John Fry, eds., *ASEAN: Regional Trend in Economic Integration, Export Competitiveness, and Inbound Investment for Selected Industries*, USOTC Publication 4176 for similar interpretation, 2010.
8. This refers to the right to fly between two foreign countries during flights while the flight originates or ends in one’s own country. In other words, a foreign carrier is allowed to pick up passengers in another country *en route* to another foreign final destination. For example, Singapore Airlines may take off from Singapore and transit in Bangkok to pick up passenger,

- before heading for Paris, France, if Singapore has a bilateral aviation agreement with Thailand that guarantees fifth freedom rights.
9. <www.aseansec.org>.
 10. <http://www.miti.gov.my/cms/content.jsp?id=com.tms.cms.section.Section_6394d9a7-c0a8156f-5cff5cff-516e4529>.
 11. <<http://www.tourism.gov.ph/Downloadable%20Files/Chap7%20Tourism%20Investment%20Laws%20and%20Incentives.pdf>>.
 12. Indonesia's presidential regulation on "list of business fields closed to investment and business fields open, with conditions, to investment", 2010.
 13. <http://www.boi.go.th/english/download/business_analysis/26/foreign-investment-laws.pdf>.
 14. <<http://www.adb.org/Documents/Reports/TMR-foreign-direct-investment/chap-5.pdf>>, <<http://www.bangkokpost.com/business/economics/239597/first-tourism-event-aims-to-turn-laos-into-a-rising-star>>.
 15. <<http://vilaf.com.vn/index.asp?progid=50003&cateID=27F93812-0CC4-0FBF-9B6B-317F57DDF4C0>>.
 16. <<http://unpan1.un.org/intradoc/groups/public/documents/apcity/unpan007120.pdf>>.
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 18. <<http://www.ida.gov.sg/Policies%20and%20Regulation/20060609161332.aspx>>.
 19. APEC, IAP Study Report, Brunei Darussalam, 2009.
 20. <http://www.ndaventures.com/Vietnam_Telecom_Brief.pdf>.
 21. Preparing ASEAN for Open Sky, February 2004.
 22. Samnang Chea, Denora Sarin and Hach Sok, "Trade in Services in Cambodia", ASEAN Economic Forum.
 23. APEC IAP Study Report, Brunei Darussalam, 2009.
 24. <<http://vilaf.com.vn/index.asp?progid=50003&cateID=27F93812-0CC4-0FBF-9B6B-317F57DDF4C0>>.
 25. Ayake Matsuno, "Nurse Migration: The Asian Perspective", ILO/EU Program on the Governance of Labour Migration Technical Note, April 2009.

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- Corbett, Jenny. "Services Trade Liberalization in the ASEAN Economic Community and Beyond". Australian National University and the Productivity Commission of Australia Research Council, Canberra, 2008.
- UNESCAP. "ASEAN and Trade Integration". Trade and Investment Division Staff Working Paper Series 01/09. Bangkok: UNESCAP, 2009.

4

The ASEAN Economic Community: The Investment Climate

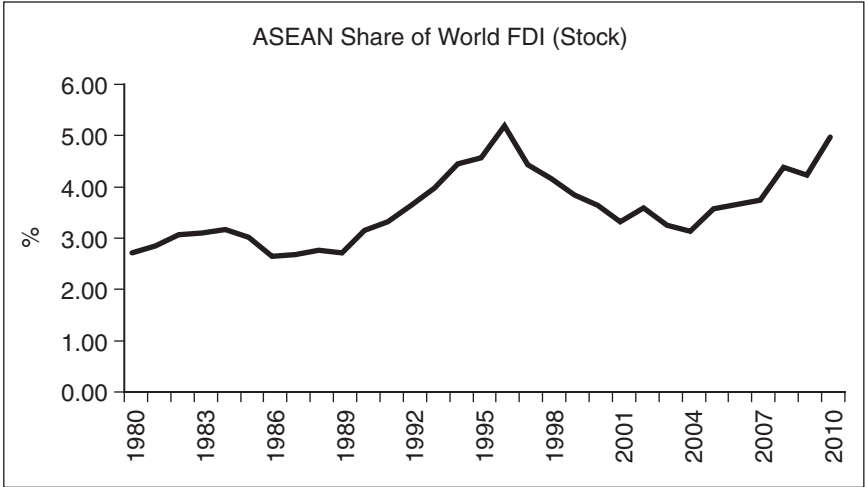
Manu Bhaskaran

1. Current State of the Investment Climate in ASEAN

1.1 Where Does ASEAN Stand Today?

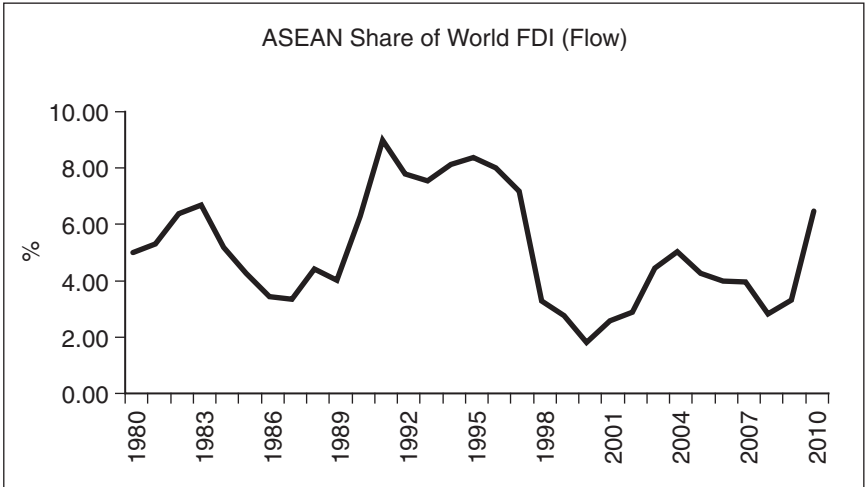
National policy-makers in ASEAN have generally accepted that there are considerable benefits stemming from Foreign Direct Investment (FDI), especially in manufacturing: FDI brings with it a ready-made package of financial capital, management know-how, product knowledge, manufacturing and other processes, distribution networks, brands and marketing skills which saves the recipient country the time, effort and risks involved in creating all these requirements for export competitiveness. Consequently, it helps to diversify the economy away from primary production, upgrading the existing manufacturing sector through raising productivity, increasing efficiency through exposure to greater competition and creating more employment opportunities. Therefore, attracting foreign investment has been an important component of the growth strategies of most ASEAN countries. In assessing the overall investment climate in

FIGURE 4.1
ASEAN has a Good Share of Global Stock



Source: Calculated by Centennial Asia Advisors using UNCTAD data.

FIGURE 4.2
But Its Share of Flows has been Declining



Source: Calculated by Centennial Asia Advisors using UNCTAD data.

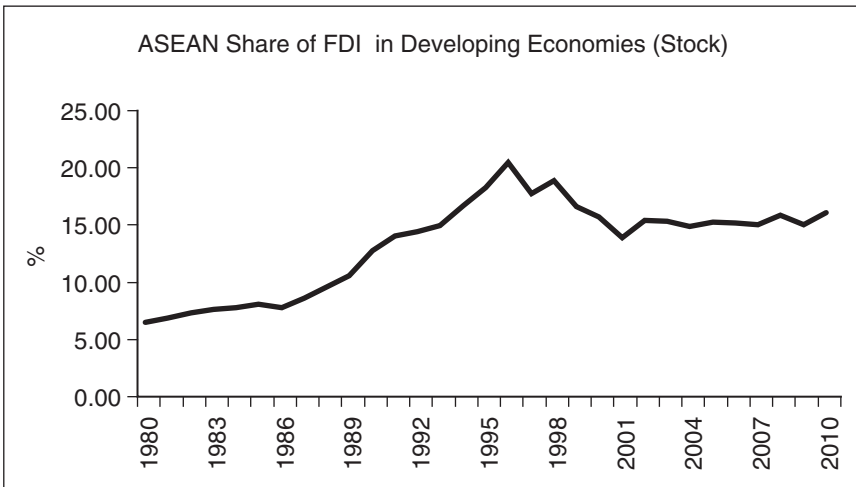
ASEAN, we begin with an analysis of FDI before studying domestic investment.

ASEAN's Share of FDI Flows has Declined

Despite numerous attempts and initiatives to foster the appropriate investment climate for foreign investors, ASEAN as a whole continues to struggle in raising inward FDI beyond levels achieved prior to the Asian financial crisis of 1997–98. Figure 4.1 shows ASEAN's share of the stock of global FDI over the past three decades: this share rose to a peak of more than 5% just before the financial crisis of 1997 and although it has been rising over the past few years, ASEAN's stock of world FDI has not reached its 1996 level. In terms of the annual flow of FDI, ASEAN's share has ebbed significantly in the 2000s from an average of 8% in the mid-1990s before recovering to about 6% in 2010.

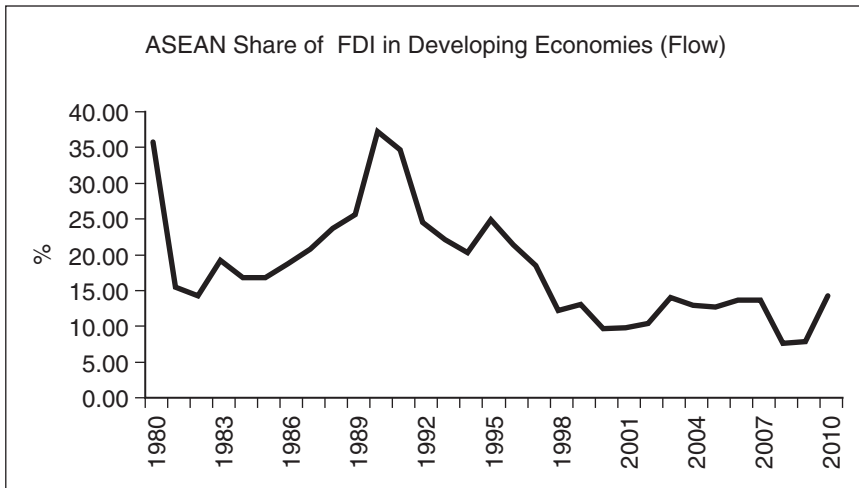
An area of concern is ASEAN's declining proportion of both stock within and flow of FDI into developing countries. Figure 4.3 indicates that ASEAN accounts for around 15% of developing countries' total stock of FDI for the last decade — lower than its peak of

FIGURE 4.3
ASEAN Losing Market Share ...



Source: Calculated by Centennial Asia Advisors using UNCTAD data.

FIGURE 4.4
... to Other Developing Economies



Source: Calculated by Centennial Asia Advisors using UNCTAD data.

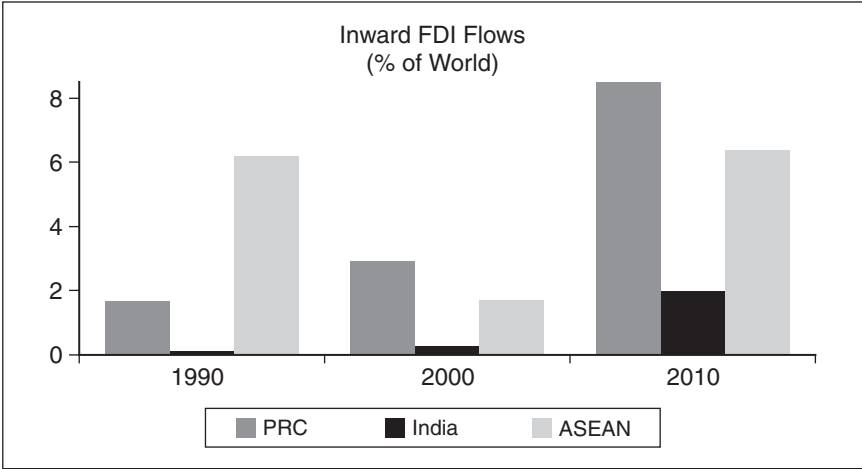
20% before the financial crisis. Its share of annual FDI flows has experienced a dramatic decline, languishing at around 14% in 2010 as compared to 37% in 1990.

The Opening of the PRC and India Coincided with the Growing Challenge for Global FDI

Increased competition for FDI is clearly an issue for ASEAN. ASEAN countries' share of rising FDI until the mid-1990s seems to be due to the fact that they were among the first to pursue export-led growth policies. Subsequently, the PRC, followed by India, started to open up, providing stiff competition to ASEAN in claiming the FDI share. The economic rise of the PRC and India has attracted the attention of investors eager to take advantage of the massive economies of scale offered by the huge and rapidly growing consumer markets in these giants whose middle classes in particular are enjoying substantial growth in spending.

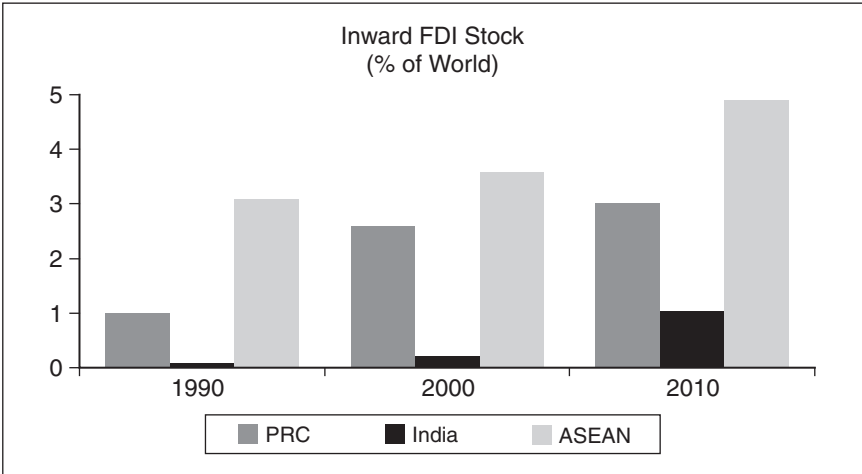
Figures 4.5 and 4.6 show that the PRC has overtaken ASEAN in FDI received in 2010 while its stock of total FDI is also rising quickly. On the other hand, India still lags behind ASEAN, but is picking up

FIGURE 4.5
The PRC is a Big Competitor for FDI



Source: Calculated by Centennial Asia Advisors using UNCTAD data.

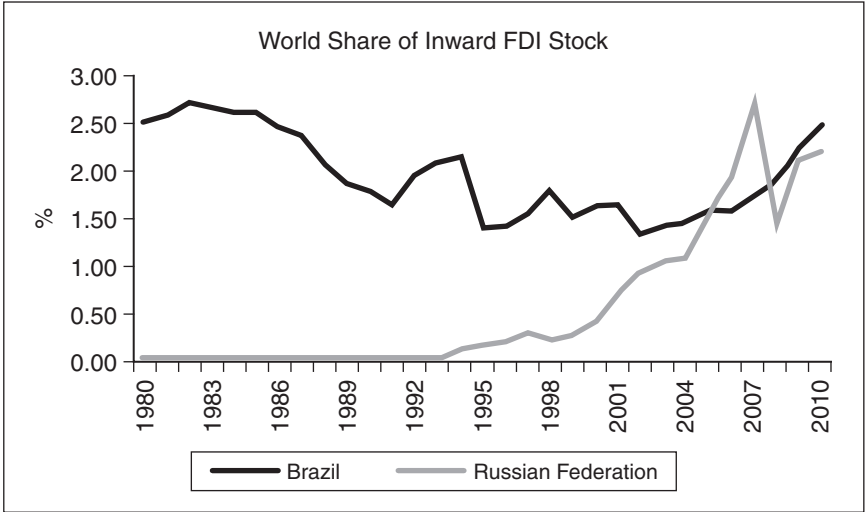
FIGURE 4.6
India is Building Momentum too



Source: Calculated by Centennial Asia Advisors using UNCTAD data.

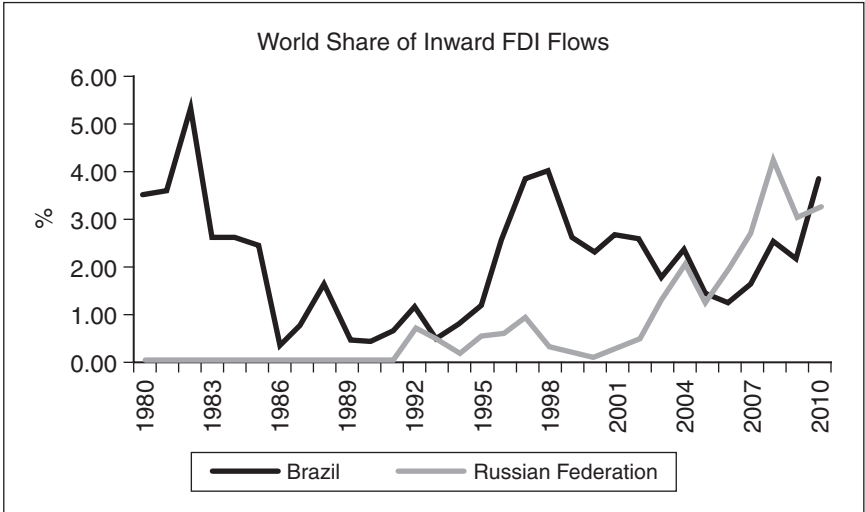
momentum and could soon pose a much bigger threat to the region's share of world FDI.

FIGURE 4.7
Russian Federation's share of FDI has risen sharply



Source: Calculated by Centennial Asia Advisors using CEIC database.

FIGURE 4.8
Brazil recovering strongly too



Source: Calculated by Centennial Asia Advisors using CEIC database.

Other Developing Countries are Opening up — Not Just the PRC and India

Furthermore, other developing countries — not just the PRC and India — have also started developing export-led strategies by opening up their industries to foreign investors. Specifically, Brazil and the Russian Federation (see Figures 4.7 and 4.8) have undertaken market reforms and provided investors with new options, further shrinking ASEAN's share of total FDI.

Domestic Investment has Fallen

Total domestic investment within core ASEAN economies has remained below the levels achieved in the 1990s. Table 4.1 tabulates gross fixed capital formation (GFCF) as a percentage of GDP for economies with available data. It shows that Singapore, Thailand and Malaysia's domestic investment rates have fallen considerably while domestic investment has become a much greater growth driver (36% of GDP) in Viet Nam. On the contrary, the PRC and India's domestic investment have grown significantly with respect to their GDPs. In essence, the disappointing numbers for both foreign and domestic investment raise questions on the investment climates in ASEAN economies.

TABLE 4.1
Domestic Investment Rates fallen since 1990s

	1990	1991	1992	2007	2008	2009	2010
Brunei Darussalam	—	—	—	13.0	13.7	17.5	15.9
Philippines	24.2	20.0	20.9	19.9	19.7	19.0	20.5
Singapore	31.1	32.5	34.3	23.6	28.3	28.6	25.0
Thailand	40.4	41.6	39.3	26.4	27.4	24.1	24.7
Viet Nam	13.1	13.7	16.7	38.3	34.6	34.5	35.6
Indonesia	30.7	28.1	27.3	24.9	27.7	31.1	32.2
Malaysia	33.9	37.8	38.6	23.1	22.3	21.4	21.9
Cambodia	8.3	11.8	14.4	21.4	20.8	16.6	—
PRC	34.9	34.8	36.6	41.7	43.9	47.5	48.6
India	25.5	24.3	24.8	35.8	33.9	32.9	31.8

Source: Calculated by Centennial Asia Advisors using CEIC database.

Clearly, the 1997 Asian financial crisis marked a major break in the overall investment trend: the political, economic and financial shocks of that period do not appear to have been fully offset in the years that followed.

1.2 Basic Parameters that Determine Investment Climate

ASEAN does not perform all that badly in terms of the determinants of investment flows.

Private investment is largely driven by a quest for maximum returns: the capacity to generate globally competitive rates of return on capital employed should, therefore, be an important consideration in determining gainers and losers in the share of global investment.

There is a clear disjuncture between the capacity to deliver high returns in some key ASEAN economies and the low investment rates

TABLE 4.2
Return on Capital Employed (ROCE) in Asia for US corporations

	2000	2005	2010
All countries	10.2%	12.1%	10.5%
ASEAN Average	16.8%	18.6%	19.0%
Average Developing Asia	14.3%	16.2%	14.6%
PRC	10.9%	19.8%	16.9%
Hong Kong, China	18.8%	13.9%	10.9%
India	9.2%	16.5%	12.2%
Indonesia	18.6%	—	23.6%
Japan	10.5%	13.3%	9.7%
Korea, Rep. of	14.8%	13.1%	13.1%
Malaysia	19.6%	24.5%	22.9%
New Zealand	6.0%	12.3%	7.2%
Philippines	12.7%	10.8%	13.5%
Singapore	16.8%	20.7%	15.8%
Taipei, China	17.5%	14.8%	9.9%
Thailand	16.2%	18.3%	19.4%

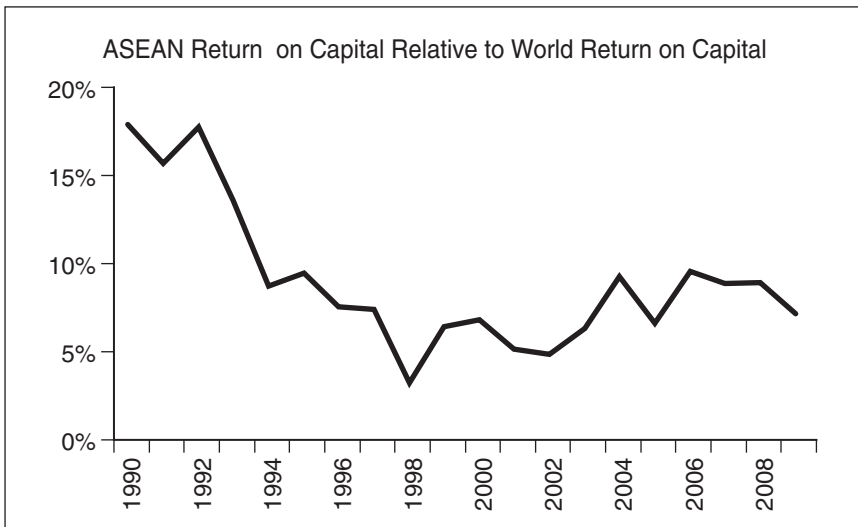
Source: Centennial Asia Advisors using US Bureau of Economic Analysis, Dept of Commerce data.

that they actually achieve. Returns on investment have been quite good, yet ASEAN is unable to break out of a downward trend in overall investment. Table 4.2 provides data on comparable rates of return on investments by US corporations across the world. Figure 4.9 shows that ASEAN's return on capital has indeed declined below the levels in the early 1990s but is still not lower relative to the world average despite a sharp fall in the returns premium after the global crisis of 2008. Figure 4.10 plots the return performance for US multinational companies (MNCs) in Asia. ASEAN has held up well, even as the PRC and India have improved.

These charts indicate the following:

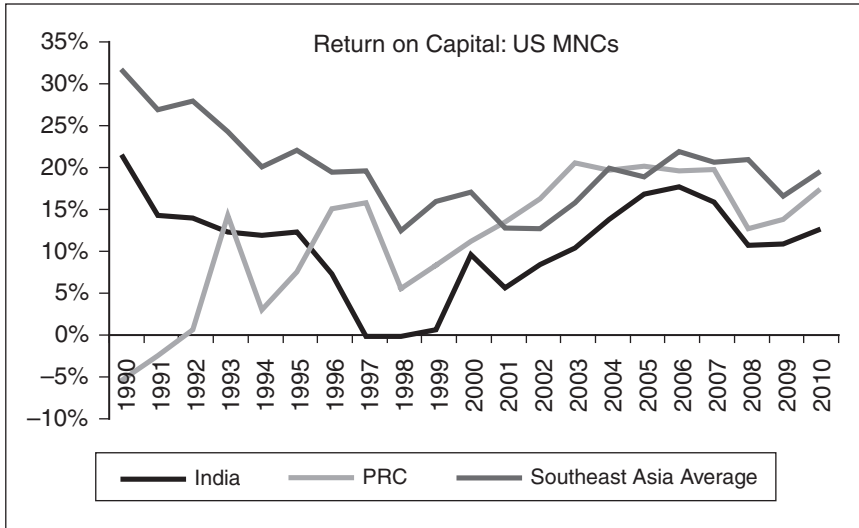
- First, return on capital is not the sole determinant of investment decisions;
- Second, ASEAN's fortunes are highly tied to the global economy: a big decline in world economic health affects the profits of firms in ASEAN more negatively than in other economies such as the PRC and India.

FIGURE 4.9
Return on Capital in ASEAN Above World



Source: Calculated by Centennial Asia Advisors using CEIC database.

FIGURE 4.10
Also comparable to the PRC and India



Source: Calculated by Centennial Asia Advisors using CEIC database.

- Third, investors demand risk premiums for investing in ASEAN countries as theoretically there should not be an outflow of investments if returns are higher than or matches other economies outside the region.

These observations suggest that efforts to enhance the investment climates of the region should focus on reducing country risks for firms in ASEAN economies in order to attract and retain investment.

2. Effectiveness of ASEAN Investment Agreements

2.1 Review of ASEAN Investment Agreements Prior to AEC Blueprint

Previous efforts to promote investment in ASEAN have been marked by a proliferation of initiatives which have had little success.

ASEAN has taken many steps to deepen investment liberalization in the region. This has produced a host of investment agreements, but most of them have failed to fulfill their stated aims. Table 4.3 provides a brief summary of these agreements and their aims.

TABLE 4.3
Assessment of ASEAN Investment Efforts

Date	Initiative	Aims
1983	ASEAN Industrial Joint Venture (AIJV)	Provided a framework through which the government and private sector could identify opportunities, formulate programs and design projects in supporting and pursuing industrial joint ventures. The greater aim was to promote greater utilization of industries, expand trade and improve economic infrastructure. This initiative did not produce many concrete results.
1987	Investment Guarantee Agreement (IGA)	To create favorable conditions for the increased flow of private investments by nationals and companies of any ASEAN member state within ASEAN territories. All investment shall enjoy equitable treatment, which shall be no less favorable than that granted to investors of the most favored nation.
1995	ASEAN Plan of Action on Cooperation and Promotion of FDI and Intra-ASEAN Investment	To facilitate and promote investment and trade, measures introduced includes joint promotional seminars and activities to attract foreign FDI especially to hi-tech and high value-added industries; joint publications on investment regulations and procedures to improve transparency; simplification of such regulations and procedures; joint training programs for officials on investment promotion; and increased cooperation amongst ASEAN investment agencies for sharing of information and best practices.
1996	Amendment to IGA	Commitment to simplify investment procedures and approval processes as well as enhance transparency on all laws and regulations pertaining to FDI. Enactment of the ASEAN Dispute Settlement Mechanism to settle disputes under the IGA. Accession of the Socialist Republic of Viet Nam to the Agreement.
1996	ASEAN Industrial Cooperation Scheme (AICO)	To promote greater industrialization and expand trade and investment in the ASEAN economies. It is based on the recognition that the liberalization of trade and investment can strengthen the process of industrialization and that increased industrial cooperation will increase investment from ASEAN and non-ASEAN economies.

TABLE 4.3 (*Cont'd*)

Date	Initiative	Aims
1998	ASEAN Investment Area (AIA)	Substantially increase investments into ASEAN from both ASEAN and non-ASEAN sources, jointly promote AESAN as the most attractive investment area, strengthen and increase competitiveness of the region's economic sectors and elimination of investment regulations. Free flow of investment for ASEAN members by 2010 and for all investors by 2020.
1999	Short Term Measures to enhance ASEAN investment climate	To stimulate investment in ASEAN and priority industries, investment projects in the manufacturing sector were granted privileges, such as tax exemptions, full foreign equity ownership, free domestic market access, duty exemption on capital imports and the removal of restrictions on employment of foreign nationals. The duration of privileges was only for the life of the project, or otherwise specified by the host country.
2001	Amendment to AIA	To provide exemption privileges for new ASEAN member Cambodia and elaborate and widen coverage of initial agreement. Clarified that Temporary Exclusion List for the manufacturing sector be phased out by 2003, except Cambodia, Viet Nam and Lao People's Democratic Republic, which were given a deadline of 2010.
2004	Amendment to AICO	To update the Basic AICO agreement and maintain its relevance beyond 2002, introducing new and lower preferential tariff rates for approved AICO projects. The Philippines, Thailand and Myanmar were to work toward reducing their rates to 0% by 2005, while Viet Nam would do so by 2006.
2009	ASEAN Comprehensive Investment Agreement (ACIA)	To consolidate IGA and AIA as well as related Protocols in response to more competitive global environment. A single improved agreement covering the manufacturing, agriculture, fishery, forestry, and mining and quarrying sectors and services related to these sectors. Encourages further development of intra-ASEAN investment, especially among MNCs based in ASEAN through expansion, industrial cooperation and specialization.

Source: Official ASEAN Website.

- One early initiative was the Investment Guarantee Agreement (IGA) which was signed in 1987. The aim of the IGA was to promote intra-ASEAN FDI by providing a legal framework to protect investments in member economies on the premise of Most Favored Nation (MFN) treatment but not national treatment.
- ASEAN leaders then signed the ASEAN Investment Area (AIA) agreement in 1998 to attract FDI from outside as well as within ASEAN through a more competitive and transparent investment climate in ASEAN via deregulation and jointly promoting the region as an optimal investment destination.
- Finally, during the 12th ASEAN Summit, the Cebu Declaration on Acceleration of the Establishment of an ASEAN Community by 2015 was signed to speed up the process of developing a well-integrated ASEAN community at all levels. This includes the ASEAN Economic Community (AEC), of which free flows of investment and capital are integral components and which called for a review of the IGA and AIA. The outcome was the creation of the ASEAN Comprehensive Investment Agreement (ACIA) which aims to integrate the two previous agreements.

2.2 The AEC Blueprint — Will It Help Raise FDI?

The AEC was endorsed by ASEAN leaders at the Bali Summit in October 2003 as one of the three pillars of the ASEAN Community vision. In general, the AEC aims to integrate ASEAN into the global economy and create a single market and production base where goods, services, capital and labor flow freely, so that equitable development can be realized within the region. The successful construction of the AEC will have tremendous implications for investment flows into and within ASEAN by expanding the economies of scale and scope in the region. In 2007, ASEAN leaders agreed to push forward the AEC deadline to 2015 and approved the AEC Blueprint, which provides detailed outlines and commitments to achieve the unified market. The AEC Blueprint has four major components:¹

(1) Single Market and Production Base

- *Free flow of goods* including the elimination of tariffs and non-tariff barriers (NTBs), rules of origin harmonization and

rationalization, trade facilitation, customs integration (including the ASEAN Single Window), and standards and technical barriers to trade (including mutual recognition arrangements, or MRAs). Trade in goods receives the most attention, in part because it includes areas relevant to the entire AEC project (such as customs and other areas of trade facilitation).

- *Free flow of services* through a progressive increase in sectoral coverage, a commitment to advance mutual recognition of professional qualifications and services, and financial services liberalization through an ASEAN-X formula.
- *Free flow of investment*, particularly FDI, building on the process initiated by the ASEAN Investment Area (AIA). The AEC will integrate several agreements pertinent to FDI, such as investment protection, and emphasize the cornerstones of the AIA (i.e., national treatment, investment facilitation and cooperation, and promotion). This will be done under the ASEAN Comprehensive Agreement on Investment (ACIA).
- *Freer flow of capital*, as a means to strengthen ASEAN capital market development and harmonize capital market standards and practices in order to facilitate cross-border transactions. It also envisions greater capital mobility and liberalization, through an emphasis on orderly processes and guarantees of safeguards to maintain stability.
- *Free flow of skilled labor*, especially to facilitate FDI and trade in services, through MRAs and concordance of skills and qualifications.
- *More rapid liberalization of the 12 priority integration sectors* — wood-based products, automotives, rubber-based products, textiles and apparels, electronics, agro-based products, fisheries, e-ASEAN, healthcare, air travel, tourism and logistics.

(2) Competitive Economic Region

- Establishment of a *clear competition policy* to ensure a level playing field in the integrated ASEAN market.
- *Consumer protection*, including the creation of an ASEAN Coordinating Committee on Consumer Protection.
- Regional commitments in *intellectual property rights protection*, based on the ASEAN IPR Action Plan (2004–2010) and accession to the Madrid Protocol.

- Infrastructure development to improve transport links, narrow development gaps, and enhance regional information infrastructure.
- *Sectoral cooperation in energy and mining* to create stable supplies and enhance efficiency.
- *Taxation rationalization*, featuring a bilateral network that would avoid double taxation.
- Approaches to *e-commerce*, to be implemented through the e-ASEAN Framework Agreement.

(3) Equitable Economic Development

- *Fostering SME development* in ASEAN, with an emphasis on taking advantage of ASEAN's diversity.
- *Enhancing the goals of the Initiative for ASEAN Integration* launched in 2000, to narrow development gaps between older ASEAN-6 members and the newer ASEAN members (CLMV).

(4) Integration into the Global Economy

- ASEAN is to work toward "*ASEAN Centrality*" in external foreign economic relations (including in the area of free trade areas and other preferential arrangements with non-partners).
- *Enhanced participation in global supply networks*, with a strong dedication to the adoption of best international practices and standards.

The AEC Blueprint provides a comprehensive framework to increase investment because it contains many mutually reinforcing measures that will improve the investment climate of individual countries as well as the region as a whole. For example, sectoral cooperation will allow resource-rich but ill-equipped countries to learn and absorb technology from more developed members, increasing both its human and capital stock. A single market and production base will allow for more efficient allocation of resources via the phasing out of uncompetitive firms and better flow of information and also increase potential economies of scale through a bigger market.

Aldaba and Yap (2009) identifies four transmission channels that have key positive impacts on FDI flows.

- First, the ACIA is more comprehensive than previous agreements and provides a wide range of *investment provisions* on investment

liberalization, most-favored-nation and national treatment, and investment protection, promotion and facilitation. The lifting of foreign ownership restrictions, sector restrictions and performance requirements is expected to increase FDI. Similarly, *deeper integration features*, such as the legislation and harmonization of standards, competition and custom laws, intellectual property rights and dispute settlement mechanisms, will improve the region's investment climate particularly in services.

- Second, the improvement of *trade flows will significantly raise the level of vertical FDI* in the region, as the development of complex networks — comprising the fragmentation of production and trade in parts and components — dominates intra-regional trade and investment.
- Third, a *larger market* will prove more attractive for foreign MNCs.
- Fourth, studies have shown that *regional integration may affect FDI by generating growth*, although the causation for the positive relationship between FDI and economic growth is uncertain.
- Last, Aldaba and Yap (2009) summarized the findings of various studies that examine the impact of the EU, NAFTA and Mercosur on FDI inflows and found significant evidence that economic integration in these regions promoted investment.

The AEC Blueprint has a greater likelihood of producing a positive effect compared to previous initiatives because of its comprehensiveness and the disciplines it contains to encourage member states to show progress in key areas. However, the deadline of 2015 may not be realistic.

FDI figures in the last 2 years showed that the prospect of the AEC has failed to inspire a significant rebound in FDI in ASEAN countries. In fact, similar to previous investment agreements, there appears to be a great deal of scepticism over what the AEC will eventually achieve. More significantly, a business survey assessment carried out by ISEAS-ADB shows that there is a distinct lack of awareness of the AEC in the business community in the first place. In our opinion, 2015 as target-year is not realistic because there are too many obstacles that will prevent the full realization of the AEC.

Many of these challenges are political, such as vested interests and fear of competition. This is not helped by the fact that ASEAN member states come from very diverse cultural and economic bases, which makes cooperation more difficult. Historical legacies, territorial disputes and misunderstandings lead to mutual suspicion and increase the difficulty of close cooperation. Furthermore, it was not too long ago that most of these ASEAN members were victims of colonization, which has raised the level of nationalism and love for sovereignty that has resulted in resistance against an accelerated level of investment liberalization. Some consequences of these differences are the high levels of red tape in areas such as customs and migration and the immobility of labor and capital throughout the region.

According to the first AEC scorecard, the region has achieved 73.6% of the targets for the period 2008–09. In total, 91 out of 124 AEC legal instruments (73%) have entered into force, compared to only 50% in 2002 as of 31 December 2009. Due to this backlog of initiatives which will hinder future targets, we do not anticipate a higher score in future evaluations as long as unmet targets in the first phase remain unfulfilled.

Despite the shortcomings, it is important to realize that such top-down initiatives have been beneficial in encouraging bottom-up integration processes, which will allow the region to emerge increasingly like a single market over time. Essentially, private businesses have signalled plans for investment and jobs in the region that have become more closely interlinked. They have realized the need to provide support to the AEC's ambitious plans in order to tap into the value of economic integration. For instance, Air Asia is working toward its goal of a single ASEAN aviation authority by setting up an office in Jakarta to engage with the ASEAN Secretariat. CEOs from major private sector companies like CIMB Bank, Bangkok Bank, Air Asia and the Ayala Group have jointly launched the ASEAN Business Club (ABC) in order to engage in ASEAN community building efforts.

Apart from companies furthering their own integration agendas, top-down initiatives have also increasingly spurred cross-border mergers and acquisitions and joint ventures within ASEAN. For example, Singaporean and Malaysian banks and telecommunication firms have invested heavily in the region. Siam Cement is gearing up to invest 75% of its 2012–16 investment fund to acquire assets in ASEAN countries.

Even companies outside ASEAN have started to take notice, as shown by Shin Shin-Etsu Chemical, Japan's largest chemical producer, which has invested US\$64 million to build two chemical plants in Viet Nam with the hope of serving a large base of customers in the region.

2.3 The Truth About Regional Agreements

A lengthy list of investment agreements has failed to stem and subsequently reverse the declining FDI trend in ASEAN after the mid-1990s. We find that the main problems with these regional agreements lie in their enforceability. Even though the agreements appear to be far reaching, they often contain underlying clauses that allow members to delay or opt out of implementing certain measures. The most obvious are the temporary exclusions and sensitivity lists that are present in almost all ASEAN investment agreements. Appendix 4.1 summarizes the main industries that are either temporarily excluded or classified as sensitive in the ACIA for each country.

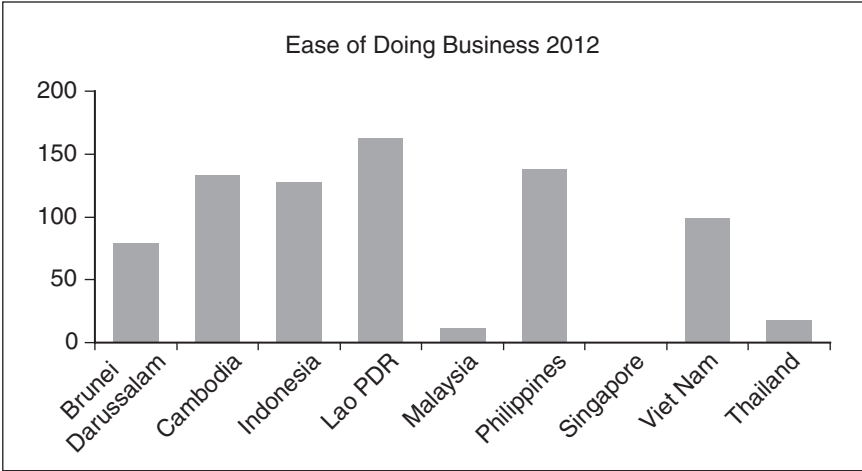
This suggests that these agreements, by themselves, are insufficient. While ASEAN regional actions and agreements can be helpful for attracting FDI, they can at best be only supplementary to and not substitute for the individual country actions. Each ASEAN country will need to have well-considered policies and carefully thought-out incentives. Strong country factors in each ASEAN nation complemented by solid ASEAN agreements could make the ASEAN region a FDI magnet again.

Country studies, such as the World Bank's annual Ease of Doing Business index and the World Economic Forum's Global Competitiveness Index (GCI) consistently show that countries that rank well often attract more FDI than those that rank lower. Figures 4.11 and 4.12 show the recent Ease of Doing Business rankings and The Heritage Foundation's ranking of economic freedom respectively, while Figures 4.13 and 4.14 show the GCI and ERIA's FDI Restriction Score.

The following findings are observed:

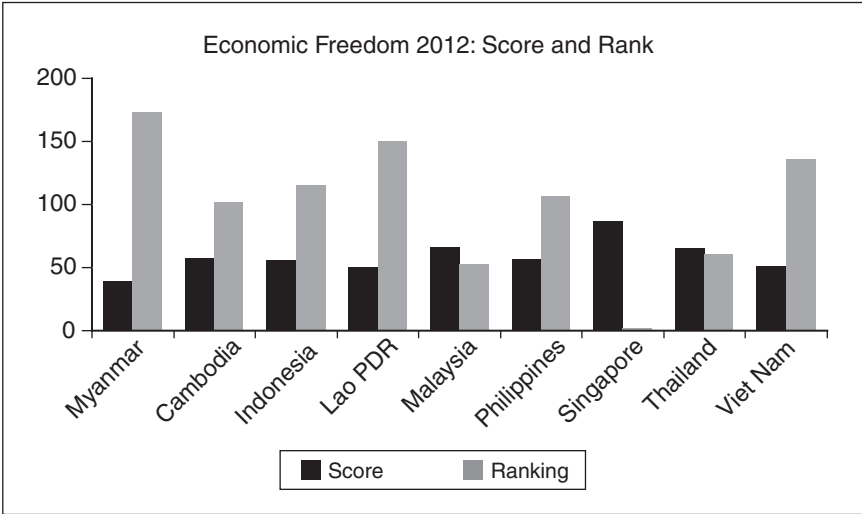
- Singapore is in a league of its own, topping all the metrics we look at in Figures 4.11 to 4.14. It has maintained its number one position in the Doing Business Index for the past 3 years, placed second on the index of economic freedom and jumped one place to second in the newest GCI for 2012. According to the ERIA measure, which is designed in such a way that the lower

FIGURE 4.11
Singapore, Malaysia and Thailand Rank High



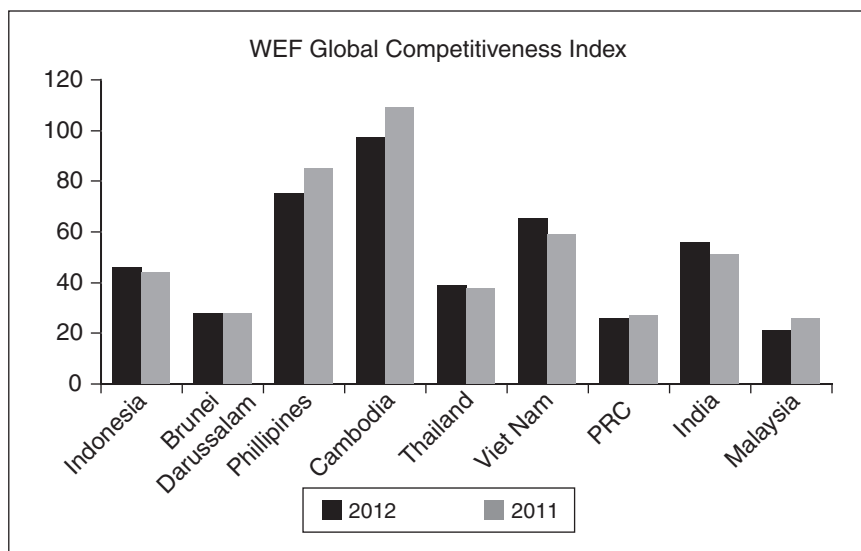
Source: World Bank and The Heritage Foundation.

FIGURE 4.12
Other Members Below Average



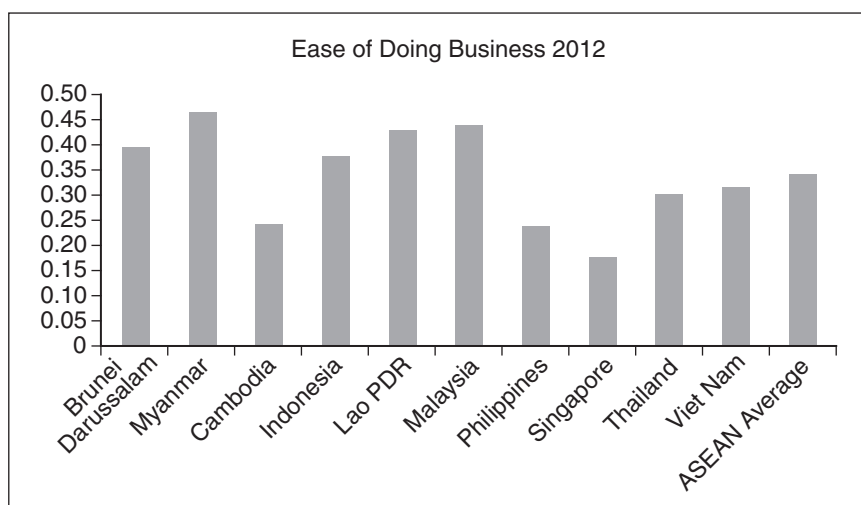
Source: World Bank and The Heritage Foundation.

FIGURE 4.13
Competitiveness Comparable to the PRC and India



Source: World Economic Forum, Economic Research Institute for ASEAN and East Asia (ERIA).

FIGURE 4.14
But Malaysia and Indonesia have Stringent FDI Rules



Source: World Economic Forum, Economic Research Institute for ASEAN and East Asia (ERIA).

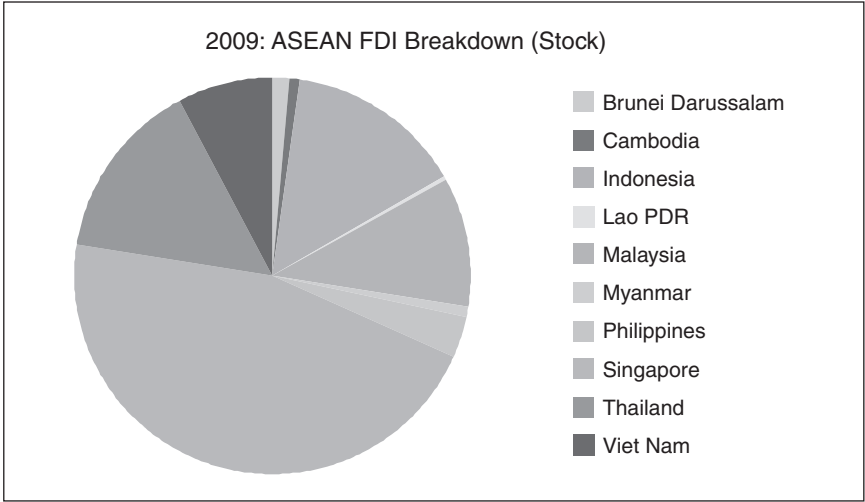
the score, the more open the economy's FDI regime, Singapore clearly outperforms its ASEAN counterparts.

- Thailand and Malaysia rank next, according to most, but not all, metrics. Apart from Singapore, these economies rank far higher than the other ASEAN countries in terms of the ease of conducting business and economic freedom. However, Malaysia has above-average restrictions on FDI, probably due to its law that forces foreign investors to have partnerships with indigenous firms in some industries instead of allowing full ownership of the business.
- Viet Nam comes next, performing relatively well and improving over time, although competitiveness has declined in the past year because of macroeconomic instability, such as high levels of inflation and a volatile currency.
- Brunei Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic, and the Philippines make up the next group whose performance is indifferent. These countries rank in the lower rungs of the Doing Business rankings and are generally considered to fare poorly in terms of the competitiveness of their industries. Although Brunei Darussalam is ranked respectably on the GCI, its FDI restriction score is the highest in ASEAN — reflective of the economy's inward and protectionist nature. Myanmar is not covered in most surveys due to its lack of available and reliable data but it performs particularly badly where it is covered.

2.4 Respective Country Conditions Still Most Critical FDI Factor

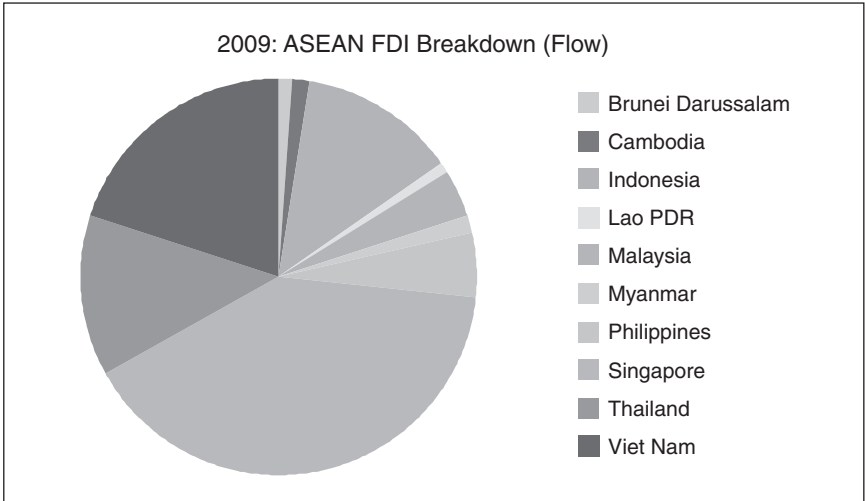
These findings corroborate Figures 4.15 and 4.16, which show the wide disparities of FDI levels among ASEAN countries. It is clear from the charts that members with better investment climates — higher incentives and lower country risks — tend to have higher levels of FDI. Accordingly, Singapore dominates other member countries by attracting almost half of total FDI stock and 40% of total FDI inflows in ASEAN followed by Thailand and Indonesia. Peripheral economies, such as Myanmar, Cambodia, Brunei Darussalam and Lao People's Democratic Republic account for less than 5% of ASEAN's FDI.

FIGURE 4.15
Singapore Dominates Both FDI Stock ...



Source: Calculated by Centennial Asia Advisors using UNCTAD data.

FIGURE 4.16
and Flow in ASEAN



Source: Calculated by Centennial Asia Advisors using UNCTAD data.

ERIA's studies on ASEAN members' investment climates were meant to complement the AEC scorecards as a way to evaluate the progress of the AEC implementation process. ERIA conducted two separate surveys involving Japanese firms and non-Japanese foreign firms in ASEAN countries. Essentially, the surveys confirm that impediments to FDI exist not only in the policies but also in their implementation. Overall, the studies suggest that ASEAN have improved the explicit investment climate but many direct barriers to FDI still exist. Tables 4.4–4.6 summarize the results of the surveys between 2008 and 2010, allowing for time-series comparison to track the progress of investment liberalization in ASEAN. The tables yield the following observations:

- Complaints about FDI facilitation are overwhelmingly greater than about FDI liberalization, suggesting that the more serious problem in ASEAN lies with implementation (country factors) and not the lack of policies drawn up to attract FDI. For instance, 86 complaints were filed in 2010 seeking improved transparency and institutional policies and regulations concerning investment. Of these 69 complains (nearly 80%) were in Indonesia, Thailand, Malaysia and Viet Nam. Ninety-one out of 121 complaints that were filed again complicated and delayed procedures were in Indonesia, Thailand, Malaysia and Viet Nam. Similarly, 91 out of 121 complaints that were filed again complicated and delayed procedures were in Indonesia, Thailand, Malaysia and Viet Nam. This shows that even major ASEAN members who attract the bulk of FDI in the region, excluding Singapore, have major facilitation problems which if addressed effectively, would likely increase the level of FDI that they attract.
- The above trend persisted from 2008 through 2010, suggesting that the AEC has thus far failed to address and reduce country-specific flaws that have led to complaints by investors. The hardware and software constraints at the country level need to be addressed. ERIA's study clearly indicates the areas that the ASEAN countries need to improve at individual country level. After all ERIA findings are based on the interviews with the business people who are supposed to bring in FDI.

FDI facilitation	0	14	64	13	43	20	31	5	55	64	309	79
(v) Lack of transparency in policies and regulations concerning investment (institutional problems)	0	5	22	1	11	7	4	0	16	20	86	22
(vi) Complicated and/or delayed procedures with respect to investment related regulations (implementation problems)	0	3	29	6	15	8	13	0	25	22	121	31
(vii) Insufficient protection of intellectual property rights	0	0	1	0	2	0	0	0	1	0	4	1
(viii) Labor regulations and related practices excessively favorable to workers	0	0	2	0	5	0	8	2	2	5	24	6
(ix) Underdeveloped infrastructure, shortages of human resources, and insufficient investment incentives	0	6	8	6	7	5	6	3	10	13	64	16
(x) Restricted competition and price controls	0	0	2	0	3	0	0	0	1	4	10	3
Total	0	14	83	14	57	28	39	6	75	74	390	100

Source: ERIA.

TABLE 4.5
Investment Climate in ASEAN Members in 2009:
The Number of Incidents by Category and Country

	Brunei Darussalam	Cambodia	Indonesia	Lao PDR	Malaysia	Myanmar	Philippines	Singapore	Thailand	Viet Nam	Total	Share by category (%)
FDI liberalization	0	0	17	0	11	8	10	1	19	8	74	20
(i) Restrictions on foreign entry	0	0	10	0	5	2	7	0	8	3	35	10
(ii) Performance requirements	0	0	3	0	3	0	0	0	3	2	11	3
(iii) Restrictions on overseas remittances and controls on foreign currency transactions	0	0	2	0	1	6	2	0	5	2	18	5
(iv) Restrictions on the movement of people and employment requirements	0	0	2	0	2	0	1	1	3	1	10	3
FDI facilitation	0	14	51	4	44	20	42	6	50	58	289	80
(v) Lack of transparency in policies and regulations concerning investment (institutional problems)	0	5	13	0	13	8	7	0	12	18	76	21

(vi) Complicated and/or delayed procedures with respect to investment-related regulations (implementation problems)	0	3	23	1	14	7	16	0	24	19	107	29
(vii) Insufficient protection of intellectual property rights	0	0	1	0	2	0	3	0	1	1	8	2
(viii) Labor regulations and related practices excessively favorable to workers	0	0	2	0	5	0	10	3	3	4	27	7
(ix) Underdeveloped infrastructure, shortages of human resources, and insufficient investment incentives	0	6	9	3	8	5	6	3	9	13	62	17
(x) Restricted competition and price controls	0	0	3	0	2	0	0	0	1	3	9	2
Total	0	14	68	4	55	28	52	7	69	66	363	100

Source: ERIA.

TABLE 4.6
Investment Climate in ASEAN Members in 2008:
The Number of Incidents by Category and Country

	Brunei Darussalam	Cambodia	Indonesia	Lao PDR	Malaysia	Myanmar	Philippines	Singapore	Thailand	Viet Nam	Total	Share by category (%)
FDI liberalization	0	0	14	0	11	7	9	1	15	9	66	21
(i) Restrictions on foreign entry	0	0	10	0	5	2	6	0	8	4	35	11
(ii) Performance requirements	0	0	2	0	3	0	0	0	2	2	9	3
(iii) Restrictions on overseas remittances and controls on foreign currency transactions	0	0	0	0	1	5	2	0	3	2	13	4
(iv) Restrictions on the movement of people and employment requirements	0	0	2	0	2	0	1	1	2	1	9	3
FDI facilitation	0	16	28	4	33	21	48	6	45	49	250	79
(v) Lack of transparency in policies and regulations concerning investment (institutional problems)	0	5	5	1	8	8	11	0	14	12	64	20

(vi) Complicated and/or delayed procedures with respect to investment-related regulations (implementation problems)	0	5	11	1	10	7	16	0	20	18	88	28
(vii) Insufficient protection of intellectual property rights	0	0	2	0	3	0	3	0	2	1	11	3
(viii) Labor regulations and related practices excessively favorable to workers	0	0	2	0	5	0	10	3	3	4	27	9
(ix) Underdeveloped infrastructure, shortages of human resources, and insufficient investment incentives	0	6	6	2	7	5	8	3	5	11	53	17
(x) Restricted competition and price controls	0	0	2	0	0	1	0	0	1	3	7	2
Total	0	16	42	4	44	28	57	7	60	58	316	100

Source: ERIA.

3. Recommendations

3.1 Assessment of Trends

Put simply, the foregoing discussion suggests that several countries in ASEAN enjoyed an attractive investment climate up to the 1990s, but since then the region's attractiveness relative to emerging economic powers has diminished, a diminution which successive efforts at the ASEAN level to promote investment have not fully rectified.

What is likely to improve in time?

In looking forward, it is important to bear in mind that some factors are coming into play which will help raise ASEAN's investment attractiveness over time.

First, ASEAN used to be ahead of the PRC and India in attracting FDI for the simple reason that most ASEAN countries were much more open to FDI than the PRC or India and able to attract a large stock of FDI that was out of proportion to the size of ASEAN economies and in comparison with the accumulated stock of FDI in the PRC and India. As the PRC especially, and India to some extent, opened up to FDI, global companies had to re-evaluate their portfolio of foreign investment. There began a process of re-adjustment within these portfolios to increase the under-represented stock of the PRC and Indian investment which inevitably meant reduced flow of FDI to ASEAN so long as this re-adjustment process was unfolding. With the stock of FDI in the PRC now substantial and more reflective of its size, competitiveness and other economic fundamentals, this re-adjustment process can slow, allowing some recovery of FDI into ASEAN.

Second, the one-off political and financial adjustments which created uncertainties or obstacles for investors, such as difficulties in securing bank loans in the post-1997 crisis period, are mostly over now. With fewer headwinds, domestic and foreign investors have fewer disincentives to invest. As political, financial and other uncertainties diminish and remain low for an extended period, the hurdle rates for an investment project to be approved by a company will tend to fall in line with a declining risk premium. This should help improve investment over time.

Third, under-investment in critical power, transportation and other infrastructure since 1997 has reached a point where congestion and risks of power shortages are spurring a new wave of investment in infrastructure. Major policy-led infrastructure programs have been announced in Indonesia, Thailand and Malaysia, for instance, while even Singapore with its relatively good infrastructure, had been stepping up

investment in mass transit schemes. In other words, ASEAN could be poised to enjoy a rebound in investment rates in coming years.

What needs to be put right?

However, such a rebound is not guaranteed. Unlike before 1997, ASEAN countries now face competition with the PRC and India and not just with one another. The above discussion also raises several issues which need to be addressed if this rebound is to materialize.

The Need for Scale Economies

One major challenge for ASEAN is in scale economies. ASEAN needs to offer scale economies for businesses that are unique or competitive with those offered by the PRC and India. Individually, each ASEAN economy cannot provide anything close to the market size that the two Asian giants can offer businesses, as Table 4.7 brings out. However,

TABLE 4.7
Population and Economic Size:
ASEAN Compared to the PRC and India

	Population	2010 GDP, US\$bn	2010 GDP per capita, US\$
PRC	1,338,299,512	3,243	2,423
India	1,170,938,000	971	830
ASEAN	591,814,000	1,496 (2009)	2,532
Brunei Darussalam	398,920	7 (2009)	17,092 (2009)
Cambodia	14,138,255	8	551
Indonesia	239,870,937	274	1,144
Lao PDR	6,200,894	3.5	553
Malaysia	28,401,017	147	5,174
Myanmar	47,963,012	25 (2009)	419 (2009)
Philippines	93,260,798	129	1,383
Singapore	5,076,700	162	31,990
Thailand	69,122,234	187	2,712
Viet Nam	86,936,464	63	723

Source: World Bank (GDP in constant 2000 prices), ASEANstats (Brunei Darussalam, Myanmar and ASEAN figures updated as of 2009).

the collective weight of ASEAN is considerable and sufficient to offer attractive scale economies.

Therefore, any recommendations should not only focus on reforms that individual economies should undertake to improve its investment climate but also include ways to encourage progress in the fulfillment of the AEC goal in order to rebrand ASEAN as a region which businesses can thrive in and be excited about.

Creating a Sense of Opportunity: The ASEAN Brand

Many recommendations for improving ASEAN's competitiveness in attracting investments focus on improving specific areas like infrastructure or raising the savings rate or leveraging more effectively on ASEAN's investment plans. These are important but not likely to be the critical factor. Instead, ASEAN needs to recapture the sense of opportunity and the promise of high returns that the core ASEAN economies were offering from around 1986 to 1996. The way to do this is to change investors' perceptions, so that they believe that ASEAN can also offer not just scale economies that are fairly strong compared to the PRC and India but also unique opportunities that are equally exciting. For this, it needs to have a new approach to economic integration.

For this to happen, ASEAN must strive to behave like a single market whenever possible in a bottom-up approach toward the formation of the AEC. In fact, there are some successful examples of joint investment programs between member countries that can either be expanded so that they are more inclusive of other members or replicated with other member states such that the overall level of investment can be maximized.

We think that national governments have also not fully appreciated the benefits of economic integration. A campaign to re-emphasize these benefits is necessary to provide the impetus to move forward in terms of realizing the AEC. With regards to investment, it is clear that economic cooperation and integration can create synergies and economies of scale, such as market size, which are essential to attracting investment. An additional benefit is improved ties between cooperating countries where an increased reliance on legal mechanisms like treaties and Memorandums of Agreement help to resolve potential disputes.

3.2 Recommendations — ASEAN Wide Level

A practical approach to improving ASEAN's investment climate must be realistic in appreciating that the political obstacles toward full-blown integration will take time to dissipate. On too many occasions, ASEAN countries compete with one another rather than act in unison. This boils down to the fact that ASEAN governments choose to retain their sovereignty instead of engaging in shared decision making that transcends national boundaries. Such an outcome is difficult to avoid, considering that conflicts in ideologies regarding economic growth models, political systems and lingering suspicions of one another due to unresolved territorial or other conflicts will not go away soon and will maintain the strong unwillingness to cede power for joint efforts that could produce collective economic benefits. This is why ASEAN members sign bilateral agreements separately, undermining the cohesiveness of the group.

The practical answer is to focus on bite-sized regional integration — where the case for substantial synergies from integration can be realized more easily. Once these synergies are released and the benefits of regional integration demonstrated, the larger efforts at regional integration can proceed with less opposition. The Iskandar and Greater Mekong Subregion projects are examples of subregional integration that could be extended to include other regions. The successful implementation of these integration efforts can also inspire similar projects that will benefit overall investment in ASEAN.

Focus on New Forms of Economic Integration such as Subregional Integration

Iskandar Region

The Iskandar Region was established in 2006 as part of the 9th Malaysia Plan and includes Johor Bahru and its surrounding towns of Pontian, Senai and Pasir Gudang. The intention is to create a thriving development area with a wide economic base and which by 2030 is projected to have the per capita income of a developed country. The project is in the interest of both Singapore and Malaysia, as there are huge benefits and synergies that can be gained through closer integration between Singapore and the Iskandar Region. It is the culmination of a natural, symbiotic and historical relationship between Singapore and Malaysia, which is much more complementary than competitive.

- Singapore has always had a close relationship with Johor (Bhaskaran 2008). Even before the British rule from 1819 to 1967, despite different political systems and jurisdictions, there was a seamless flow of goods and people between both countries. After 1967, the integration between Singapore and Malaysia began to wither as they followed separate economic and political paths. From 1986 to mid-1990s, there was an outward relocation of manufacturing activities from Singapore and Singapore tourism ventured into Johor. The proximity and historical relationship make renewed cooperation between the two areas more viable and attractive.
- There exist clear complementarities. For Singapore to attain its desired status as a global city, it needs to grow bigger as the mass within the Singapore territory is insufficient. In comparison with other global cities with multiple airports, Singapore is lagging behind with just one. However, it is highly constrained by its limited land, and it is impossible to have another large airport or seaport in its territory. In addition, Singapore is also constrained by population density limits which will cause it to lose its competitive edge. Iskandar's youthful demographic profile and abundant land present Singapore with the ideal hinterland that will provide it with the necessary economies of scale and critical mass to continue its drive toward becoming a global city.
- From Malaysia's point of view, it can also take advantage of the critical mass and connectivity, such as transportation facilities, that are available in Singapore. Cooperation and investment from Singapore will also help to boost Malaysia's competitiveness which is way below the level of Singapore. Furthermore, Singapore's tourism products can complement Iskandar's, so that the total product is compelling and varied enough to keep bringing tourists back for repeat visits. In addition, economic integration would lower business costs for SMEs. The lower cost of living will significantly ease the burden of lower-income groups. Heightened economic cooperation would also improve the overall quality of life for people of both countries, as congestion may be reduced and the increase in diversity would create greater choices for consumers.

Thus, the synergies released from integration will be huge and the net benefits visible. The demonstration effect of visible benefits will help push the case for wider integration efforts over time. The results have been encouraging. According to official figures, the Iskandar Malaysia development region has brought in RM77.82 billion in new investments by September 2011, much higher than the target of RM47 billion. Approximately 60% are domestic investments, while the rest is from foreign sources. Singapore's cumulative committed investments into Iskandar Malaysia have totalled RM4.13 billion as of the end of June 2011.

Greater Mekong Subregion (GMS)

The GMS program began in 1992 and comprises the ASEAN members Lao PDR, Myanmar, Thailand, Cambodia and Viet Nam and the Yunnan Province and Guangxi Zhuang Autonomous Region of the People's Republic of China. The aim of the program is to foster economic cooperation to enhance the living standards and economic prosperity of the collective region through a three-pronged strategy of increasing connectivity, improving competitiveness and building a greater sense of community. An "economic corridor" approach has been adopted by the GMS governments with the intention of achieving more equitable development for poorer locations through better integration with their more prosperous neighbors. Three such economic corridors have been identified: the East-West Economic Corridor (EWEC), the North-South Economic Corridor (NSEC) and the Southern Economic Corridor (SEC). Similar to the Iskandar Region, the key to achieving the GMS's goals is to leverage each region's strengths to compensate for its weaknesses. Priority infrastructure projects worth around US\$11 billion have either been completed or are being implemented.

- For example, the most prominent corridor is the SEC, which covers six provinces in Eastern Thailand, 21 provinces and municipalities in Cambodia, four regions in Viet Nam and six provinces in Lao PDR (Wiemer 2009). These areas contain established manufacturing and agricultural hubs, rich natural resources, big consumer markets and tourist attractions that provide the SEC with great potential for economic development.
- The economic diversity of the four countries in the SEC generates a wide range of complementarities that could produce valuable

economies of scale if used efficiently. For instance, Thailand has the most developed infrastructures, highly educated workers and a good level of technological base, but its labor costs have been rising rapidly. Conversely, Lao PDR and Cambodia have poor infrastructure development, such as unreliable transport and power generation systems, but they possess a large workforce of lowly educated workers who command much smaller wages compared to Thailand. Similarly, Viet Nam's labor force is relatively skilled but wages have been creeping higher because of government policies to raise living standards, although it boasts abundant land and marine resources as well as a rapidly growing class of consumers that businesses can exploit in a well-integrated SEC.

Thus, a Push for More Cross-border, Subregional Integration is recommended.

ASEAN leaders should study the results and implementation process of the Iskandar Region and the Greater Mekong Subregion and draw lessons from them, so that more cross-border, subregional integration could take place that would allow member states to gain competitiveness and enhance their investment climates. Ideally, the "One Economy, Many Countries" model should be used wherever possible. This would require massive deregulation across industries and modifications of existing legislation concerning labor, immigration and commercial matters so as to ensure:

- Companies registered in one country can operate freely in another;
- There is reasonably free flow of labor;
- People movement is made easy — little in the way of immigration checks, etc;
- Goods continue to flow across the border as in pre-separation days;
- The Stock Exchange and currency are unified.

The list above is not exhaustive, yet it demonstrates the difficult challenges that confront governments when pushing for integration between areas of diverse economic statuses, cultures and ideologies. For example, Singapore has a much more welcoming stance toward foreign

companies compared to Malaysia, which places various restrictions on how a foreign firm can operate there. In addition, countries have different levels of tolerance toward issues such as the level of environmental responsibility or immigration requirements. All these suggest that much political will is needed for participating governments to exert thorough discussions to iron out differences and come up with compromises, so that sustainable integration can commence.

The GMS experience also indicates that integration need not be confined to ASEAN member states: cooperation and integration with other Asian economies should also be considered as long as there are mutual economic benefits to be reaped. We briefly discuss two options that have the potential to achieve deep integration for ASEAN. Table 4.8 summarizes the various growth triangles in ASEAN. ADB has recently approved a Regional Technical Assistance (RETA) to strengthen regional cooperation and promote links among BIMP-EAGA, IMT-GT, GMS and ASEAN to help implement the Master Plan on ASEAN Connectivity and actualize the AEC by 2015.

- First, the rise of the PRC as an economic giant and the corresponding liberalization of its economy present challenges for ASEAN economies, such as competition for investment as discussed in Section 1. However, its emergence has also produced opportunities, including increased trade and complementarities to exploit. ASEAN is a region well-endowed with natural resources and could help the PRC meet its increasing demand for oil, gas and minerals to drive its rapid industrial expansion. Likewise, the PRC can serve as an export platform for ASEAN manufactured exports and as a profitable final market due to its vast consumer market. It can also absorb manufacturing operations from Singapore and Malaysia, which are looking to move up the value chain while shifting low-level textile operations to lower-wage economies like Cambodia and Myanmar. How can ASEAN and the PRC better integrate their economies?
- One initiative that seems to have lost steam in recent years is the Pan-Beibu Gulf Economic Region (PBG). Authorities should immediately revive talks to accelerate the realization of this project. The PBG is a proposed integrated zone that the Pan-Beibu Gulf Economic Cooperation Zone, the two plates of the GMS and the Nanning-Singapore Economic Corridor linking to form an

M shape (Gu and Li 2009). The entire region will cover parts of the PRC, Viet Nam, Malaysia, Singapore, Indonesia, Brunei Darussalam and the Philippines. The geographical location and environmental conditions of the PBG mean that it has great potential to become a transportation hub for the PRC and ASEAN via air, coast and land. Once the transportation infrastructure is in place, the PBG can be developed into a dedicated center for trade and logistics between the PRC and ASEAN.

- Second, a sizeable effort should be undertaken in Cambodia, Lao People's Democratic Republic, Myanmar and Viet Nam (CLMV) to help them integrate better with the more developed ASEAN economies. Although the CLMV countries have grown rapidly in recent years, they still lag behind the other ASEAN economies considerably in terms of social, infrastructure, economic, and financial development. There is much potential for the CLMV to cooperate and jointly develop industries that are useful and competitive. For example, a combined state-enterprise between the countries could be set up to expand, upgrade and modify infrastructure in a way that more complementarities between the countries can be created, producing more opportunities for future cooperation. This could be within the framework of special economic zones (SEZs) that integrate the CLMV countries through demarcated production sites, efficient administrative rules to expedite processes, and business services to provide financing, legal, logistics and labor training support for businesses that operate within the SEZs. For this to happen, the annual CLMV Summit must work to create and operationalize action plans instead of remaining a largely symbolic forum.

TABLE 4.8
ASEAN Growth Triangles

Progress	Remarks
Indonesia-Malaysia-Singapore Growth Triangle (IMS-GT)	
The IMS-GT is a natural extension of the Singapore-Johor-Riau triangle. The tripartite scheme was formally	Limitations to progress: <ul style="list-style-type: none"> • The Asian Financial Crisis deteriorated the business

Progress	Remarks
<p>recognized in 1994. It is the most successful among all growth triangles in ASEAN in enhancing investment competitiveness.</p> <ul style="list-style-type: none"> • Singapore has been able to secure future water, food and energy supplies. • Batam has achieved the highest per capita income in Indonesia, thanks to FDI from Singapore. • As the gateway to Malaysia from Singapore, Johor has been able to exploit metropolitan spillover effects from Singapore and facilitate an economic catch-up. It is now one of the most developed states on the Malaysian Peninsula. 	<p>environment across Asia and led to the decline of investment.</p> <ul style="list-style-type: none"> • Broader bilateral and multilateral relations have impinged on the potential of the growth triangle. • Continued impediments to cross-border flows of goods and labor. • Poor law enforcement, complex tax policies, frequent riots and conflicting government authorities, especially in Batam. • The Johor-Riau link remains limited due to the lack of economic complementarity. Malaysian investment in Indonesia remains confined to palm oil plantations and two industrial parks in West Sumatra and Riau.

Brunei Darussalam-Indonesia-Malaysia-The Philippines East ASEAN Growth Area (BIMP-EAGA)

EAGA spans four ASEAN nations and is the Asia's largest regional grouping. It has been said to be the fastest growing since its creation in 1994.

- Improved air and sea transportation links. Substantial reduction in port and dockage fees increased trading activities between Mindanao, the Philippines and North Sulawesi, Indonesia.
- The Philippine tourism industry benefited most in terms of visitor arrivals. EAGA investments in the Mindanao tourism sector totalled over US\$500 million.
- Improved GSM telecommunications, making cross-border transactions easier and encouraging commercial expansion.

Limitations to progress:

- Economies remain competitive rather than complementary. In particular, Brunei Darussalam, Indonesia and East Malaysia produce oil and gas, while Indonesia and the Philippines export agricultural products.
- No Singapore equivalent to act as an industrial leader and provide metropolitan spillovers and other resources.
- Areas are geographically separated while infrastructure is deficient. Governments have actively promoted air and sea routes and telecommunication facilities, with some success.
- Barriers to trade and investment have not been fully removed. The governments agreed when signing

TABLE 4.8 (Cont'd)

Progress	Remarks
	the EAGA pact that full and efficient functioning of the growth area could take decades.
Indonesia-Malaysia-Thailand (IMT-GT)	
Beginning in 1993, the pact aims to accelerate private sector-led economic growth, reduce poverty and improve peace and stability in the subregion.	Limitations to progress:
Progress has been limited, but as in the case of BIMP-EAGA, there has been significant expansion of air routes and promotion of tourism.	<ul style="list-style-type: none"> • Lack of infrastructure: many areas are still underdeveloped, while other planned infrastructure projects have been delayed due to technical, financial and legal impediments.
<ul style="list-style-type: none"> • Cooperation in halal products and services has been active, though only in the realm of activities such as expos, seminars and capacity building, instead of concrete projects. 	<ul style="list-style-type: none"> • Limited complementarity: Penang has the potential to serve as the metropolitan core, but is significantly less accessible than Singapore in the IMS-GT.
<ul style="list-style-type: none"> • Joint tourism promotion has successfully marketed the IMT-GT as a tourist destination. 	<ul style="list-style-type: none"> • Lack of coordination at the working-group level has prevented projects from reaching a critical mass in order to create an impact. Recommendations provided by ADB regional technical assistance (RETA) have also not been mainstreamed into the working groups.
<ul style="list-style-type: none"> • Significant improvement in air routes, although other mobility issues such as visa waivers and the reduction of travel taxes are still being developed. 	<ul style="list-style-type: none"> • Governments lack clarity in providing incentives for private sector initiatives.
	<ul style="list-style-type: none"> • Human resource development projects, such as establishing a university network, university accreditation and labor mobility are beyond the mandate of sub-regional bodies.
Greater Mekong Subregion Economic Cooperation Program (GMS-ECP)	
Established in 1992, the GMS program is about market-based integration as opposed to institutional integration.	Limitations to progress:
	<ul style="list-style-type: none"> • Underdeveloped infrastructure in most parts of the GMS means that much of the focus is on physical

Progress	Remarks
<ul style="list-style-type: none"> • US\$11 billion worth of priority infrastructure projects are being carried out or have been completed with the assistance from ADB and other donors. The reduced economic distance is associated with an 11-fold increase in intra-regional trade since 1992. • Economic growth in the GMS has been striking, though it is difficult to determine the extent of the GMS program's contribution. • Trade within the GMS and with the world has expanded, though a significant portion of intra-GMS trade is informal. • FDI has risen, especially intra-GMS FDI, which is an important source of capital for smaller countries, such as Lao People's Democratic Republic. • Subregional cooperation in promotional campaigns and other initiatives has firmly placed the GMS on the world map as a tourist destination. 	<p>infrastructure development. Until this constraint is overcome, the aim of market integration through increased connectivity and lower transport costs is a far-off goal.</p> <ul style="list-style-type: none"> • Despite extraordinary economic growth, a significant portion of the region remains in poverty. There has been little attention paid to growing inequality, ethnic minorities, and basic health and education. • Development has mostly taken place along coastal areas of the GMS countries; hence, the interior regions of larger countries are lagging behind national growth. The speed of convergence of poorer members with the rest of ASEAN remains slow. • Poor credit ratings of the GMS countries in the past had limited inward private investment flows.

Source: Compiled by Centennial Asia Advisors using various sources.

Make a Big Push for Increased Physical Connectivity

One crucial strategy to achieve cross-border integration is to establish efficient transport links for increased physical connectivity between two regions. This would facilitate the flow of labor, raw materials and goods, so that intra-regional trade and production could be optimized. The experience of other iconic connectivity projects shows that improving physical connectivity can have tremendously positive benefits, as the synergies from connecting complementary subregions are released. For example, the Øresund Bridge that connects Copenhagen and Malmö was built in 2000 and carries over 60,000 commuters daily

between the two cities. The bridge has facilitated incredible access for the Danes and the Swedish to each other's country. Rising house prices in Copenhagen has encouraged many Danes to relocate to Malmö yet are able to maintain jobs in Denmark due to easy commute between the two towns, mitigating any labor shortage in Copenhagen. At the same time, Danish employers have also found it easier to recruit Swedish employees and vice versa leading to a peak in employment numbers for both countries in 2007. Some ongoing projects strive to achieve increased connectivity.

- **High-speed train link between Kuala Lumpur and Singapore:** Under ETP, Prime Minister Najib Razak's administration is planning a high-speed rail (HSR) system linking Penang, Kuala Lumpur and Singapore. The project is estimated to cost RM8–14 billion. A feasibility study has found that the HSR journey from Kuala Lumpur to Singapore could take 2.4 hours, the train travelling up to 280km/hour. Through fast and efficient physical connectivity, the realization of the project would facilitate trade flow, alleviate the flow of manpower, build up tourism potential and link the two countries to become a prime economic hub.
- **Rapid Transit System between Johor and Singapore:** Singapore and Malaysia are also due to undertake a rapid transit system project connecting Johor and Singapore by 2018. Commuters will only need to clear immigration once per travel. The proposal is part of a land swap agreement signed by both countries in June 2011 to free up Malaysian railway land in Singapore for joint development.
- **Sunda Strait Bridge:** The Sunda Strait Bridge (JSS) will connect Java and Sumatra, cutting travel time significantly between the two Indonesian islands. It is planned to be completed by 2022. This would be part of Indonesia's Master Plan 2011–2025 for economic development.
- **Strait of Melaka Crossing:** It is designed to connect Malaysia to Sumatra and will be the world's longest link at 128 km. The project is meant to increase political security and ignite social change in the region. However, there are concerns regarding safe navigation, as the bridge and its construction will affect traffic of more than 70,000 shipping vessels per year.

Showcase Iconic Projects and Successful Industries to Entice Investors.

These projects and industries will serve to highlight to investors the potential of ASEAN economies.

(a) Economic Transformation Programme (ETP), Malaysia

The ETP, managed by the Performance Management and Delivery Unit (PEMANDU), is a national effort intended to transform Malaysia into a high income country by 2020 that is service-based. The program aims to more than double gross national income per capita primarily through private investments and generate 3.3 million new jobs. The authorities identified 12 National Key Economic Areas (NKEAs) that are projected to become key growth drivers of the country which will lead to 131 new “Entry Point Projects”. The NKEAs are complemented by 51 broad and cross-cutting policy measures that are categorized into six Strategic Reform Initiatives (SRIs) that will strive to achieve efficiency and competitiveness for both the public and private sectors in Malaysia.

The ETP has firmly established itself as the buzzword and pet project of the government, which has used every opportunity to market the program to foreign investors and the domestic audience until the point that it is synonymous with the government’s progress. In the sixth progress update of the EPT on 13 June 2011, Prime Minister Najib Razak announced that the ETP had seen 50% of its 131 Entry Point Projects taking off, which accounted for RM170 billion in investment and 362,396 new jobs — a much quicker rate required to hit the RM440 billion total investment target for the decade.

(b) Master Plan for the Acceleration and Expansion of Indonesia’s Economic Development (MP3EI), Indonesia

MP3EI, unveiled on 13 May 2011, is coordinated by a committee chaired by President Yudhoyono. The plan provides a framework for achieving Indonesia’s aim of becoming one of the 10 major economies in the world with a US\$4.5 trillion GDP, by 2025. The Master Plan includes eight main programs, each consisting of 22 main economic activities, including commodities, agriculture, and defence. Three implementation strategies have been recognized: (i) developing regional economic potential in six Indonesia Economic Corridors; (ii) strengthening national

connectivity; and (iii) strengthening human resource capacity, and science and technology to support the development of main programs. The Master Plan was designed to support and complement currently ongoing economic development plans by the government, such as the Long Term National Development Plan and the Medium Term National Development Plan.

Infrastructure projects are to be the focus for the next 5 years, including the expansion of airports, a rig project, power plants and highways. The government set aside US\$464 billion to be invested for the next 14 years, including infrastructure, but the private sector is expected to take the lead in the longer term. As of 11 August, 39 projects worth Rp400 trillion have officially started. Even amidst the economic crisis, Indonesia remains attractive to investors; foreign direct investment has shown positive increases. Republic of Korea, Japan and the PRC, the three leading investor countries, will establish secretariats to support Indonesia's Master Plan.

(c) Pharmaceutical Industry, Singapore

Between 2003 and 2008, Singapore's pharmaceutical sector received around 30 to 40% of total FDI in the manufacturing industry, reaching a record 41.1% in 2007. Such world-class organizations as GlaxoSmithKline, Roche, Merck Sharp and Baxter are among the pharmaceutical companies that have significant investments in biological facilities or established regional headquarters in Singapore. These foreign investors have profited from their investments. The returns on investment (ROI) make the pharmaceutical sector one of the most profitable sectors. They are consistently above the ROI of the manufacturing industry in general (see Table 4.9).

Singapore is the fourth largest foreign exchange trading center in the world and is a leading provider of a wide array of services such as international banking, insurance, wealth management, legal services and trade financing. Investors also get to enjoy a politically sound environment, protection of ideas and innovations, and the many FTAs and Investment Guarantee Agreements that the country has in place.

The Singapore government has also rolled out specific incentives catering to the pharmaceutical and biomedical sector, including measures to increase foreign participation. It has ensured that top-quality infrastructure is available for R&D purposes by spending S\$295 million on a Biopolis hub, which is a designated cluster aimed to bring

TABLE 4.9
Return on FDI in Singapore's Manufacturing Industry
 (%)

	2003	2005	2007	2008
Total FDI	12.7	17.9	19.2	13.8
Manufacturing	19.0	22.7	30.5	17.9
Food, Beverages & Tobacco	11.6	26.1	9.1	0.9
Textiles, Wearing Apparel and Leather	-13.2	-7.2	-0.4	-2.7
Wood & Wood Products	-4.9	-2.8	-3.6	-2.9
Paper & Paper Products, Printing and Publishing	4.0	6.3	4.0	4.3
Refined Petroleum Products	15.1	27.4	41.7	2.7
Chemical & Chemical Products	13.6	21.8	17.1	3.7
Pharmaceutical Products	22.5	29.6	42.8	26.5
Rubber & Plastic Products	12.1	12.1	9.2	2.7
Basic Metals	36.8	16.4	3.5	7.7
Fabricated Metal Products	3.9	5.7	4.9	6.5
Machinery & Equipment	12.1	27.6	17.8	11.8
Electrical Machinery & Apparatus	12.8	2.8	19.6	19.3
Electronic Products & Components	21.0	15.3	16.6	19.5
Transport Equipment	10.4	5.0	29.7	17.0
Instrumentation, Photographic & Optical Goods	38.5	38.1	51.5	31.3
Others	5.2	17.5	6.8	5.3

Source: Singapore Statistics.

together research and medical communities to encourage collaboration, so that synergies can be achieved. The Economic Development Board has strived to secure a steady stream of highly qualified workforce for the sector by setting up A*STAR, which aims to produce more Ph.D. graduates, both local and foreign, in related disciplines. Finally, generous government subsidies are provided for research purposes in order to bolster R&D capacities in Singapore. Table 4.10 shows a selected list of incentive measures that Singapore has in place for foreign investors.

(d) Automobile Industry, Thailand

Thailand is called the “Detroit of Asia” because of its prowess in automobile manufacturing. The automobile industry is one of the biggest manufacturing sectors in Thailand and employs an estimated

TABLE 4.10
Financial Assistance and Incentive Schemes

Scheme	Benefits		Suitable for
General incentives			
Tax incentives			
Pioneer Status	Tax exemption on income from qualifying activities	Manufacturing	
Development and Expansion incentive	Reduced tax 5% or 10% on incremental income from qualifying activities	Manufacturing, Services, RHQ/IHQ, IP Hub	
Investment Allowance	Allowance of 30% or 50% of approved fixed capital expenditure on top of normal 100% capital allowance	Manufacturing	
Approved Royalties Incentive	Reduced WHT 0% or 5% on royalty payments to access advanced technology and know-how	Manufacturing, FTC	
Approved Foreign Loan	Reduced WHT 0%, 5% or 10% on interest payments on loans taken to purchase productive equipment	Manufacturing	
S19C writing-down allowances for R&D cost-sharing	1-year write-down for Research & Development (R&D) cost-sharing payments	Manufacturing, IP Hub	
Operational headquarters incentive	Concessionary corporate tax of 10% for entities providing headquarters-related services from Singapore. Full exemption if host is global headquarters.	Manufacturing, Services, R&D	

Financial incentives

Research and Development Assistance Scheme	Grants offered to support specific projects on product or process R&D that lead to the enhancement of the company's competitiveness and in-house capability development.	R&D
Accelerated depreciation allowances	Can claim 33.3% (usually 20%) over three years for all plants and machinery; may also claim 100% in 1 year for prescribed automation equipment and robots, and certain environmental-related equipment.	Manufacturing

Pharmaceutical sector-specific incentives

Expenditure on infrastructure	S\$500 million for Phase One Biopolis and S\$70 million in Phase Two to expand total complex to 222,000 sq meters.	R&D, Manufacturing
Subsidies	Government committed SGD12bn (US\$8.5 billion) to R&D and another SGD5bn (US\$3.6 billion) for the new National Research Foundation.	R&D
Support and training	Government expanded local pool of production operators through EDB's Company Training Scheme, allowed flexibility on foreign worker cap, developed local and foreign talent through scholarships.	R&D

Source: Collated by Centennial Asia Advisors using EDB website.

450,000 employees. Production of vehicles has increased greatly between 1998 and 2010, consistently achieving positive year-on-year growth each year except in 2009, the height of the global financial crisis. The annual production of motorcycles receded in 2007 but has recovered in the past year and more than tripled over the same time frame. Correspondingly, exports of the sector increased more than ten folds between 1998 and 2010.

International automobile companies, including all leading Japanese, US and European producers like Toyota, Ford, BMW and Mercedes Benz, have invested in facilities in Thailand to assemble cars for both export and domestic sale. The automobile sector receives a significant amount of total FDI into Thailand. This is a result of a concerted effort by the Thai government to promote the sector.

A key appeal of investing in Thailand is that unlike most economies in the region, foreign investors are allowed to remain independent, without partnering with local companies, allowing them to retain full control of their operations in Thailand. The geographical location of the country is also appealing, as it serves as a gateway to markets across Asia, as is the many FTAs that Thailand has in place with countries like Australia, New Zealand, the PRC and India. Next, the existence of a strong parts and components sector complements the automobile sector. As international car-makers set up production in Thailand, many of their parts manufacturers like Bosch, GKN and Denso followed in their footsteps to provide their clients with accessible parts and cost savings from import tariffs and transport expenses. The Japan Automobile Manufacturers Association describes the quality of Thai-made automobile parts as the highest of any ASEAN nation.

High-level support by the government and its consistent policy for the sector are cited as important factors in the development of the sector. The Thai government has worked closely with the Thai Automotive Industry (TAI), an independent organization that promotes the development of the sector and facilitates cooperation between the public and private sectors, to implement projects to increase the competitiveness of the industry. Two projects, named The Master Plan for Thai Automotive Industry I and II, were drawn up by the TAI to help the sector compete on a global scale by improving infrastructure, human capital, information flow and trade capabilities, in order to build the sustainability of the Thai economy through import substitution and the acquisition of foreign currency via export promotion. Some of the strategies suggested and implemented are summarized in Table 4.11.

TABLE 4.11
Key Strategies of Master Plan for Thai Automotive Industry

Strategy	Approach	Desired outcome
Creating predictable environment for business operations	Industry situation analysis project	Easily accessible automotive website, auto makers and parts supplier database
Automotive Human Resource Development	Automotive training center project	Increased number and income of trained persons, cost reduction and profitability
Market expansion by opening market through Free Trade Area	Market responsiveness project, ASEAN and international development program	Increased market share in foreign and domestic markets, lessened production cost, narrowed market gap
Trade promotion and networking	Cluster-based development project	Automotive cluster linking industry with public sector and institutes for industrial development, cooperative projects created in cluster
Standardization development	Automotive standards projects	Internationally standardized testing center, decline in testing costs, standardized products for exports, automotive R&D center
Upgrading of manufacturing technology and management	Export promotion center for auto parts	International recognition of auto parts and vehicles, new products for exports, new export markets, information center about export procedures
Development of product technology	Supplier development program	Provide advice and technology assistance, develop R&D capabilities, develop human resources
Productivity thrust	Lean supply chain development, best practice benchmarking	Establish R&D centers, auto parts testing centers, car-testing tracks, information technology center to analyse trends
Investment and linkage promotion thrust	Domestic and overseas investment promotion, industry linkage development	Automotive experts dispatching program to establish clusters, upgrade auto parts manufacturing technology

Source: The Office of Industrial Economics, Thailand Automotive Institute.

Minimize the Exclusion and Sensitive List

There should be a minimum gap between what is committed and what is implemented if business trust and confidence are to be earned. In other words, it is more beneficial to focus on implementation of agreements rather than promising fantasy reforms that cannot be fulfilled. One way is for ASEAN leaders to urgently compromise to reduce the exclusion and sensitive lists that have greatly reduced the incentives for some members to enact the necessary reforms. For such lists to be minimized, the richer and more competitive countries may need to agree to monetary compensation or other conditions to make it economically viable for the other party to drop certain exclusion conditions.

Better Adherence to Existing Frameworks

It is important to make better use of the existing agreements than adding more agreements on the list. Member states must make use of existing frameworks that can help further promote FDI in the region. This means adhering to previously agreed frameworks such as free trade agreements and bilateral treaties. In particular, the ACIA, which entered into force only at the end of 2009, must be fully utilized and disciplinary mechanisms must exist to punish parties that veer from it. According to the ERIA, insufficient information on investment impediments and the small sample size of surveyed firms restrict the ability to identify a relationship between the specific FDI impediments that a particular type of firm faces. This is required in order to formulate optimal policies to attract broad-based investments. Hence, ASEAN leaders must ensure two things: a well-functioning entity to deal with treaty enforcement and disputes and better research and disclosure of investment impediments within regional countries.

3.3 Recommendations — Country-Specific

Have a Strong Investment Promotion Organization

Each ASEAN member should establish a strong investment promotion organization. It should be based on strong commitment from the political leadership, enabling it to get other government agencies in line whether it be immigration, universities and education ministries, or labor ministry. The organization must be well-resourced in terms of funding and talented staff and headed by a strong, forward-looking leader. In this respect, ASEAN members should model themselves

against Singapore's Economic Development Board (EDB) and Hong Kong, China's InvestHK — two of the most successful investment promotion organizations in the world.

- **EDB, Singapore:** The EDB works in conjunction with the Ministry of Trade and Industry to provide long-term strategic solutions by identifying and attracting investors within sectors that are important to Singapore's economic development at each point in time. The organization does not only focus on multinational corporations but also places much emphasis on individual investors and domestic start-ups through a myriad of programs and incentives tailored for each category of investors. For example, the EDB has enacted a wide range of flexible financial schemes that offer affordable loans for equipment and machinery, international expansion and rebates for small-medium enterprises, among many others. It is also responsible for encouraging and arranging networking between local and foreign enterprises to explore joint ventures and business opportunities. Much of EDB's success is attributed to its ability to constantly evolve with the changing global economic conditions and spotting new industries in which Singapore could have competitive advantages over its competitors and entice them aggressively. Overall, the restructuring of Singapore's economy from a low-skilled, labor-intensive industrial hub to a research-driven knowledge economy is testament to the EDB's achievements.
- **InvestHK, Hong Kong, China:** A department within the Commerce and Economic Development Bureau, InvestHK helps to promote investment by providing services to both domestic and foreign companies. It has offices locally and in 27 foreign cities which cover Hong Kong, China's target countries. Services include business matching, tax and labor advice, help to reduce licensing procedures, and liaison with other governmental departments.

Identify Weaknesses in Ease of Doing Business and Address Them Aggressively

A proactive and efficient investment promotion organization is not enough and will have problems attracting investment if the investment climate of a country is poor. Therefore, it is fundamental that ASEAN countries also work aggressively to improve their investment conditions.

The hardware and software constraints at the country level need to be addressed. ERIA's study clearly indicates the areas that the ASEAN countries need to improve at individual country level. After all ERIA findings are based on interviews with the business people who are supposed to bring in FDI.

Table 4.12 highlights the top three problems in each country based on the World Bank's 2011 Ease of Doing Business Report. Singapore is not included because it generally ranks at the top in every category. We then suggest some alternatives and reforms, mostly based on the Singapore model which can be considered as the "best practices" approach.

- Starting and closing a business: The most prevalent issues as seen in Table 4.12 are the obstacles that firms face when trying to start or shut down a business. In general, firms are required to undergo too many procedures that delay their operations and also increase their total costs. In Indonesia, it is mandatory for businesses to have a minimum paid-in capital of 53% which is far above the norm. Lowering or abolishing this requirement will likely lead to increases in initial registrations of businesses. For example, when Jordan and Morocco reduced paid-in capital requirements, it resulted in 18% and 40% increases in registrations, respectively, the following year.

ASEAN economies should also consider adopting Singapore's online registration system, which helps businesses save an estimated US\$42 million each year. Similarly, New Zealand — ranked first in starting a business — is the first country to introduce online business registration back in 1996. These one-stop portals for business registrations would help entrepreneurs save both time and money, leading to a greater willingness to invest. In terms of closing a business, recovery rates are quite low because bankruptcy processes usually take too long, resulting in higher liabilities. In this respect, authorities could consider reforming bankruptcy laws to make them more efficient.

- Paying taxes: This includes high overall taxes on profit as well as the administrative burdens of complying with tax laws in countries. The latter is especially serious in Viet Nam, where firms spend up to 941 hours a year fulfilling their tax obligations. ASEAN economies should adopt low tax costs such as in

TABLE 4.12
Main Weaknesses in Key ASEAN Economies

Country	Indicator	Rank	Description
Indonesia	Starting a business	155	<ul style="list-style-type: none"> No. of procedures: 9 Time (days): 47 Cost (% of income/capita): 22.3 Min. Capital Requirement (% of income/capita): 53.1
	Enforcing contracts	154	<ul style="list-style-type: none"> No. of procedures: 40 Time (days): 570 Cost (% of claim): 122.7
	Closing a business	142	<ul style="list-style-type: none"> Recovery rate: 13.2% Time (years): 5.5 Cost (% of estate): 18
Malaysia	Starting a business	113	<ul style="list-style-type: none"> No. of procedures: 9 Time (days): 17 Cost (% of income/capita): 17.5 Min. Capital Requirement (% of income/capita): 0
	Dealing with construction permits	108	<ul style="list-style-type: none"> No. of procedures: 25 Time (days): 261 Cost (% of income/capita): 7.9
	Registering a property	60	<ul style="list-style-type: none"> No. of procedures: 5 Time (days): 56 Cost (% of property value): 2.5
Philippines	Starting a business	156	<ul style="list-style-type: none"> No. of procedures: 15 Time (days): 38 Cost (% of income/capita): 30.3 Min. Capital Requirement (% of income/capita): 6
	Dealing with construction permits	156	<ul style="list-style-type: none"> No. of procedures: 26 Time (days): 169 Cost (% of income/capita): 778.5
	Closing a business	153	<ul style="list-style-type: none"> Recovery rate: 4.5% Time (years): 5.7 Cost (% of estate): 38

TABLE 4.12 (Cont'd)

Country	Indicator	Rank	Description
Thailand	Starting a business	95	<ul style="list-style-type: none"> No. of procedures: 7 Time (days): 32 Cost (% of income/capita): 5.6 Min. Capital Requirement (% of income/capita): 0
	Getting credit	72	<ul style="list-style-type: none"> Strength of legal rights index: 4/10 Depth of credit info index: 5/6 Public registry coverage: 0% Private bureau coverage: 35.7%
	Paying taxes	91	<ul style="list-style-type: none"> Payments/year: 23 Time (hours/year): 264 Profit tax: 28.9% Labor tax/contributions: 5.7% Other taxes: 2.8% Total tax rate (% of profit): 37.4
Viet Nam	Protecting investors	178	<ul style="list-style-type: none"> Extent of disclosure index: 6/10 Extent of director liability index: 0/10 Ease of shareholder suits index: 2/10 Strength of investor protection index: 2.7/10
	Paying taxes	124	<ul style="list-style-type: none"> Payments/year: 32 Time (hours/year): 941 Profit tax: 12.5% Labor tax/contributions: 20.3% Other taxes: 0.3% Total tax rate (% of profit): 33.1
	Closing a business	124	<ul style="list-style-type: none"> Recovery rate: 18.6% Time (years): 5 Cost (% of estate): 15

Source: World Bank.

Hong Kong or Singapore, where total tax average below 30% of profit. Also, Hong Kong, China and Singapore have invested in electronic filing systems and joint payments for different types of taxes, leading to more efficient and manageable payment of taxes.

- Investor Protection: A troublesome issue in less developed ASEAN countries but especially so in Viet Nam, which it ranks in the bottom 10 among countries analysed by the World Bank. This is in contrast with Singapore, which has one of the strictest disclosure regimes in the world. Hence, countries with weak investor protection should increase disclosure requirements to ensure easy access to corporate information for all shareholders. Director liability should also be raised, so that they are held accountable for any transactions that turn out to be prejudicial. This can be done by adopting a clear set of rights and duties for directors and a special regime of liability for directors in the event of an abusive transaction. All these will make it easier for shareholders to pursue lawsuits against managements that have acted against the welfare of the investors.

APPENDIX 4.1

Country	Maunufacturing	Agriculture	Fishery	Forestry	Mining and Quarrying
Viet Nam	<p>Temporary Exclusion: Varying levels of export requirements and/or local raw material development. For example, Aqua products require 80% export requirement in order for FDI entry.</p> <p>Also, some electronic and intermediate goods sectors have additional technology and quality requirements.</p> <p>Sensitive List: Firecrackers is the only fully closed sector. No new licenses will be issued for other sectors such as soft drinks, tobacco and construction material production.</p> <p>Additional local content and government planning required in assembly plants, such as motorcycles, and consumer electrical products.</p>	No restrictions	Sensitive List: Foreign investment not licensed for fishing	No restrictions	Sensitive List: Mining of minerals, and clay and sand exploitation are subject to government planning.

Thailand	<p>Sensitive List: Only cane sugar production is closed to local and foreign investments, and subject to the cabinet's decision.</p> <p>Foreign equity participation restrictions to less than 50% for other manufacturing sectors. Several conditions have to be met for higher levels. These would include minimum capital investment levels, quotas for hiring Thai nationals as employees and directors, qualifying for the Investment Promotion Law and obtaining permission from the Ministry of Commerce. Not all of these conditions necessarily apply together. The sectors concerned are mostly in the processing of agricultural goods like rice milling, silk, wood and metal crafts, and materials manufacturing such as lime or processed woods.</p>	<p>Temporary Exclusion: (For ASEAN Investors) Foreign equity participation in artificial propagation/plant breeding is restricted to less than 50% of registered capital. Similar conditions across all sectors need to be satisfied for higher foreign equity participation.</p> <p>Sensitive List: Foreign equity participation restricted to 50% of registered capital for salt and silkworm farming. Similar conditions across all sectors need to be satisfied for higher foreign equity participation.</p> <p>(For Non-ASEAN Investors) Foreign equity participation in artificial propagation/plant breeding is restricted to less than 50% of registered capital. Similar conditions across all sectors need to be satisfied for higher foreign equity participation.</p>	<p>Temporary Exclusion: Foreign equity participation in the fishery sector is restricted to less than 50% of registered capital. Similar conditions across all sectors need to be satisfied for higher foreign equity participation.</p>	<p>Temporary Exclusion: Foreign equity participation in plantation logging is restricted to less than 50% of registered capital. Similar conditions across all sectors need to be satisfied for higher foreign equity participation.</p>	<p>Sensitive List: Foreign equity participation restricted to 50% of registered capital for mining, rock blasting and rock salt mining. Similar conditions across all sectors need to be satisfied for higher foreign equity participation.</p>
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APPENDIX 4.1 (Cont'd)

Country	Manufacturing	Agriculture	Fishery	Forestry	Mining and Quarrying
Singapore	<p>Sensitive List: All forms of chewing gum production and firecrackers are banned for safety and social reasons.</p> <p>Foreign equity is subject to a relevant ministry's approval in newspaper printing and publishing.</p> <p>Other conditions like water conservation, limits on steel scrap and protection of intellectual property rights apply to the appropriate manufacturing sectors.</p>	<p>Sensitive List: No new licenses issued for pig farming.</p>	<p>No restrictions</p>	<p>No restrictions</p>	<p>Sensitive List: No new licenses issued for quarrying.</p>
Philippines	<p>Temporary Exclusion: Enterprises with over 40% foreign equity must export at least 70% of output. Those under the Philippine Economic Zone Authority (PEZA) or export oriented businesses under the Bases Conversion and Development Act (BCDA) are generally required to export 100% of production.</p>	<p>Sensitive List: Agriculture cooperatives closed to foreign investors, no foreign equity allowed.</p> <p>Other agricultural projects are restricted to 40% foreign equity.</p>	<p>Sensitive List: Fishery cooperatives closed to foreign investors, no foreign equity allowed.</p> <p>Other deep-sea fishing projects are restricted to 40% foreign equity.</p>	<p>Sensitive List: Forestry cooperatives closed to foreign investors, no foreign equity allowed.</p> <p>Other forestry projects are restricted to 40% foreign equity.</p>	<p>Sensitive List: Mining & Quarrying cooperatives closed to foreign investors, no foreign equity allowed.</p> <p>The People's Small Scale Mining Programme is also closed to foreign investors; with only citizens or</p>

Sensitive List: Manufacturing cooperatives closed to foreign investors, no foreign equity allowed.

corporations at least 60% Philippine-owned may form a cooperative for mining activities. Further restrictions on methods used, land area, investment caps and labor to equipment utilization cost ratios apply.

Other mining projects are restricted to 40% foreign equity. 100% foreign equity will only be allowed for large scale projects that provide technical or financial assistance.

Myanmar

Temporary Exclusion: Production of refined petroleum products is reserved for the State, no foreign or local investments are allowed.
National forestry policy applies to wood-based manufacturing.

No restrictions

Fishing is closed to foreign investors, and investment is only allowed with a government permit.

Temporary Exclusion: National policy — no local or foreign investors for hardwood logging and sale

Oil/Petroleum exploration, extraction & sale are closed to all investors unless a government notifies with a permit.

APPENDIX 4.1 (Cont'd)

Country	Maunufacturing	Agriculture	Fishery	Forestry	Mining and Quarrying
	<p>Sensitive List: No new permits to be issued for both alcoholic and non-alcoholic beverages, cigarettes and corrugated galvanized iron sheets.</p> <p>No investments allowed for weapons manufacturing under the national defence policy.</p> <p>No foreign investments for sawmilling and wood planning under the national forestry policy.</p> <p>Export requirements for bakery products and mandatory integrated projects for paper products.</p>				
Malaysia	<p>Sensitive List: Pineapple and palm oil related manufacturing closed for all investors except those with supplies from their own plantations. Wood & Timber products fully closed to investments on Peninsular Malaysia.</p>	No restrictions	<p>Sensitive List: No foreign fisheries allowed in Exclusive Economic Zones (EEZs)</p>	<p>Sensitive List: Timber harvesting is closed to foreign investors except in Sarawak where majority local participation is required.</p>	<p>Oil and gas upstream industries are open to foreign investments as joint ventures with a subsidiary of Petronas that must have at least 15% equity. Further</p>

<p>Numerous sectors including sugar, optical disks, vehicle assembly and biodiesel are completely closed to investments. Exceptions are in petroleum refining but 100% export criteria must be met, and cement and steel billets/blooms where integrated and large-scale projects are allowed.</p> <p>Maximum 30% foreign equity in fabrics and integrated cement projects.</p> <p>Explosives and weapons production requires Ministry of Internal Security approval for local and foreign investors.</p>	<p>Government regulations apply to the contracts granted.</p>					
<p>Lao PDR</p> <p>Temporary Exclusion: Production of cultural products like authentic music instruments and kapok and cotton mattresses and blankets are only open for local production.</p> <p>Beverages, tobacco and rice noodle products are subject to conditions that include joint ventures, 100%</p>		<p>Sensitive List: Logging is prohibited for both local and foreign investors; other forestry activities are subject to government approval.</p>	<p>Sensitive List: All fishery operations are closed to foreign investments, unless government approval is granted. Investment incentives are</p>	<p>Sensitive List: Hunting and game propagation activities are subject to government approval.</p>		<p>Temporary Exclusion: All forms of mining including coal and its associated deposits, oil and gas, iron and other non-ferrous metals as well as salt extraction are subject to</p>

APPENDIX 4.1 (Cont'd)

Country	Manufacturing	Agriculture	Fishery	Forestry	Mining & Quarrying
	<p>exports, and high local content ratios for foreign investment.</p> <p>Sensitive List: Weapons, culturally destructive items and chemicals that leave toxic industrial waste are totally prohibited.</p> <p>Narcotic drug and psychotropic substance production is subject to approval from the Ministry of Public Health.</p> <p>Chemical-related manufacturing is open to foreign investments as long as the projects pose no threat to environment or society.</p> <p>Foreign investment in vehicle assembly and pharmaceuticals is subject to local equity ownership and/or export and/or local content requirements.</p> <p>Foreign investment in new wood processing factories is banned unless raw materials are sourced from plantations or reforestation projects.</p>		<p>awarded if at least 3 of 6 stipulated conditions are met that cover the use of local labor and raw materials, environmental protection and exports. The incentives also apply to the production and processing of medicinal products derived from fish.</p>		<p>the government's approval for foreign investments.</p> <p>Sensitive List: Mining of nuclear elements such as uranium and thorium ores require negotiations with the government.</p> <p>Stone, sand and clay mining are also subject to government approval.</p>

Foreign investments in alcohol-based products can qualify for incentives if they meet certain criteria that might include use of local labor and raw materials, export requirements or environmental conservation.

Indonesia

Sensitive List: Processed food industries, textile related factories and the manufacturing of tools and clay and lime products are closed to both local and foreign investments as they are reserved for small-scale enterprises. This also applies to electrical component and scientific equipment production. Some of these industries allow partnerships with the small enterprises.

Foreign investment is restricted in many other food processing industries, wood and silver crafts factories, the manufacturing of rubber

Sensitive List: Investments in estate crops plantations require partnerships with small-scale enterprises. Certain estate crops only allow partnerships with local investors, in particular medicinal herbs and spices. Foreign investors are generally only allowed to form joint partnerships with local farmers or cooperatives for other estate crops.

Livestock rearing is completely reserved for small enterprises, no investments are allowed.

Sensitive List: Fishery activities conducted in a catching area less than 12 miles, the catching of marine ornamental fish and aquaculture hatcheries are reserved for small enterprises, no investments are allowed.

Freshwater fish culture is closed to foreign investors as it is reserved for national

Sensitive List: A range of forestry exploitation activities are reserved for small enterprises, no investments are allowed, also to better protect the environment.

Utilization of naturally growing and community forests is reserved for locals and foreign investment is thus not allowed also in order to protect the environment and preserve biodiversity.

Sensitive List: Radioactive material mining is closed for national security reasons and other small scale mining activities require partnerships with small-scale enterprises and are only allowed in certain forested areas that are not conserved or preserved.

APPENDIX 4.1 (Cont'd)

Country	Manufacturing	Agriculture	Fishery	Forestry	Mining & Quarrying
	products, silk yarn spinning and agricultural machinery production as partnerships must be established with small-scale enterprises.		small-scale enterprises. Brackish-water shrimp hatcheries and the aquaculture of eel, est-dle allow foreign investments only with partnerships with small-scale enterprises.	Foreign investment is allowed only through small-scale enterprises for the utilization of Industrial Plantation forests.	
Cambodia	Sensitive List: Production of chemical products that harm public health and the environment are in accordance to WHO prohibitions are closed to both local and foreign investments. Narcotic and psychotropic substance production and producing/processing electricity using imported waste is also closed to all investments.	No restrictions	No restrictions	Sensitive List: Forestry exploitation is prohibited under the forestry law and therefore closed to all investors.	No restrictions

Brunei Darussalam	<p>Sensitive List: Garment manufacturing for the US market is no longer allowed and therefore closed to all investments.</p> <p>Drinking water and cement production are closed to foreign investors and otherwise subject to government control.</p> <p>For food related products, 30% local participation is required for foreign investments which will then have access to government facilities and the domestic market. For other manufacturing activities that do not use local resources full foreign ownership is allowed if all production is exported.</p>	<p>Temporary Exclusion: For foreign investment to have access to government facilities and the domestic market, 30% local participation is required for most agricultural activities, including growing crops and rearing cattle.</p> <p>Sensitive List: Other forms of animal farming such as for animal products similarly require 30% local participation for foreign investment.</p>	<p>Sensitive List: Off-shore capture fisheries and aquaculture require 30% local participation for foreign investment.</p>	<p>Temporary Exclusion: For foreign investment to have access to government facilities and the domestic market, 30% local participation is required for forest plantations and nurseries and downstream processing.</p>	<p>Sensitive List: For foreign investment to have access to government facilities and the domestic market, 30% local participation is required for stone quarrying, groundwater extraction and silica mining.</p> <p>Foreign investment is also allowed for crude petroleum and natural gas extraction. However, 100% participation interest is not guaranteed as the government may acquire participation through its holding company under the Production Sharing Contract (PSC).</p>
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Source: ASEAN Secretariat.

NOTE

1. Reproduced from M.G. Plummer and Chia S. Y., eds., *Realizing the ASEAN Economic Community* (Singapore: Institute of Southeast Asian Studies, 2009), pp. 187–88.

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5

Competition and Intellectual Property Laws in the ASEAN ‘Single Market’

Ashish Lall and R. Ian McEwin

1. Introduction

The ASEAN Economic Community (AEC) Blueprint provides a roadmap for establishing a ‘single market’ by 2015. The intent is to create a single economic market and production base as well as to enhance the competitiveness of the region and improve its attractiveness as a host location for foreign direct investment. Relative to the European Union (EU), ASEAN’s notion of a ‘single market’ represents loose integration. However, even this requires countries to move beyond trade liberalization. As a result, the AEC Blueprint has set goals in a number of policy areas. This chapter examines two areas: competition policy (here limited to competition law) and intellectual property policy.

The AEC Blueprint recognizes that both the notion of fair competition and sound intellectual property policy provide static and dynamic efficiency gains. Ultimately, they ensure that firms succeed not due to

monopolization and collusion but because of efficiency and innovation. Fair competition and secure intellectual property rights are aimed at improving the business environment and impacting both foreign direct investment flows and the willingness of firms to share and transfer advanced technology. Since there is no multilateral or plurilateral competition regime, every ASEAN member state has agreed to enact a national competition statute prior to 2015, and most have already done so. In the area of intellectual property, the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) sets the minimum standard, as all ASEAN countries except Lao People's Democratic Republic are signatories to TRIPS. In both areas, there is no intent to harmonize laws across the region or to have regional enforcement bodies; instead, countries rely on regional networks to build capacity and enhance cooperation and coordination.

This chapter provides an assessment of the achievements thus far on the path to 2015 and draws lessons from other regional trade agreements and case law to provide a sense of likely pitfalls that ASEAN may encounter. It also highlights some yet unaddressed issues and suggests some refinements that ASEAN may wish to consider as it prepares for 2015. The next section provides a general overview of competition and intellectual property (IP) and the goals of the AEC. Section 3 provides an overview of competitiveness and competition policy, drawing lessons from the other regional trade agreements such as the North American Free Trade Agreement (NAFTA), the Common Market of the Southern Cone (MERCOSUR) and the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA). Section 4 provides a similar overview for Intellectual Property Rights (IPRs) and also draws on case law from the EU. Section 5 discusses the policy issues that arise at the intersection of competition and IP law and policy. Section 6 discusses the balance between competition and IP laws. Though they have similar goals, sometimes there can be conflicts if firms use their IP to exclude competition. In addition, countries need to strike a balance between static and dynamic efficiency goals, and this is likely to be influenced by their level of economic development. Section 7 concludes the chapter and provides an assessment and some suggestions for ASEAN to consider. In addition the chapter has an appendix, which provides a survey of existing competition laws and sector-specific competition regulations in ASEAN countries.¹

2. Competition, Intellectual Property and the ASEAN Economic Community

In a closed economy, competition and intellectual property (IP) laws are generally recognized as sharing the same goals — enhancing consumer welfare and promoting competition as “[b]oth spur competition among rivals to be the first to enter the marketplace with a desirable technology, product, or service” (US Department of Justice 2007, p. 2). Intellectual property rights create property rights over new ideas and expressions that allow innovators to appropriate the rewards from new products, more efficient production processes and artistic works and so encourage their creation. Competition law tries to ensure that goods and services are sold at least cost and produced using the least resources.

Anti-competitive conduct can have effects across borders and reduce the benefits from trade liberalization. Competition law complements reductions in trade barriers and, according to Cernat (2005, p. 6), more so for developing countries, as these countries tend to have more public and private barriers to trade, more localized markets and a larger non-traded sector which cannot be disciplined by import competition.

Competition law chapters or provisions in regional trade agreements can regulate cross-border anti-competitive practices. This can involve, at one extreme, harmonization of competition laws together with a supranational competition regulator to deal with the effects of anti-competitive practices that cover more than one country to, at the other extreme, simply agreements to cooperate on competition law matters on the basis of principles of comity. Both positive and negative comity relate to the impact of a country's law enforcement on other countries. Negative comity involves conducting investigations and proceedings with a view to not harming other countries; whereas positive comity involves conducting them so as to assist another country or countries (OECD 1999 pp. 17–18).

ASEAN has opted to move mainly toward coordination of competition and intellectual property laws. The ASEAN Economic Community (AEC) Blueprint states that: “The main objective of the competition policy is to foster a culture of fair competition” but does not say what ‘fair competition’ means (ASEAN Secretariat 2009, p. 32). ASEAN has set fairly modest goals for itself in the area of competition law and policy (ASEAN Secretariat 2009, p. 32). First,

not all ASEAN countries have competition laws but they have all committed to introducing them by 2015. Secondly, ASEAN sought to develop regional guidelines on competition policy by 2010 and did so (ASEAN Secretariat 2010). Thirdly, it seeks to enhance capacity building in the area of competition law. Lastly, it seeks to establish a network of national competition law enforcement bodies — the role of the network being to “discuss and coordinate” competition policies.² There is no commitment to harmonize competition law and policies across countries.

In the area of intellectual property, the AEC Blueprint recognizes that sound intellectual property policy helps the creation, adaptation and adoption of new technology and impacts foreign direct investment flows and the willingness of firms to share and transfer advanced technology. Ultimately, in addition to providing a predictable environment for investors and inventors, this contributes to higher productivity and competitiveness. In the realm of IP, ASEAN seeks to foster cooperation on copyrights, traditional knowledge, genetic resources and cultural traditional expressions. In addition, it seeks to establish an ASEAN filing system for design and to promote consultation and information exchange between national agencies responsible for the protection of IP rights (ASEAN Secretariat 2009, pp. 32–33).

The interest of countries in setting IP standards and levels of enforcement depends largely on their levels of development. The TRIPS agreement sets minimum standards for WTO members but still allows members some flexibility in setting those standards. Free trade agreements (FTAs) usually involve higher standards of IP protection. For FTAs involving the United States, the American standard is set (Abbot 2006). Countries should set IP standards to balance the *domestic* interests of IPR holders (dynamic efficiency) with the interests of consumers (static efficiency). The balance between dynamic efficiency and static efficiency in developed countries is unlikely to be the same balance for developing countries (which have little research and development and lack the legal and other institutional capacity to administer complex IPRs). So harmonizing IP laws and their enforcement within regional trade agreements should be approached with considerable caution.

Conflicts can occur between intellectual property law and competition law across borders. IPRs are national, so that a patent granted in Singapore does not stop a firm copying the idea in Indonesia. For

example, in the 1960s, the European Union (EU) permitted an agreement between firms in different EU countries to limit trade by exercising national IP rights. So, an agreement within the EU stopped cross-border sale by the owners of the same trademark. It was soon seen that protecting IPRs on the basis of national boundaries was incompatible with the idea of a common market, so the European Court of Justice (ECJ) adopted a doctrine of Community IPR Exhaustion. This means that once a firm introduces a product protected by IPR in one Member State of the EU, the IPRs are 'exhausted' with respect to that product in the other Member States. So once a product has been put on the market in Germany by the owner of the trademark, the owner cannot prevent the importation of that product into another EU Member State, such as France, despite the fact that trademarks are held on a country basis.

While IPRs provide incentives for domestic research and development, they can also hinder growth by raising the costs of imitation through abuses of the IPR system itself (falsely claiming a wide scope for a patent, for example) and by limiting the dissemination of new products and processes through anti-competitive conduct (for example, members of a cartel setting an IP product standard that others cannot meet). These problems are magnified across countries where IP standards and competition laws may differ.

While both competition and intellectual property laws are national laws with national enforcement, both are increasingly subject to international agreements, which include 'national treatment' (i.e., non-discrimination) provisions. TRIPS sets minimum IP standards but does not require countries to have the same IP-specific enforcement system. Thus, IP enforcement is left to general procedural laws, which differ considerably between countries.

The signing at the thirteenth ASEAN Summit in Singapore in 2007 of both the ASEAN Charter and the Declaration of the AEC Blueprint was a significant step toward achieving the goal of a single economic market. Of particular importance was the commitment to move away from the 'soft-law' approach of political commitments dealing with trade and investment liberalization toward an "adherence to rules-based systems for effective compliance and implementation of economic commitments" (ASEAN Secretariat 2009, p. 21). It remains to be seen how much progress toward an ASEAN rules-based system occurs in the foreseeable future.

The AEC Blueprint provides a master plan toward establishing a 'single market' by 2015. The AEC comprises four key pillars: firstly, creating a single market and production base; secondly, enhancing a competitive economic environment; thirdly, promoting equitable economic development; and, fourthly, integrating ASEAN into the global economy. Until 2007 the main focus was on the first pillar dealing with trade and investment liberalization. Now more emphasis is being placed on the second pillar, that is, to develop a highly competitive region which involves examining domestic policies that may impinge on integration, such as competition policy, taxation, infrastructure development, e-commerce, and intellectual property rights.

For ASEAN to be competitive internationally as a region, goods and services within ASEAN should be produced at the lowest possible cost. This means lowering intra-region border restrictions and harmonizing business laws to some degree in order to allow resources to go where they are best employed within ASEAN. Some steps toward harmonization have already occurred. In 2010, the ASEAN Secretariat released regional guidelines on competition policy (dealing mainly with competition law) to provide "a general framework guide for the AMSs [ASEAN Member States]" (ASEAN Secretariat 2010, p. 1). The TRIPS agreement has set minimum intellectual property standards, including national treatment (that is, once the product or factor crosses the border, it is given the same treatment as domestic products and factors). National treatment seeks to ensure a degree of competitive equality between nationals and foreigners. ASEAN has also introduced intellectual property "Action Plans".

Full economic integration would necessarily mean the same IP and competition laws — similar to a single country. In this scenario, standards of IP protection would be the same; an IP registered in one country would be recognized throughout ASEAN. In addition, a single supranational competition regulator would regulate anti-competitive practices irrespective of where within the region the anti-competitive harm occurred. An alternative to full integration is harmonization, which is usually seen as a move toward a level playing field or fair trade. But harmonization across countries at different levels of development leads to distributional issues; harmonizing wages, for example, would create more unemployment and lower growth in the less developed countries. The same applies to business regulation, setting high product standards, for example, may discriminate not only against domestic

consumers who want cheaper products but also against producers in less developed countries in the region which cannot meet those standards — either because of a lack of technological capacity or an inability to pay the necessary IP license fees for more sophisticated products.

Mutual recognition is another alternative. That is, if a product complies with the exporting country's laws in the region (this could be environmental, workplace or intellectual property standards), it can be sold within the trading party's borders. Manufacturers do not have to adapt products to satisfy different standards in the country of export. But if there are considerably different standards between countries, there could be a race to the lowest standard. Mutual recognition is only appropriate where there are minor differences in regulation between trading partners. ASEAN countries appear to be too far apart in their levels of economic development for any meaningful harmonization or mutual recognition; however, these can be long term goals. The experience of the European Union shows that creation of a single market takes many decades. ASEAN cannot reasonably expect to leapfrog this process just because it feels compelled to react to the growing economic importance of India and the PRC. Laws and regulations have to reflect local circumstances. Thus, ASEAN should focus on coordination and cooperation and the uniform and transparent application of the laws that do exist, to both domestic and foreign firms. Given the differences in the quality of governance even this may not be an easy task.

To set the context and to bring a sense of realism to the issues at hand, Tables 5.1–5.3 show the stark differences among ASEAN countries not just in per-capita gross domestic product, but in national competitiveness, the extent of intellectual property protection, the intensity of local competition, the costs of doing business; and governance indicators such as control of corruption, rule of law, judicial independence and regulatory quality. Both competition and IP policies are important for competitiveness, but they are less important than many of the factors mentioned above. Ultimately the competitiveness of ASEAN depends on the quality of the business environment. The exhibits clearly show that there is much work to be done in this area. The next section discusses competition law and integration in ASEAN, followed by a similar discussion of intellectual property laws in Section 4.

Table 5.1
ASEAN Selected Competitiveness Indicators 2011–12
 (Rank out of 142 countries)

	Brunei Darussalam	Cambodia	Indonesia	Malaysia	Philippines	Singapore	Thailand	Viet Nam
Global Competitiveness Index Rank (/142)	28	97	46	21	75	2	39	65
1st pillar: Institutions								
1.02 Intellectual property protection	50	91	62	31	102	2	92	127
1.05 Irregular payments and bribes	32	117	103	43	119	3	79	104
1.06 Judicial independence	42	96	76	43	102	20	55	78
1.07 Favoritism in decisions of government officials	25	48	36	24	118	3	68	71
1.09 Burden of government regulation	31	34	44	8	126	1	45	113

1.11	Efficiency of legal framework in challenging regulations	52	48	61	14	118	8	54	73
1.21	Strength of investor protection	100	60	36	4	111	2	12	137
6th pillar: Goods Market Efficiency									
6.01	Intensity of local competition	63	88	89	26	47	33	52	62
6.02	Extent of market dominance	65	54	53	14	117	12	83	57
6.03	Effectiveness of anti-monopoly policy	74	70	53	25	98	11	77	85
6.11	Prevalence of foreign ownership	92	96	74	46	72	2	70	117
6.12	Business impact of rules on FDI	71	40	78	12	89	1	38	86

Note: Data are not available for Lao People's Democratic Republic and Myanmar.

Source: K. Schwab, ed., *The Global Competitiveness Report 2011–2012* (Geneva: World Economic Forum, 2011).

3. ASEAN Competition Laws and Integration

The economic goals of the AEC include the establishment of a single market and production base, which allows for the free flow of goods, services, capital, investment and skilled labor. The goal is not to establish a customs union as in MERCOSUR, but a region that is outward-looking and consistent with multilateral rules and commitments. Unlike the EU, ASEAN seeks to establish a single market without supranational institutions. Achieving this would, of course, require the elimination of both tariff and non-tariff barriers and other public barriers to trade. An additional goal is to be a market-driven “highly competitive region” (ASEAN Secretariat 2009, p. 2). Here, competitiveness could be interpreted to mean productivity; however, the (political) intent goes beyond the economic notion of productivity and represents ASEAN’s aspiration to be perceived as an attractive ‘single market’ of about half a billion consumers. The AEC is ASEAN’s response to the increasing economic and political importance of India and the PRC. A single ASEAN market could, in principle, provide an alternative to investors both as a host-location for foreign direct investment and a market for goods and services. In addition to these economic goals, the AEC incorporates political-security and social-cultural goals. It aims for example, to provide opportunities for small and medium-sized enterprises (SMEs), reduce poverty and income inequality within member states as well as between them. Table 5.3 shows the disparity in per-capita income across ASEAN member states.

3.1 Competitiveness, Competition Policy and Trade

The notion of a ‘highly competitive *region*’ alludes to geography and fits nicely into the competitiveness framework developed by Michael E. Porter who states that improving competitiveness is about raising productivity, as this ultimately determines the standard of living of a country (Porter 1990). Competition takes place between firms and not countries, but this does not imply that country or region characteristics have no impact on a firm’s performance. Porter’s work can be characterized as location-based competitive advantage. In other words, the proximate business environment at a location has a deep impact on location and other choices of firms. Location affects the segments firms may choose to compete in; it affects the choice of ‘homebase’ or the place where core product or process technology development takes

TABLE 5.2
ASEAN Governance 2010: Percentile Rank Among 213 Countries
(ranges from 0 (lowest) to 100 (highest) rank)

	Brunei Darussalam	Cambodia	Indonesia	Lao PDR	Malaysia	Myanmar	Philippines	Singapore	Thailand	Viet Nam	Regional Average
Control of Corruption	78.5	7.7	27.3	13.9	61.2	0.5	22.5	98.6	46.9	33	45.8
Government Effectiveness	77.5	22.5	47.8	16.7	82.3	2.4	51.7	100	58.4	44	44.3
Regulatory Quality	82.3	35.4	39.7	17.7	71.3	1	44	98.6	56.5	31.1	41.1
Rule of Law	73.5	12.8	31.3	21.3	65.4	3.3	34.6	93.4	49.8	38.9	50.8

Source: World Bank — World Governance Indicators <<http://info.worldbank.org/governance/wgi/index.asp>> (accessed 10 December 2011).

Table 5.3
ASEAN Doing Business Rankings 2012

	Brunei Darussalam	Cambodia	Indonesia	Lao PDR	Malaysia	Philippines	Singapore	Thailand	Viet Nam
Ease of Doing Business	83	138	129	165	18	136	1	17	98
Starting a Business	136	171	155	89	50	158	4	78	103
Protecting Investors	122	79	46	182	4	133	2	13	166
Enforcing Contracts	151	142	156	110	31	112	12	24	30
Trading Across Borders	35	120	39	168	29	51	1	17	68
Per Capita GDP 2011 Est.	49,518	2,286	4,668	2,659	15,579	4,111	59,937	9,693	3,355

Note: Doing Business ranks are from the IFC/World Bank and not available for Myanmar. Per capita GDP estimates are from IMF. These are PPP data expressed in US\$ at current international prices. Myanmar: US\$1,327.

Sources: IFC/World Bank — Doing Business <<http://www.doingbusiness.org/>> (accessed 10 December 2011). IMF World Economic Outlook Database, September 2011 <<http://www.imf.org/external/pubs/ft/weo/2011/02/weodata/index.aspx>> (accessed 11 December 2011).

place. Hence, (multi-national) firms choose where to locate different activities in the value chain and disperse them in a manner that provides some system based advantages. Where would Toyota locate its engine plant if it had a choice between Detroit and Vientiane? Or where would a biotechnology firm locate if it had a choice between Vientiane and Boston? The answers are obvious. Vientiane may not at this point be the best location for a biotech business perhaps because it lacks educated workers, research institutions and the appropriate intellectual property rights laws. Vientiane could however be the ideal location for some other industry for which these factors are not critical. Some locations allow firms in certain sectors or segments to make more productive use of the resources available in that locale — it is in this sense that locations (regions or nations) compete.

International trade and investment are intermediate indicators competitiveness. International trade allows countries to specialize in segments or sectors in which their firms are more productive and competing in international markets exerts more pressure on firms to upgrade their products to meet international standards. Exports play an important role in Porter's typology of industries and clusters. Porter makes a distinction between traded clusters and local service clusters. The market for traded clusters is not restricted by population and data for the United States show that traded clusters account for a higher proportion of national earnings than of national employment, in other words, traded clusters are relatively better at generating higher wages and therefore higher levels of prosperity. They also account for an overwhelming proportion of patents, so they are important for innovation.

Since the business environment in a particular location has an impact on firm performance, Porter devised the 'diamond' framework to assess the business environment. The diamond has four components: factor input conditions, demand conditions, related and supporting industries and the context of firm strategy and rivalry. Intellectual property protection and competition laws both belong in the 'context of firm strategy and rivalry' box in Porter's framework. Indeed any policies that promote rivalry, competition and innovation belong in the same box. However, it is important to note that these are just two of many factors that influence the business environment and therefore, the competitiveness of any location.

There are, of course, other economic rationales for competition policy. Healthy competition or rivalry leads to the provision of goods

at the lowest possible cost. It also puts pressure on firms to upgrade via the adoption of new production techniques and to improve product quality. Freedom of entry and exit imposes discipline on incumbent firms. Since competition law and policy seek to prevent illegitimate business practices such as the abuse of dominant position and price-fixing cartels, aggressive enforcement ensures that consumers are able to buy products at the lowest possible prices, or at competitive prices. In this way, competition policy enhances welfare by maximizing both consumer and producer surplus. Of course, regardless of which argument one alludes to, before countries think of adopting competition policy, they have to be convinced that the market is the best institutional mechanism for organizing economic activity. The market and business are also central to Porter's approach. Competition policy then becomes another policy pillar — just like monetary and fiscal policy. Markets only work if participants play by the rules. Competition policy provides those rules.

The welfare enhancing goals of competition policy are domestic. The goal is to protect *domestic* consumers, not just from illegitimate business practices of domestic firms, but also perhaps of cartels formed in other countries by foreign or multinational firms located elsewhere that raise prices in the domestic market. It is domestic concerns that led countries such as Canada and the United States to adopt anti-cartel and anti-monopoly laws in 1889 and 1890 respectively. They were not 'rich' countries at the time. Most countries in ASEAN have competition laws or are considering adopting them, not due to domestic concerns but due to trade-related factors. In the case of Singapore, the push came from the bilateral FTA with the United States, which raised concerns about the dominant role of government-linked companies. Where does the state end and the market begin?³ In the case of countries that presently do not have competition law, the push has come from the AEC. Of course this raises the question: why did these countries not feel compelled to protect domestic consumers prior to entering into bilateral or regional trade agreements? The answer clearly lies in the role of the state in most ASEAN countries. Indeed, the much-celebrated 'East-Asian Miracle' is more a narrative of state capitalism than of the primacy of markets. Market incentives aside, not too long ago, Singapore Telecommunications was not just a telecommunications firm, it was a 'valued national asset'. Indeed, during the partial privatization of the firm, every Singaporean got a share. Over time, of course, the

company has become more like a regular telecommunications company and prices have declined dramatically since. National champions are built on the backs of *domestic* consumers. Malaysia has had its fair share of misadventures with government trying to 'marry' domestic banks, and more recently, to build a domestic automobile industry using all available instruments of protection along with subsidizing government officials to purchase the much-revered Proton. The Indonesia of the past was well known for the handing out of monopoly rights to dominant domestic businesses and business families with close connections to the political leaders at the time. In this type of environment, competition policy creates competition for government, government interests or individuals in power, as in the case of Myanmar, and who wants that? As both 'socialist' PRC and inward-looking India have discovered, the market is a superior mechanism for generating economic growth and prosperity.

Even though the need or pressure to adopt competition laws may have come from trade related considerations for most ASEAN countries, trade and competition make good bedfellows. Trade barriers, regulatory barriers, state-owned or state-sanctioned monopolies all represent public barriers to trade and commerce. When public barriers are removed through trade liberalization, deregulation and privatization, competition policy is essential to preventing private restraints from taking the place of public restraints. To take a simple example, zero tariffs do not ensure market access to foreign goods if domestic distribution channels are monopolized. Competition policy keeps the latter in check to ensure market access and the resultant benefits from tariff reduction. Competition policy contributes to growth and development, as the basis of competition is efficiency, and incumbent firms can no longer be supported by monopoly rents. As mentioned earlier, developing countries may be more susceptible to anti-competitive practices because they have smaller markets with less depth. This may be due to poor infrastructure, ineffective legal systems, large informal and non-traded sectors, more state intervention, or poor governance.

In developed countries, competition policy may serve efficiency goals, but, in developing countries, it also serves distributional goals. Fox (2007) provides numerous examples from Africa where cartels have fixed prices of basic necessities such as milk, sugar, fish and chicken. Fox contends that the anti-competitive practices of Mexican telecommunications firm Telmex raised the prices of incoming calls

for migrant Mexican workers in the United States. Clearly the benefits of competition policy go beyond the economic objectives of AEC and have broader social impacts insofar as they contribute to reducing prices for staples and facilitating entry of SMEs. Fox argues that certain conditions must be met in order for competition policy to be effective in developing countries. Firstly, exemptions must not be overly broad. For example, firms that are favored by the state should not be immune, as this may restrict the domain of anti-trust and also encourage cronyism. Secondly, competition agencies should be free from political interference. Thirdly, they should be well funded and staffed by an adequate number of well-educated and well-trained individuals. Lastly, competition agencies should engage in active advocacy. Clearly, the ability to independently and effectively implement laws is critical for the desired results. In most instances, the costs imposed by cartels substantially outweigh the costs of funding a competition agency.

3.2 Competition Laws in ASEAN Countries

Cambodia is the only country without any competition law or laws with competition provisions. Indonesia, Malaysia, Singapore, Thailand and Viet Nam have general competition laws. In Lao People's Democratic Republic, competition law takes the form of a decree issued by the Prime Minister's Office in 2004, but it has not been implemented as yet. The constitutions of Myanmar and the Philippines contain anti-monopoly and fair competition provisions. Brunei Darussalam does not have a statute as yet. However, there are various competition provisions in sector-specific regulations on telecommunications. As would be expected, countries that do have general competition laws have taken a variety of approaches and some are more comprehensive than others. It is important to emphasize, however, that the differences between statutes are stark and in many instances countries have competition statutes, even though they appear not to acknowledge the primacy of markets in allocating resources, instead, priority is accorded to the State and the (economic) interests of the State. In these countries, investors and the domestic private sector will have to contend with both public and private restraints to trade.

The State-owned Economic Enterprises Law (SLORC Law 9/89) in Myanmar gives the government exclusive right to carry out pretty much all major economic activities; in extractive and natural resource industries, fisheries, transportation, finance, post and telecommunications, defence, broadcasting and electricity generation. What then is left to

the private sector? Viet Nam allows firms to compete so long as they do not infringe the interests of the State. For *all* restrictive agreements, Malaysian law relieves infringing parties of liability if there are technological, efficiency or *social benefits*, which could not have been provided in the absence of the agreement and if the agreement does not result in a monopoly or in the elimination of all competition. A detailed survey of competition laws in ASEAN countries is provided in Appendix 5.1.

3.3 Lessons from Other Regional Agreements

There are hundreds of Regional Trade Agreements (RTAs) and a little less than half contain competition policy chapters or provisions. Cernat (2005) indicates that in 2004–05 there were between 250 and 300 RTAs in force and approximately 140 contained competition provisions. They were becoming particularly fashionable after the 1990s but recently have become less so, because of the post-Cancun hurdles in the WTO in relation to trade and competition.

This section reviews three agreements and the growing literature on the ineffectiveness of competition provisions in RTAs involving developing and emerging market economies. The EU is not included in the review primarily because AEC does not call for the establishment of a supranational competition authority. The three agreements reviewed here are NAFTA, MERCOSUR and ANZCERTA.

ANZCERTA provides an example of an ideal agreement, but one that also has unique cultural and other underpinnings. Its stated goal has always been policy coordination, but over the years there has been considerable harmonization in the area of competition law. MERCOSUR is a customs union, unlike ASEAN, the latter being an example of open regionalism. Nonetheless, MECOSUR is discussed here, as it provides an instructive example of a failed attempt at harmonization. Over time, the objectives have been watered down to strengthening cooperation, but some scholars suggest that even this minimal cooperation has not been successful.⁴ NAFTA has its share of critics, but appears to be most relevant to ASEAN. Like AEC, it requires members to have competition laws, but does not require harmonization. Although the AEC Blueprint calls for “adherence to rules-based systems for effective compliance and implementation of economic commitments”, it does not include any formal dispute settlement mechanism in the context of competition law (ASEAN Secretariat 2009, p. 21).⁵ This attribute is also similar to NAFTA as the competition law provisions of Chapter 15

of NAFTA are not subject to formal dispute resolution. The following discussion illustrates that this creates its own set of problems, not so much in disputes between private firms, but in disputes involving private firms and state-sanctioned monopolies, whether publicly or privately owned. Given the dominant role of the state and state-owned enterprises in ASEAN, such disputes could very easily arise in ASEAN at some point in the future.

3.3.1 NAFTA

NAFTA does not prescribe a common or uniform set of competition rules for parties. There are five articles in Chapter 15 pertaining to competition policy and state-owned enterprises. Article 1501 (1) of the treaty only requires countries to have competition laws and to enforce and apply them in a non-discriminatory manner.⁶ Article 1501 (2) requires parties to cooperate and consult on competition policy matters through means such as “mutual legal assistance, notification, consultation and exchange of information” so as to fulfill the objectives of the free trade area.⁷ Further, Articles 1502 and 1503 allow the establishment of state enterprises including state-owned monopolies or private companies designated as monopolies by government so long as their actions are not inconsistent with Chapters 11 (Investment) and 14 (Financial Services). In addition parties are required, through regulation or administrative supervision to ensure that state-owned or state-designated monopolies do not use their monopoly position to (Article 1502 (d)):

... engage, either directly or indirectly, ... in anticompetitive practices in a non-monopolized market in its territory that adversely affect an investment of an investor of another Party, including through the discriminatory provision of the monopoly good or service, cross subsidization or predatory conduct.

The problem is that, according to Article 1501 (3), parties do not have recourse to a dispute-settlement process for Chapter 15 disputes. As a result, both corporations and governments have sought other means of relief. Two examples are considered here. The first was a dispute between United Parcel Service of America (UPS) and the Government of Canada (Canada) and the second between the United States and the Mexican telecommunications monopoly Telefonos de Mexico (Telmex).

UPS vs. Government of Canada

UPS Canada provides courier and small parcel delivery services in Canada and, at the time, competed with Canadian companies such as Purolator, which was owned by Canada Post Corporation (Canada Post), a Federal Crown Corporation and regulated by the Postal Services Review Committee.⁸ The Canada Post Corporation Act of 1981 provides Canada Post the exclusive privilege (or monopoly) to collect and deliver domestic letters otherwise known as first-class mail.⁹ The statute also requires Canada Post to operate on a commercial basis and, at the very least, on a breakeven financial basis. Canada Post, of course, provides other (competitive) services such the delivery of parcels and courier services, areas in which it has competitors.

In the mid-1990s UPS alleged that Canada Post was competing unfairly, as it was using its first-class mail or monopoly product infrastructure such as sorting facilities and collection and delivery system not just for first-class mail, but also for its competitive products, such as parcels and courier services. In other words, the regulated monopoly product was used to cross-subsidize the provision of competitive services. Canada did nothing to stop this practice, so in the year 2000 UPS filed a NAFTA claim against Canada before an international arbitration panel under Chapter 11 of NAFTA (Jones 2006).¹⁰ Chapter 11 deals not with competition issues, but with national treatment for investors. Article 1102 requires parties to accord national treatment or "treatment no less favorable, in like circumstances" than it accords to its own investors, to "investors" and to "investments of investors" of another party, with respect to "... the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments."¹¹

After 7 years, in May 2007, the arbitration panel rejected all claims by UPS and ruled in favor of Canada, suggesting that Canada Post's decisions were commercial decisions in accordance with Chapter 15. In order to violate Chapter 15, they would have to have been government decisions. The Tribunal also compared the first-class mail services of Canada Post with the courier services of UPS and found that they were not in "like circumstances", which is a requirement of Chapter 11.¹²

United States vs. Telmex

The Mexican telecommunications market was an important market for US companies. In 1999 Americans spent over US\$1 billion on

long-distance calls to Mexico. Despite attempts by the Mexican government to increase competition in the Mexican telecommunications market, US companies had a market share of less than 30%. Telmex controlled the local telecommunications market and more than 80% of the long-distance market. It was one of the most profitable carriers in the world in 1999, with profits of close to US\$4 billion on revenues of about US\$10 billion, a return on sales in excess of 40% (Rosenthal 2002). American telecommunications companies (WorldCom and AT&T) and industry associations (Competitive Telecommunications Association) expressed concerns about anti-competitive practices and lack of effective regulation of Telmex as early as 1998, as part of the annual review of trade agreements by the office of the United States Trade Representative (USTR).¹³

International Long Distance Rules governed telecommunications regulations in Mexico, including the accounting rates (for call termination) regime, which allowed accounting rates negotiated by the carrier with the largest market share (of international calls with a particular country) to be applicable to all carriers. At the time of the dispute, due to the dominance of Telmex in the Mexican market, rates negotiated by Telmex were applicable to *all* calls originating from *all* foreign countries (Kill 2011).

The American concerns regarding the Telmex monopoly would likely fall under Chapter 15 of NAFTA, but the United States chose to raise them in the WTO. While there are no multilateral competition rules in the WTO agreement, the telecommunications reference paper under the General Agreement on Trade in Services (GATS) contains anti-competitive safeguards. In July 2000, the United States requested WTO consultations with Mexico and, despite consultations in both 2000 and 2001, the parties did not reach a resolution. Eventually, the dispute settlement body established a panel in April 2002, which issued an opinion in favor of the United States in April 2004.¹⁴ The US alleged that Mexico had violated Article XVII of GATS, which relates to national treatment, and Articles 5(a) and (b) of the Annex on Telecommunications, which require:

... any service supplier of any other Member country is accorded access to and use of public telecommunications transport networks and services on reasonable and non-discriminatory terms and conditions ...

This includes purchase and lease of terminal equipment, private leased circuits, operating protocols and interconnection.¹⁵ In addition

the US asserted that Mexico had violated Articles 1.1 and 1.2 of the GATS Telecommunications Reference Paper, which contains principles of independent regulation, timely interconnection on non-discriminatory terms and competitive safeguards that seek to prevent anti-competitive practices in telecommunications, particularly by "major suppliers".¹⁶ The United States presented three claims:¹⁷

Mexico's failure to ensure that Telmex provides interconnection to United States basic telecom suppliers on a cross-border basis on cost-oriented, reasonable rates, terms and conditions ...

Mexico's failure to maintain measures to prevent Telmex from engaging in anticompetitive practices and in particular, that Mexico's ILD Rules ... empower Telmex to operate a cartel dominated by itself to fix rates for international interconnection and restrict the supply of scheduled basic telecommunications services ...

Mexico's failure to ensure United States basic telecom suppliers reasonable and non-discriminatory access to, and use of, public telecom networks and services ...

The panel ruled in favor of the United States and indicated that Mexico's measures did not conform to its obligations under GATS.

3.3.2 MERCOSUR

In March 1991, Argentina, Brazil, Paraguay and Uruguay, signed the Treaty of Asunción, which sought to establish MERCOSUR by 31 December 1994.¹⁸ Like any common market, countries agreed to eliminate trade barriers among themselves while maintaining a common external tariff and trade policy with respect to third countries. In addition, Article 1 of the Treaty called for policy coordination in various areas and harmonization of relevant laws:

... coordination of macroeconomic and sectoral policies ... in the areas of foreign trade, agriculture, trade, industry, fiscal and monetary matters, foreign exchange and capital, services, customs, transport and communication ...

The commitment ... to harmonise their legislation in the relevant areas in order to strengthen the integration process.

Progress was slow, as Article 18 of the Treaty of Asunción called for the establishment of an institutional structure and administrative bodies prior to 31 December 1994. This was finally done on 17 December 1994, via the additional Protocol of Ouro Preto, which set up various bodies

such as the Council of the Common Market (CMC), the Common Market Group (CMG) and the MERCOSUR Trade Commission (MTC), which is essentially supposed to monitor and review the application of the common trading rules and regulations agreed upon by parties.¹⁹ The decision of these various organs are supposed to be binding upon parties. Competition policy had to wait until December 1996, when countries signed the Fortaleza Protocol.²⁰ The goal of the Protocol (Article 2) was to prevent anti-competitive practices, which had a detrimental impact on trade between parties. Substantive provisions included price-fixing, bid-rigging, refusal to deal, predation, tied sales etc. However, there were no merger provisions. Instead, Article 7 called for the incorporation of common rules relating to regional economic concentration and dominance of the regional market within 2 years of the signing of the Protocol.

Although enforcement was the responsibility of national competition agencies, the two regional institutions that played a part included the MTC and Committee for Protection/Defense of Competition (CDC), the latter being composed of representatives of national competition authorities and/or ministries (Azavedo 2005). Any competition proceedings were to be initiated by national competition authorities, which must make an initial determination as to whether there were any regional or bloc-wide implications. If there were bloc-wide implications, then the case was referred to the CDC, which could either terminate the inquiry or, using a rule-of-reason approach, establish guidelines for the relevant antitrust market, and the evidence and analytical criteria to be employed.²¹ The problem, however, was that regional bodies such as the CDC worked on the basis of consensus, and any party could block a decision.

Interestingly, the Fortaleza Protocol was ratified only by Brazil and Paraguay and the latter still does not have a competition law. MERCOSUR has now moved to the other end of the spectrum — from harmonization and regional competition bodies to agreements of cooperation, exchange of information and consultation between national competition agencies. Botta (2010) indicates that not only was the Fortaleza Protocol “de facto unenforced”, it has been “abrogated” by a 2010 Decision by the CMC (Botta 2011, pp. 10–11). The 2010 Decision or Agreement for the Protection of Competition in MERCOSUR did not need to be ratified by parties and just sought to strengthen cooperation. Surprisingly, Botta (2011) indicates

that even this minimal level of cooperation has not been successful because of:

... the lack of mutual trust among these national institutions [National Competition Authorities], mainly due to the different level of development of competition law enforcement in the different MS [Member States]. (Botta 2011, p. 13)

Botta (2011, p. 15) concludes:

A regional enforcement system based on a mechanism of cooperation among different NCAs [National Competition Authorities] can be successful only if the NCAs have achieved a comparable level of development in competition law enforcement.

3.3.3 ANZCERTA

ANZCERTA came into force in 1983 and is an excellent example of a WTO-consistent trade agreement and of harmonization of competition laws, even though the initial commitments and obligations were quite limited.²² The treaty sought to eliminate barriers to trade between Australia and New Zealand "in a gradual and progressive manner under an agreed timetable and with minimum disruption; and to develop trade ... under conditions of fair competition".²³ With regard to harmonization, member states undertook to:²⁴

... examine the scope for taking action to harmonise requirements relating to such matters as standards, technical specifications and testing procedures, domestic labeling and restrictive trade practices; and

... where appropriate, encourage government bodies and other organisations and institutions to work towards the harmonisation of such requirements.

Despite this somewhat limited commitment, over the years there has been harmonization in various areas of Business Law via a Memorandum of Understanding (MOU) signed in 1988, which was replaced by a 2000 MOU on coordination of business law. The 2000 MOU was most recently replaced by one signed in 2006.²⁵ Both more recent documents recognize that coordination is multifaceted and need not involve adoption of identical laws and statutes:²⁶

An array of approaches exists to achieve the goal of increased coordination in business law. Both Governments recognise that one single approach would not be suitable for every area, that coordination is

multi-faceted and does not necessarily mean the adoption of identical laws, but rather finding a way to deal with any differences so they do not create barriers to trade and investment. In working towards greater coordination, the efforts of both Governments will focus on reducing transaction costs, lessening compliance costs and uncertainty, and increasing competition.

In the area of competition law, some degree of similarity existed prior to the signing of these MOUs. The 1986 Commerce Act of New Zealand was based to a considerable extent on the 1974 Trade Practices Act of Australia (Round et al. 2005 p. 50). Over time, close cooperation between competition agencies of the two countries has resulted in similar approaches and interpretations. Of course, the MOUs also led to legislative changes in both countries. For example, in the early 1990s, legislation abolished anti-dumping controls and both countries modified their respective competition legislations to allow competition agencies in either country to investigate misuse of market power, predation and other anti-competitive behavior regardless of national boundaries. The “trans-Tasman impact market” could be any market within Australasia; national borders were effectively eliminated (Round et al. 2005, p. 41). Further, either the Federal Court of Australia or the High Court of New Zealand could sit in the other country and the two competition agencies could act on each other’s behalf (Round et al. 2005, p. 26). The move toward greater cooperation in all areas, including competition law, continues and most recently, in August 2006, the Australian Competition and Consumer Commission and the New Zealand Commerce Commission signed a cooperation protocol for the review of mergers.

ANZCERTA is a unique model and its success has been attributed to similarities in the level of economic development, history, institutions, language, and culture; geographic proximity; a shared economic approach, and a belief in market-oriented economies and competition. In addition there appears to be the political will and patience to work through an iterative process toward greater coordination and harmonization without a supranational or a dispute-settlement body.

3.4 RTAs and Competition Provisions

Many RTAs contain competition provisions particularly since the 1990s. As Cernat (2005) indicates, the application of competition law in a regional trade context can have trade creation or trade diversion

effects. If members apply competition laws in a non-discriminatory manner across the board, then there will be trade creation, whereas if they are only applied in a discriminatory manner to tackle anti-competitive practices insofar as they affect trade between members this may have a trade diverting effect. Cernat finds that though developing and emerging market countries have been eager to sign RTAs with competition policy provisions, "little action has been recorded in the implementation phase of such CRPs [competition related provisions]" and concludes that countries appear to be more eager to sign such agreements rather than implement them (Cernat 2005, p. 31). Though Cernat does not provide reasons for the lack of implementation, other scholars suggest that there are limits to the effectiveness of competition policy provisions, particularly if competition officials are not involved in negotiations. Competition officials find more informal methods of cooperation to be more effective than formal cooperation rules (Alvarez et al. 2005).

More recently, Gal and Wassmer (2012) come up with similar findings. They suggest that despite the proliferation of regional competition agreements in developing jurisdictions, these have been problematic and have not enhanced the enforcement of competition law in the respective regions. They suggest that this may be due to financial and human resource constraints and a weak competition culture.

Sokol (2008) conducted a survey of regional free or preferential trade agreements to which at least one Latin American country was a party. Many of these agreements include chapters on competition policy.²⁷ Sokol contends that conventional wisdom overstates the effectiveness of these chapters. Many of these chapters lack binding dispute settlement. Sokol found that all Latin American preferential trade agreements (with competition policy chapters) lack binding dispute settlement for core issues such as mergers, collusion and monopolization. The determining factor for the inclusion of competition chapters appears to be whether or not some or all parties had antitrust laws at the time they signed the agreements. The decision to include competition policy chapters is not a result of power relationships, so a substantial number of American agreements lack competition provisions. Sokol interprets the American position as one where it does not oppose the inclusion of competition policy chapters so long as they are non-binding. Anti-competitive practices may also be addressed in the IP and services discussions. Interestingly only three of the 36

agreements lack dispute settlement in IP and none in services. Thus Sokol concludes that competition policy is treated differently from other areas of regulation and suggests that this may be due to the fact that competition policy is not covered in the WTO agreement whereas IP and services are. The WTO serves as a floor for coverage; in other words, countries will not go below what they agreed to in the WTO.

In essence, countries may enter into non-binding agreements because there are no globally agreed principles of competition and there is a lack of convergence even between the EU and the United States. The difference between the treatment of antitrust and IP could be because the transaction costs of dispute resolution may be higher for antitrust than for IP violations, where detection is easier and violation may be an issue of the level of enforcement. Sokol offers a number of reasons as to why non-binding agreements may be of value. Firstly, they could play a signalling role. They may signal to other countries that a country plays by the rules, or similar rules based on the norms of competition. They could also serve as a signal to foreign investors that the country is market-oriented and pro-investment. Secondly, such agreements could have symbolic value for domestic constituencies as to the importance of regulatory liberalization and country competitiveness. Thirdly, non-binding agreements could promote relational contracting between competition agencies, in other words; cross-border disputes may be better resolved through bilateral discussion rather than through trade remedies. Lastly, this could be due to the fear of adverse outcomes. In summary, then, non-binding competition agreements could still be of value so long as the costs of negotiating them do not outweigh their symbolic value.

4. ASEAN Intellectual Property Laws and Integration

Innovation is the main driving force in economic growth. Innovation includes not only invention but also the diffusion and absorption of new ideas, knowledge and technology. IPRs give inventors and artists the right to exclude others from using their ideas, expression, etc. This allows IPR holders not only to appropriate the returns from their innovation but also, by creating a legal property right, allows them to transfer their innovation to others who can better produce or distribute the resulting products or services by sale or licence.

IPRs are usually classified as either industrial or artistic and literary property. The former includes patents but also industrial designs, trademarks, geographical indications and trade secrets, and the latter covers copyright. There are several other 'tailor-made' IPRs covering database protection, integrated computer chips, and plant breeder rights.

Knowledge has public good characteristics and is usually *non-excludable*. If a new technology is valuable it will be copied unless it can be protected. This reduces the original innovator's profits, so the incentive to engage in innovation is reduced. Knowledge is also *non-rival*. One person's use of the knowledge does not diminish another's use, so there is no scarcity value. For economic efficiency then, once created, knowledge should be available to all at the marginal cost of transferring it, which may be close to zero. But, access to knowledge at its marginal transfer cost reduces the rewards to innovators and thus the incentives to innovate. While IPRs provide incentives for inventors to create new knowledge and for artists to create new expressions exclusivity comes at a price: limited dissemination of the technology or expression during the life of the IPR protection. At the single-country level, there is a trade-off between promoting innovation (long-term dynamic efficiency) and its dissemination (short-term static efficiency). IP protection, given in the short term to encourage innovation, leads to temporarily higher prices and therefore less access. So in a closed economy, governments have to make a policy choice between short- and long-term effects.

When innovation occurs in one country and is sold in another, this welfare trade-off becomes more complicated. IP laws are national, and governments naturally focus on maximizing their own country's economic welfare. A small number of developed countries produce most innovation. Their interest is in having strong IPRs in the countries to which they sell. On the other hand, for developing countries, with limited research and development, imitation and adaptation of new technology is more important than its creation; thus their interest is in having weak enforcement or non-enforcement of IPRs. For a less developed country the introduction of IPRs can reduce the profits of local imitators and increase the profits of the innovator in the developed country, a difficult idea to sell to locals in a developing country.

The welfare effects of harmonizing IPRs across countries at different levels of innovation (or development) can be illustrated with the help of

FIGURE 5.1
Welfare Effects of Harmonizing IPRs

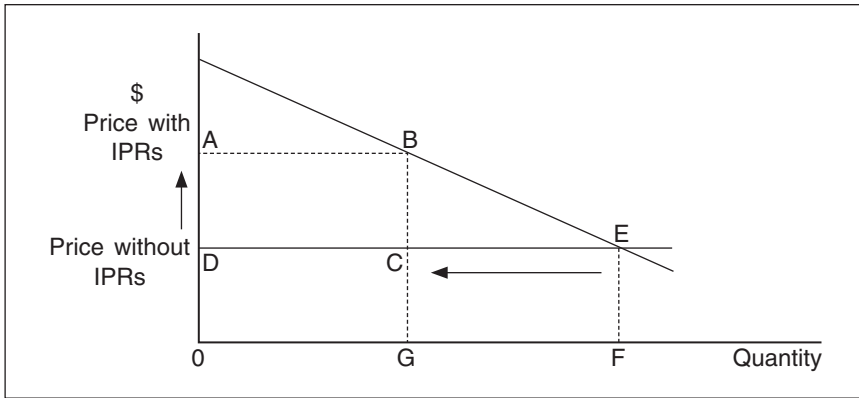


Figure 5.1, which assumes that research and development are undertaken in Country I and the resulting products are sold (the technology is diffused) in Country W — which, for simplicity, is initially assumed not to have IP laws (or does not enforce them).

Firm X is the innovating firm in Country I. Harmonization means that Country W will introduce IPRs similar to those in Country I; Firm X can now also seek patent protection in Country W. If it is assumed that prior to harmonization, Firm X's product was imitated and produced under competitive conditions in Country W; then the following occurs. With harmonization, Country W loses all domestic production (OF) and imports the quantity OG from Firm X in Country I. Because prices have risen in Country W there is a consumer welfare loss of ABED, of which ABCD is transferred to Firm X in Country I. Of course there are other possibilities. For example, Firm X could invest in Country W and produce OG there, or Firm X could licence a firm from Country W to produce (which could lead to less or more production in Country W depending on the licence fee). For both foreign direct investment (FDI) and licensing, the introduction of IPRs could also lead to research and development in Country W to adapt the product or process for local conditions. In addition, there could be exports from Country W due to preferential access in other countries in the region that are part of a regional trade agreement. Overall the net effect of the introduction of IPRs depends on a range of factors, including the capacity of Country W to absorb new technologies, which

in turn depends on skills and educational attainment. However, it is likely that firms in country with weak IPRs may have difficulty moving beyond imitation (Maskus 2000).

In summary, there are a number of possible economic effects from introducing IPRs or harmonizing and enforcing them to a higher standard. These include:

1. A loss of employment in any pre-existing imitative industries. Due to the closure of the imitators, the innovator has greater demand in the importing country for their (now) IPR protected-product. Maskus (2000) calls this the *market-expansion effect* — obviously, market expansion across borders.
2. Possibly greater innovation in the importing country, which leads to both locally made goods and services replacing imports and more exports, but the evidence for this is weak (see Lerner 2002, for example).
3. The innovator having greater market power in the importing country. This allows the exporting IPR owner to charge a higher price. Maskus (2000) calls this the *market-power effect*. Maskus and Penubarti (1995) suggest that the market-power effect is probably greater for countries with a low capacity to imitate with the opposite likely in countries with a high ability to imitate.
4. Possibly greater research and development by developed countries on adapting and tailoring their products to developing country problems, but this is only likely if there is sufficient demand and income in developing countries.
5. A greater willingness to invest in the importing country or form a joint venture or licence production of now IPR-protected products, processes and expressions.

The welfare effects of IPRs in an open economy context are mixed, as is the empirical evidence on the impact of IPRs on trade, investment, and growth. This is by no means a new debate. Machlup and Penrose (1950, p. 9) suggest that the debate on patent protection in nineteenth-century Europe was ideologically linked with tariff protection. Dutfield (2003, p. 53) corroborates this view, suggesting that those who opposed patents “denounced them as anachronistic and unfair monopoly privileges that should be dispensed with”. Now it is generally acknowledged that IPRs rarely create monopolies, but their owners justifiably use them to maximize the profits from innovation. But how do IPRs affect trade

and growth? A recent survey by Bessen and Meurer (2008, pp. 20–21) concluded that:

... with the cross-country studies in particular, the quality of general property rights institutions has a substantial direct effect on economic growth. Using the same methodology and in the same studies, intellectual property rights have at best only a weak and indirect effect on economic growth ... the positive effects of patents appear to be highly contingent.

Bessen and Meurer (2008) also conclude that less developed countries benefit less from patents, but those with higher levels of trade benefit more.

Insofar as FDI and technology diffusion are concerned, Kiriyaama (2012, p. 5) concluded, after surveying the empirical literature, that:

... the state of domestic intellectual property legislation and enforcement has improved in recent years, and evidence suggests that this has facilitated technology diffusion through various channels, including FDI and trade.

Another recent paper, by Breitwieser and Foster (2012, p. 55), summarizes the available empirical evidence on IPRs and technology diffusion. The empirical evidence examined deals mainly with patents. They conclude that:

... views on the importance of IPR protection tend to be polarised. On the one side, it is believed that stronger IPR protection can encourage innovation, technology diffusion and enhance growth. On the other it is thought that stronger IPR protection leads to monopoly power for patent holders, reduces the incentive to innovate and limits the diffusion of knowledge. The evidence reviewed supports neither claim.

Similarly, the UK Commission on IPRs (2002, p. 23) concluded the evidence that IPRs provide incentives for FDI is lacking:

If this was the case, then large countries with high growth rates but weak IPR regimes would not have received large foreign investment inflows in the past and even now. This includes many of the East Asian and Latin American economies which have received the bulk of such flows. If the question is addressed in terms of what factors are most important in determining foreign investment, it is quite common for IPRs to be omitted altogether.

They do find, however, that IPRs in developing countries are important in “IPR sensitive” industries such as chemicals and pharmaceuticals.

The Commission Report also indicates that developed countries traditionally regard IP laws as part of their industrial policy, establishing and changing them to suit their own stages of economic development. On the relationship between IPRs and growth, the Commission concluded that (p. 22):

... in most low income countries, with weak scientific and technological infrastructure, IP protection at the levels mandated by TRIPS is not a significant determinant of growth. On the contrary, rapid growth is more often associated with weaker IP protection.

International agreements on IPRs such as TRIPS, by setting minimum standards, have already harmonized IP laws across countries and indeed within ASEAN, at least on paper. But there is a gap between TRIPS minimum standards and the actual enforcement of those standards.

4.1 The TRIPS Story

Research-intensive developed countries have an interest in lobbying for increased IP protection in countries in which they sell or in which copies are sold (which may be imported back into the IP-originating country reducing prices there and creating incentives). IP laws started to internationalize and harmonize from the 1960s, as developed countries argued that developing countries needed sound IP laws to attract foreign capital and technology. Over time, developed countries sought to extend overseas the IP protection given in their own countries by setting minimum international IP standards, which arguably benefitted developed countries more than developing (Finger 2002).

For a long time developed countries lobbied through the World Intellectual Property Organization (WIPO) for better worldwide IP protection, but the developed countries failed to achieve the IP outcomes they wanted (Drahos 1998). At the beginning of the Uruguay Round the US argued for the introduction of IPRs as part of the trade negotiations agenda, since its proposals could be defeated by coalitions of developing countries in other forums such as WIPO and UNCTAD (Drahos 2002).

The Uruguay Round led to the TRIPS Agreement, which set minimum IP standards for WTO Members covering copyright, patents, trademarks, geographical indications, industrial designs, the layout designs of integrated circuits, protection of and undisclosed information,

including trade secrets and test data, and the control of anti-competitive practices in licences on the basis that IPRs affect trade flows.

TRIPS incorporated provisions from pre-existing international agreements on IPRs, such as the Paris and Berne Conventions administered by WIPO. However, TRIPS also added provisions dealing with enforcement and a dispute resolution mechanism, which were lacking in previous treaties. Of particular importance was the extension of the principles of 'national treatment' and 'most favored nation' to all IPRs.

Developing countries agreed to accede to TRIPS for several reasons: pressure from developed countries (mainly the US and EU); a belief that there would be greater access to developed country markets particularly for agriculture and textiles; some lobbying by innovators in the developing countries themselves; and a belief that stronger IP protection would lead to increased technology transfer through foreign direct investment and increased technology licensing.

However, TRIPS does not fully harmonize international IP laws as IPRs still can be tailored to a country's level of development. The Preamble to TRIPS notes that the public policy underpinning includes *development and technological objectives*. The advent of TRIPS means that countries now find it difficult to adapt IP laws to suit their stage of development through imitation like developed countries had previously done. Instead, countries must now place less reliance on imitation and instead rely primarily on using IPRs to develop domestic innovation and to increase FDI and cross-border IP licensing. TRIPS recognized (Article 40) that IP licensing and other practices can have "adverse effects on trade and may impede the dissemination of technology". As a result members have discretion to specify "in their legislation licensing practices or conditions that may in particular cases constitute an abuse of intellectual property rights having an adverse effect on competition in the relevant market".²⁸

All ASEAN countries are members of TRIPS, apart from the Lao PDR, which has observer status and is currently negotiating access, and have enacted IP laws based on imported Western models. Little attempt has been made by ASEAN countries to develop IP laws from the ground up based on their different stages of economic development or institutional capacity.

But since TRIPS was signed, developing countries have tried to dilute the provisions. For example, to clarify the scope of TRIPS with respect

to medicines, a new round of talks began that resulted in the Doha Declaration in 2001. One outcome of the talks was an agreement that TRIPS should be interpreted in light of the goal "to promote access to medicines for all".²⁹ In addition, the WTO Council extended (by more than 7 years to July 2013) the period for least developed countries to implement TRIPS commitments. Least developed countries need not protect pharmaceutical products until 2016.

While TRIPS has uniform protection standards, it does not provide for a uniform enforcement system. Articles 41 to 47 require TRIPS members to set up national enforcement systems for the rights agreed to in TRIPS. Members must ensure that IPR holders have fair and equitable enforcement procedures. The mechanisms must include the authority to require the production of evidence and remedies such as injunctions and compensation for damages. But as Antons (2011, p. 2) notes, procedural harmonization can be a challenge in developing countries:

... the problems of harmonising procedural rules in developing Asia are much more severe than those experienced in Europe and North America, with law in Asia drawn not only from different traditions, but also from different colonial periods, and with a judiciary that is often struggling to free itself from political influence and from a negative image of being corrupt to some degree.

In any event, increasing IP protection takes time. Harmonization is even more difficult in practice given that IP laws are generally national in nature. For example, even the European Union has not achieved full IP integration; most patent and utility model law is solely national, while trademark, design and copyright law has been harmonized to a degree through EU Directives. Only community trademarks and community designs law are EU-wide (Antons 2011, p. 5). The European efforts toward harmonization of IP laws are discussed next.

4.2 Harmonizing IP Laws in the European Union

As an economic union, Europe has had the most experience in harmonizing IPRs. The task has not been easy. This section provides a brief discussion of the path the EU has taken toward harmonizing each type of IPR. This provides a background to the likely IP harmonization issues ASEAN will have to deal with.

Patents give an exclusive right to the inventor of a new idea the right to stop others from making, selling, distributing, importing or otherwise using the invention without permission for a period (TRIPS provides for a minimum of 20 years from the filing date of the patent application). Patents need to be registered. Industrial designs protect aesthetic aspects such as symbols or colours. TRIPS requires a minimum of 10 years protection. The idea of an EC patent was considered when the EC was set up in 1957. In 1973 the European Patent Convention (EPC) was signed in Munich. Initially, the intent was to promote a European system of examination rather than using it to promote trade between member countries. European patents are only granted to inventions that are new, involve an inventive step and are susceptible to industrial application. Changes were made to the EPC in 2000 (EPC 2000), which came into force at the end of 2007. The EPC 2000 provided for a single, centralized process for patent grants. As Seville (2009, p. 94) puts it:

A successful application will result in single grant of a bundle of national patents in each of the countries designated by the applicant. Each European patent has, in each of the countries for which it is granted, the effect of a national patent. Its term is 20 years from the application filing date.

However, issues of validity and infringement are still matters for the national courts as the EPC harmonizes the national IP laws only up to the point of grant of the patent. There is no appeal from the national courts to a European Court or Tribunal. As a result, a European patent may be interpreted differently in different member countries. This could be an important issue for ASEAN in the future.

A working party was set up in 1999 to address the fact that there was no single dispute resolution mechanism. In 2003, a draft European Patent Litigation Agreement (EPLA) was proposed, which would commit member states to an integrated judicial system, including uniform rules of procedure and a common appeal court for patent disputes.³⁰ The Council of the European Union proposed a Community Patent with its own Patent Court (EUPC) in 2009. To date, nothing has happened.

Trademarks give an exclusive right to use distinctive signs to identify the source of the product. Trademarks, unlike patents, do not promote research and development directly but mainly exist to protect the producer's reputation and to encourage product development. By

doing so, they also serve a consumer protection function by preventing consumers from being misled. Usually, trademarks can be renewed indefinitely. An international registration of marks system (the Madrid system) is administered by WIPO. This system allows a trademark owner to file one application with their national trademark office. Once registered, the mark is protected in the countries chosen by the applicant, unless the trademark office of any of those countries refuses protection within a certain time.

The first step in harmonizing trademark law within the EU was the 1988 Trade Mark Directive, which harmonized the conditions for obtaining and continuing to hold a registered trademark. Next, Regulation 40/94 on the Community Trade Mark [1994] OJ 11/1 introduced an EU trademark. This gave uniform protection in all countries with a single registration, but individual country trademarks coexist and are often more important, given difficulties in demonstrating community-wide eligibility. Though the EU has been relatively successful in harmonizing trademark law, there is some lack of clarity in the legislation and, therefore, a considerable amount of case law.

Copyright covers copying and not independent creation. It covers literary and artistic work, music, television, broadcasts, computer software, databases, advertising ideas and multimedia products. TRIPS requires that copyright must last for at least 50 years after the death of the author (70 years in the US and the EU). Copyright must be granted automatically and not based on registration. Computer programs must be regarded as "literary works" under copyright law and so receive the same terms of protection.

Copyright is difficult to harmonize, because it covers such a broad range of subject matter. There is no EU copyright. Instead, there are a number of directives dealing with particular areas (for example, databases, satellite broadcasting and rental rights). However, the Commission is interested in examining the issue of copyright in promoting competition and innovation through the exploitation of cross-country rights. There is a difference between common law and civil law countries with respect to copyright. The common law seems mainly concerned with economic rights while the civil law usually gives priority to the natural rights of authors. Civil law makes a distinction between author's rights and 'entrepreneurial' rights. However, both systems have much in common.

Copyright protection is affected considerably by changes in technology. For example, digitization allows for low-cost, almost perfect copies. International copyright protection started because of the lower costs of international travel in the nineteenth century. Copyrighted English books would be sent to the United States and re-published at a lower cost, because the publisher had only to pay the printing costs. Pressure by authors and artists led to the Berne Convention in 1886 based on the principle of *national treatment*, that is, it required signatories to recognize the copyright of works of authors from other signatory countries in the same way that it recognized its own authors (the United States was not a signatory). Initially, the Convention only covered literary and artistic works, including cinematographic. No protection was provided for performers, sound recording, broadcasters or publishers. A separate agreement was negotiated (the Rome Convention 1961), dealing with performers, producers of phonograms and broadcasters. TRIPS further harmonized and raised the level of copyright protection.

Another important IPR issue for economic integration is the protection of designs. Design refers to the appearance and composition of an article and to any preliminary drawings or models. It can include product or packaging design, web design, software design, graphic design, theatre design, colour design, architectural design, automotive design, fashion design, environmental design, furniture design, industrial design, interior design, etc. Patent protection is rare for designs, but trademarks or copyright may be used to protect designs. Lack of harmonization of design IPRs can affect the free movement of goods.

In 1991, the European Commission issued a Green Paper, which proposed a Community Design system (somewhere between patent and copyright). A Directive was adopted in 1998 to harmonize design IPRs including registration, the extent and time of protection and the conditions for refusal. Remedies and enforcement were left to national laws. Regulation 6/2002 on Community Designs followed [2002] OJ L/1. The EU has acceded to the Geneva Act of the Hague Agreement concerning the international registration of industrial designs, which allows for a single application at WIPO for protection not only within the EU, but in all countries that are signatories to the Geneva Act of the Hague Agreement. However, the breadth of designs has led some EU countries to use different protection through copyright, patent and *sui generis* design protection. While

the conditions for obtaining registration, and the extent and terms of protection have been harmonized, many procedural elements are left to individual countries.

Trade secrets allow firms to protect their research and development without disclosing the property (as required by patents). Trade secrets are protected, as long as they remain secret and are protected by laws against unfair acquisition or unauthorized disclosure. Trade secrets help to 'fill in the gaps' in the protection given by statutory IP protection. The EU does not have any specific legal provisions to protect trade secrets or undisclosed information. TRIPS (Section 7) provides for minimal legal standards for trade secret protection, leaving individual countries considerable discretion. All that is required is that the secret information has commercial value because it is secret, and the person controlling the information has taken reasonable steps to keep it secret. Because of its secretive nature, there is potential for such information to be used anti-competitively.

4.3 Integration of IP Laws in ASEAN

EU integration saw IPRs as playing an important part in its overall regional growth strategy, called the Lisbon Strategy, which called for the harmonization of IP laws to establish an *internal market in knowledge*. Like the EU, ASEAN also sees an important role for IPRs in fostering economic growth. In particular, according to the ASEAN IP Rights Action Plan 2011–2015, ASEAN seeks to accelerate the pace of IP asset creation and commercialization so as to transform the region into one where growth is driven primarily by innovation. More importantly, it seeks to attract foreign direct investment and, to that end, sees the need to ensure the protection of IPRs of trading partners. However, nowhere does the Plan explain how IPRs actually help economic integration, particularly with differing standards of actual protection (harmonization is ruled out). Nor is it explained how improved protection of trading partners' IPRs will encourage FDI. As summarized earlier the evidence on the relationship between IPRs and FDI is not conclusive. Even if FDI is encouraged the investment need not necessarily involve technology transfer, which stresses the importance of looking at IPRs as part of a broader technology policy.

Like the EU, ASEAN has worked on IP integration issues for some time. The ASEAN Working Group on Intellectual Property Cooperation

(AWGIPC) has served as the consultative body for ASEAN cooperation since 1996. The ASEAN Project on the Protection of Intellectual Property Rights (ECAP III) has followed the EC-ASEAN Patents and Trade Marks or ECAP (1993–1997) and the EC-ASEAN Intellectual Property Rights Co-operation Programmes (ECAP II 2000–2007), which were funded by the EU (€13.8 million) and the European Patent Office (€1.5 million). The 4-year ECAP III program started in January 2010 with an additional funding of €5.1 million from the EU and European Patent Office. The goal is to enhance regional integration “by strengthening institutional capacity, and legal and administrative frameworks for protecting IPRs in the region”.³¹

More recently, the AEC Blueprint includes several measures that relate to IP protection, including the full implementation of the ASEAN IPRs Action Plan 2004–2010. Under that plan and the more recent ASEAN IPRs Action Plan 2011–2015, ASEAN members have set out a number of priority goals and actions. These include the improvement of IP legislation, protection and enforcement; accession to international IP treaties (Madrid Protocol); establishing an ASEAN filing system for design; promoting regional cooperation on traditional knowledge, genetic resources and cultural traditional expressions; consultations and information exchange among national IP enforcement agencies; the simplification and harmonization of IP registration and procedures.

Harmonization of IP laws is central to the European approach and, as discussed earlier, it has yet to be achieved on the enforcement side. ASEAN rules out harmonization. It takes a ‘soft-law’ approach to integration, that is, commitments are declarations of political will, often voluntary and non-binding, rather than legally binding agreements backed up by a binding dispute resolution mechanism. This allows member states to implement rules when they are able to do so and to incorporate differences that reflect national conditions. This is the approach used for IP. The ASEAN IPRs Action Plan 2011–2015 states (p. 2) that:³²

Instead of trying to formulate a single set of laws and designing a harmonised regional system in IP, the AWGIPC has crafted its own means of integrating through a higher level of cooperation by undertaking programmes and activities together, with AMSs strengthening linkages with each other to improve their capacity and participating in global IP structures, subject to the capacity and readiness of each AMS.

Harmonizing both rules and enforcement is an important element of reducing trade barriers. The latter is difficult, particularly in developing countries. Europe only started on the path of harmonizing enforcement in 2004. A 2004 European Commission Directive noted that harmonization "promoted the free movement of goods between European Union countries and made the rules more transparent, the means of enforcing intellectual property rights have not been harmonized at all until now". The Directive was aimed at harmonizing enforcement and promoting innovation and business competitiveness.³³ Given ASEAN's relative infancy and major differences in levels of economic development, harmonized regional standards and enforcement are a long-term agenda item, one that could nevertheless lead to major benefits in terms of development of a regional market. These include:

1. Better protection and enforcement of IPRs will mean greater confidence that goods or services produced in one ASEAN country can be sold in another without copying, leading to more investment not only by non-ASEAN countries but also by ASEAN companies as well. However, in the short term, more developed countries in ASEAN may gain more.
2. Reduced cross-border transaction costs for the sale and licensing of IPRs.
3. A reduced level of national 'strategic' use of IPR regimes within ASEAN; for example, granting wide patents to local industry but giving narrow protection to other countries in ASEAN and elsewhere.
4. A consistent level of protection and enforcement within the region will lead to FDI into ASEAN being made on the basis of the comparative advantage of countries rather than just the IP regime.

Without harmonization, those seeking IPR registration *or* enforcement within ASEAN will have different requirements in each country. This may impact on FDI to the region. Since TRIPS sets a minimum level of protection, there seems little point in setting ASEAN IP standards at a higher level. The ASEAN commitments are to greater cooperation, which over time should be able to resolve the institutional and public policy issues involved with integration. The main problems are likely to be the use of national IP laws to limit intra-ASEAN trade (which could be corrected by each ASEAN country allowing for parallel

importation) and limiting private anti-competitive conduct which inhibits intra-ASEAN trade and integration (which, due to problems of proof and the impact of anti-competitive conduct, which differs in different ASEAN countries can only be resolved by cooperation or an ASEAN-wide competition law). This is discussed in the next section.

5. Policy Issues in the IPRs and Competition Law Intersection

IPRs give a property right over an idea, expression, trademark, commercial secret etc. It is appropriate, then, that IPRs be subject to competition law as are other property rights. Should competition law treat IPRs in exactly the same way as real property rights? This has been the subject of considerable debate in developed countries in the last 20 years or so as IPRs have become more important to their economies.

It should not be surprising that competition law and intellectual property laws overlap. Competition laws are concerned with maintaining competition. Intellectual property laws protect against copying, which may provide some market power, but help competition by allowing competition from follow-on substitute products. Generally, developed countries do not give IPRs immunity from competition law but do allow for some differences in treatment from normal competition laws. As previously mentioned, intellectual property law is mainly determined by international treaty (TRIPS), while competition laws are determined nationally. Article 8.2 of TRIPS says, "... appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by rights holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of knowledge."

The anti-competitive use of IPRs can be divided into three main types:

1. Strategic conduct by firms in setting too wide a scope for IPRs due to deficiencies in the procedures for examining and granting the IPR. This is mainly a problem with patents, where patent applications may be given too easily or too broadly and so are used to block other beneficial patents. Differences between ASEAN

countries in patent grants could lead to disputes. Harmonizing registration systems (for patents and trademarks) would reduce future conflicts.

2. Where the IPR grant is correct but *used* in a way that limits competition in either the product market, innovation (licensing) market or a research and development market; for example, a dominant firm tying an unrelated good or service X, which reduces competition in the market for X.
3. Where there is abusive enforcement of IPRs by either ASEAN or non-ASEAN countries; for example, a firm with considerable resources prevents, improperly, a less well-resourced firm from exploiting a new idea by predatorily claiming the small firm's patent has infringed an existing patent. The only solution here is rigorous IPR examination systems and sophisticated courts. The Action Plan is, by stressing institutional development, likely to address this problem.

Each problem is discussed in turn.

5.1 Problems in the Procedures for Examining and Granting an IPR

While the boundaries of copyright protection are clear, patent boundaries are usually vague and settled only through expensive litigation. Jaffe and Lerner (2004, p. 6) describe how the US patent system:

... provides incentives for applicants to file frivolous patent applications, and for the patent office to grant them. It likewise encourages patent holders to sue, and those accused of patent infringement to give in and pay under threat, even if the patent is of dubious validity.

Uncertain patent boundaries affect the ability of others to improve products and processes. These could be improvements that better suit a country's circumstances, such as the development of drugs for tropical conditions. Uncertainty also allows firms to use a number of strategies, such as making a broad claim (i.e., establishing a 'beachhead' like planting a flag on an island claiming the whole island). Firms could set up a number of narrow claims with gaps in between, which a would-be patentee would have trouble negotiating, or build a cluster of patents around a new technology (called a 'blanket' or 'flood' strategy). Challenges to these large numbers of patents are much costlier to litigate.

Externally imposed regulation can also provide the holder of an IPR with market power. For example, environmental regulations requiring the best or cleanest technology will limit competition from older technologies. Countries can try to stifle imports by setting technology standards best suiting local companies. Or companies in a country could agree to an industry-wide technology standard that favors their own technology.

In dealing with the potential anti-competitive impact of patent grants, the OECD has recommended a number of measures, including stricter examination of patent applications or a discount for successful grants, thus raising the cost of unsuccessful applications and so deterring frivolous claims and the greater use of petty patents or utility models as alternative for minor inventions, which are protected for a shorter time period (OECD 2004, p. 29).

Trademarks may not last forever, if the trademark relates to an expired patent. For example, LEGO's patents on the geometrical patterns on the studs on top of the bricks expired, but LEGO tried to protect those designs by trademark. The Canadian Supreme Court ruled against it, saying, "A purely functional design cannot be the basis of a trade-mark and trade-mark law should not be used to perpetuate monopoly rights enjoyed under now-expired patents. [40–61]"³⁴

5.2 Problems When IPR is Used to Limit Competition

As the pace of globalization increases and companies (and countries) develop a better understanding of their intangible assets, companies look for more imaginative strategies to maximize the value of their IPRs and to stop others from using them. For example, pharmaceutical companies may try to 'patent-flood' to stop generics or deliberately raise the costs of rivals legally imitating them or by refusing to licence or supply drugs when faced with terms they do not like. Or dominant firms may offer cumulative discount schemes designed to prevent the entry of new competitors. Or micro-processor manufacturers may acquire a patent portfolio to use when either negotiating cross-licences with other manufacturers or trying to avoid patent litigation. In these cases, IPRs provide some kind of market power, which is then used to reduce competition by new or existing competitors. Of course, the market power may be domestic or derived from overseas.

Copyright has a smaller breadth than patents but can still be used anti-competitively. In both *Magill* and *IMS* the ECJ said that in

exceptional circumstances the European Commission could prevent a refusal to licence as an abuse of a dominant position by imposing a compulsory copyright licence.³⁵ For example, in Europe, in Microsoft, the General Court upheld the European Commission's decision to order compulsory access to interface codes protected by IPRs on the grounds that technological progress was impeded.

When these problems arise across countries the only solution is cooperation between national competition agencies or an ASEAN-wide competition law. Cooperation alone is likely to be problematic, as the effects of anti-competitive conduct will differ across countries. For example, a merger between two firms in ASEAN could be beneficial for one country (which gains employment) and worse for another (which loses research or production facilities). In these kinds of situations, there will be a direct conflict between overall ASEAN economic welfare where resources go to countries that can best use them and the interests of individual countries who may use industrial policies to advantage their own country at the expense of other ASEAN countries. While these kinds of problems are mainly political and can be resolved through existing means, there is still a place for independent examination of the likely effects through perhaps the ASEAN Experts Group on Competition or cooperation among competition regulators.

5.3 Where There is Abusive Enforcement of IPRs

Firms may seek injunctions through the courts to try and stop legitimate competition. In the United States, the fraudulent procuring of a patent by a firm with market power can violate s. 2 of the *Sherman Act*, i.e., the monopolization or abuse of dominance.³⁶ In addition, competition law may sanction situations where litigation by a firm with market power is either 'objectively baseless' or used by the firm as an anti-competitive weapon.³⁷ Similarly, sometimes customs authorities have the power to detain goods suspected of infringing IP laws (e.g., see European Regulation 1383/2003). These kinds of problems can only be resolved through proper enforcement.

6. Getting the ASEAN Balance Right between Competition Law and IPRs

Competition law limits the exercise of IPRs based on the adverse economic *effects* of the conduct. But getting the balance right between

giving incentives to create new ideas and their dissemination is not easy. Importantly, from a regional integration perspective, the balance will differ between countries. Countries with considerable research and development like the United States and Japan will not want to limit their company's strategic use of IPRs in other countries, if it damages their own future R&D. Countries without domestic R&D will be more concerned with the low-priced dissemination of goods and services involving IPRs (almost all from overseas), because there is negligible domestic economic impact on innovation in the short term. But as countries develop and engage in domestic R&D, there will be greater concern to develop and protect local innovation. Hence, there will be an increasing concern with anti-competitive use of domestic innovation if it hinders further innovation.

Countries in ASEAN are at different stages of development and have different levels of R&D and domestic competition. Singapore is the most developed and has the highest level of IPR protection coupled with considerable international competition due to an absence of trade barriers. Other countries, like Cambodia, Lao People's Democratic Republic and Myanmar, have negligible R&D and undeveloped, uncompetitive markets. Determining a one-size-fits-all model of competition law and IPRs would not seem possible. Some countries will not want to sacrifice static efficiency losses, particularly when the innovative benefits go elsewhere. Countries with high levels of research and development will want their firms to maximize their profits in other countries.

Because ASEAN countries have different interests in balancing static efficiency and dynamic efficiency, firm conduct that may be in the interests of one country may not be in the interests of another. For example, Singapore, with its much higher level of research and development and living standards may not want to affect research incentives and so will be careful about using competition law to limit what innovators can do in Singapore. On the other hand, a less developed country in ASEAN, with negligible research and development, may find it in its interest to limit the anti-competitive use of IPRs.

Thus, harmonization of the standards used to judge anti-competitive *use* of IPRs may not be justified. If national interest is paramount, then each ASEAN country should develop its own standards for the anti-competitive use of IPRs, as whether a practice is anti-competitive or not depends on its *impact or effect* in their own country. Harmonization

of IPR competition rules would inevitably favor some countries within ASEAN over others.

6.1 The Intersection Between IPRs and Competition Law in Europe

The ECJ has interpreted IP rights narrowly when there is a conflict with competition law. In particular, the ECJ has found that, while the EC Treaty did not interfere with the existence of IPRs, competition laws could curtail the *exercise* of IPRs. In other words, the exercise of IPRs should not impede the essential freedom of movement of goods between member states (which includes the possibility of parallel imports).

In the *Consten and Grundig* case in 1966, the Court found that competition law prevented trademark owners and their licencees from using their national IPR to block parallel imports from another European country.³⁸ The Court held that their decision did not affect the national trademark rights but only their *exercise*. In 1968 in *Parke, Davis v. Probel*, the Court decided similarly over the possible abuse of patent rights to divide EC markets.³⁹ However, in that case, the ECJ held that the owner of a Dutch patent for an antibiotic process could stop the selling of a version of the drug in Holland, because the drug had been manufactured in Italy, which did not provide patent protection for drugs. As the drug had been placed on the market in the EC without the permission of the patent holder, the freedom of movement issue was not relevant. Under national law, an IPR is 'exhausted' after the protected product has been sold for the first time by the IPR holder (or a licensee with the holder's consent) only within that country. For example, under the doctrine of community-wide exhaustion, once a product has been put on the market in a particular member state with the consent of the legitimate trademark owner, the owner can no longer rely on his national rights to prevent the importation of the product from that state into another member state.

6.2 Some Examples of Anti-Competitive Practices That Can Affect Intra-ASEAN Trade

Anti-competitive conduct can occur in any of the areas normally proscribed by competition law, i.e., single-firm conduct by a dominant firm, anti-competitive agreements involving IPRs, and anti-competitive

mergers that involve IPRs. An important area in practice in developed countries has been refusals to supply IPRs. Generally, competition law in developed countries regards IPRs in the same way as other forms of property and so owners have the right to refuse sale or licence. However, in certain circumstances some countries enable compulsory licensing to allow others to compete, the circumstances differing from jurisdiction to jurisdiction.

It is important to note that developed countries use compulsory licensing to correct violations of competition laws (for example, unilateral refusals to licence). In the United States, the Federal Trade Commission (FTC) has used compulsory licensing to remedy an antitrust violation. *Rambus* had concealed essential patents it held from an industry-wide standards-setting organization. The FTC imposed a compulsory licence by setting a maximum royalty rate.⁴⁰ In the EU, competition law has been used to force compulsory copyright licences.⁴¹

Compulsory licensing is not inconsistent with TRIPS. Article 8.2 of the TRIPS Agreement recognizes that:

Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.

Section 8 of Part II of TRIPS provides for international cooperation in the control of anti-competitive practices in contractual licences and allows members to take appropriate remedies, such as the grant of a compulsory licence. Where a compulsory licence is granted to remedy a practice determined after judicial or administrative process to be anti-competitive, there is no longer a requirement to seek first a voluntary licence on reasonable commercial terms and conditions, the goods produced under the licence need not be predominantly for the supply of the domestic market of the member granting the compulsory licence, and the need to correct anti-competitive practices may be taken into account in determining the amount of remuneration of the right holder.

Developing countries have also used competition laws to force supply, particularly for pharmaceutical products. In 2003, the Competition Commission of South Africa found that GlaxoSmithKline and BoehringerIngelheim had abused their dominant positions in their anti-retroviral markets and violated prohibitions against excessive

pricing. The Commission also found that the firms had refused access to essential facilities and the exclusionary activities had anti-competitive effects, which outweighed any technological, efficiency or other pro-competitive gains. Menzi Simelane, Commissioner at the Competition Commission said (Competition Commission of South Africa Press Release 2003):

Our investigation revealed that each of the firms has refused to license their patents to generic manufacturers in return for a reasonable royalty. We believe that this is feasible and that consumers will benefit from cheaper generic versions of the drugs concerned. We further believe that granting licenses would provide for competition between firms and their generic competitors.

Other kinds of dominant firm conduct can include tying (i.e., forcing consumers to buy a product as a condition of selling a product they do not want). This could be a patent or copyright tie (e.g., block booking of films where one copyrighted film is licenced on condition that the exhibitor also licences another film) or trademark. It could also involve deceptive conduct before standard setting organizations, such as failing to disclose the holding of a patent that could be used to stop other firms from manufacturing products according to the standard.

Anti-competitive agreements could include IPR price-fixing, patent pooling, blanket licensing of copyright works (to collecting societies), standards setting organizations that set standards to exclude particular technologies, and market allocation (e.g., firms distributing products incorporating IPRs across countries), where parallel importing is not available. This means that firms can set different prices in different countries, because arbitrage across countries is not allowed due to the fact that the IPR holder has sole right to sell in each country.

7. Conclusions and Implications for ASEAN

In the area of competition policy, ASEAN countries are well on their way to meeting the goals set out in the AEC Economic Community Blueprint. Most countries have a statute and others appear to be committed to meeting this obligation by 2015. The regional competition guidelines have already been published. The ASEAN Group of Competition Experts could evolve into a regional forum to facilitate coordination and cooperation and to build capacity. The major challenge however is

whether countries will be able to implement and apply their competition laws effectively and in a manner that does not distinguish between domestic and foreign firms.

The provisions of the competition laws show considerable variance across countries, as they should, insofar as they reflect domestic political and economic realities. Given some of the evidence provided above, harmonization at this stage appears to be unrealistic, but should be on the agenda as a long-term goal. In the meantime, the focus should be on comity and cooperation, although the MERCOSUR discussion above shows that even this may prove to be a challenge when parties are not at comparable levels of economic development.

Four critical issues deserve further consideration as they impact the goals ASEAN has set for itself, although they appear to have been ignored. The first is dispute resolution. The competition provisions in NAFTA and ANZCERTA do not have a formal dispute resolution system, and yet this has led to different outcomes. ANZCERTA countries appear to be able to resolve any differences through goodwill and cooperation. On the other hand, the two NAFTA cases discussed above suggest that when there is no formal dispute resolution system for competition disputes, particularly between investors and states; parties will look elsewhere and indulge in 'forum shopping'. Although ASEAN does have a dispute resolution process for trade and investment disputes, it is rarely used, as ASEAN countries prefer to use international rather than regional institutions for this purpose. Research on other RTAs shows that there is little enthusiasm for formal dispute resolution for competition-related provisions. Where a system exists, it is seen as being included for cooperation rather than for specific enforcement.

The second issue is anti-dumping. Many scholars view anti-dumping as a means of protecting competitors and not competition. The thinking is that the predatory pricing provisions of competition laws are better able to handle this. However, only a handful of agreements have eliminated anti-dumping, including the EU, the Chile-Canada FTA and ANZCERTA. The third issue relates to export cartels. Most competition laws exempt export cartels on the basis that the goal of competition laws is to protect domestic and not foreign consumers. This thinking can clearly be problematic in a regional context. The fourth and final issue is the elimination of export subsidies for intra-ASEAN trade. There cannot be an ASEAN 'single market' if countries play

market share games. Some agreement along the lines of "State Aid" provisions in Europe may be desirable in the medium to long term.

Insofar as IPRs are concerned, the welfare effects of strong IPR protection in a regional integration context are ambiguous. This is supported both by theory and empirical evidence. For less developed countries, the introduction of IPR protection legislation can reduce employment and the profits of local imitators. Yet, it may also lead to more research and development by developed countries by adapting and tailoring their products to developing country problems. In addition, there may be a greater willingness on the part of developed countries to invest in developing countries or to form joint ventures, or licence production. The empirical evidence suggests that, although strong IPR protection may facilitate technology diffusion, the link with economic growth is weak. If anything, the growth experience of East Asian countries shows that strong intellectual property protection is not an important determining factor for foreign direct investment. For developing countries, rapid growth is more often associated with weaker IP protection.

Within ASEAN, the TRIPS agreement sets a minimum standard of protection, since all countries (except Lao People's Democratic Republic) are signatories, yet TRIPS allows IPRs to be tailored to a country's level of development. More importantly, while in principle, protection standards may be uniform under TRIPS, it does not provide for a uniform enforcement system. Harmonizing both rules and enforcement is an important element of reducing trade barriers. But the latter is difficult, not just in developing countries but also in single markets such as the European Union. Europe only started on the path of harmonizing enforcement in 2004, and the progress has been slow. However, in the absence of a harmonized ASEAN IPR system, IPR registration *or* enforcement within ASEAN will have different requirements in each country. This could mean less foreign direct investment into the region compared to a harmonized system.

Turning to the interplay between competition and IP, some issues are procedural and can be sorted through more rigorous IPR examination systems and sophisticated courts. Cooperation among ASEAN countries and capacity development may be sufficient to resolve issues such as setting too wide a scope for IPRs and abusive enforcement of IPRs. However, only aggressive enforcement of competition law can

solve issues related to the exclusionary use of IPRs by both domestic and foreign firms.

Given the diversity in the level of economic development among ASEAN countries, it is reasonable to expect that countries will balance static and dynamic efficiency goals differently. Countries without domestic R&D will be more concerned with the low-priced dissemination of goods and services involving IPRs (almost all from overseas) because there is negligible domestic economic impact on innovation in the short term. For the more developed members of ASEAN, which engage in domestic R&D, there will be greater concern to develop and protect local innovation. Because ASEAN countries have different interests in balancing static efficiency and dynamic efficiency, firm conduct that may be in the interests of one country may not be in the interests of another. It is not evident that this issue can be resolved only by cooperation. So it may prove to be another impediment to achieving the goal of a single market and production base. It appears then that ASEAN countries, like those in many other regions are adopting these policies for signalling and symbolic reasons. Ultimately, both competition and IP laws are just two components of the overall business environment. The focus both now and post-2015 should be on the institutional arrangements to ensure the effective implementation and enforcement of agreed policies in a non-partial manner. This in itself may prove to be the real challenge, given the poor governance and weak institutions in many ASEAN countries. Because ASEAN is an example of loose integration, the focus should be on minimizing the negative impacts of greater integration rather than trying to maximize the positive benefits.

Appendix 5.1

Survey of Competition Laws in ASEAN

This appendix provides a survey of competition laws in ASEAN countries. All ASEAN countries except Cambodia have some type of statute though, not necessarily a stand-alone general competition law.

BRUNEI DARUSSALAM

Brunei Darussalam does not have a general competition law; however the sector specific regulations on telecommunications contain various competition provisions. As in many countries, the government has the power to grant exclusive privilege. The Monopolies Act, which has existed since 1932, allows His Majesty the Sultan and Yang Di-Pertuan to grant exclusive privilege to collect and export crocodile, python and monitor lizard skins. In addition, His Majesty can grant exclusive rights to manufacture and to trade, either in the domestic market or in international markets, firearms and defence equipment used by the Royal Brunei Police and Armed Forces.¹

The Telecommunications Order of 2001 (Telecom Order) and the Authority for Info-communications Technology Industry of Brunei Darussalam Order of 2001 (AiTi Order) governs sector regulation of the telecommunications industry. The Telecom Order grants AiTi the exclusive privilege to provide and operate telecommunications infrastructure and services in Brunei Darussalam.² The AiTi has a broad set of powers and duties, but in essence it is a regulator and promoter of the industry and the international representative of Brunei Darussalam in matters relating to the information and communication industry.³ It issues licenses for the provision of infrastructure and services; approves prices and tariffs; ensures access; monitors market conduct to ensure fair and effective competition; encourages investment and the domestic expansion of the industry; and promotes its international competitiveness.

The AiTi issues infrastructure (InTi) and services licenses (SeTi) and has also published an Interconnection Handbook (Handbook), which lays out the regulatory framework. Section 7 of both InTi and SeTi are identical. They list prohibited anti-competitive practices including misleading claims; undue discrimination; cross-subsidisation, predatory pricing; vertical price squeezes; and anti-competitive agreements, including non-compete agreements, bid-rigging, refusal to deal, agreements to fix prices, restrict output or otherwise restrict competition. Section 7 also contains an efficiency defence, which trades off anti-competitive effects with potential efficiencies in the development, production, marketing or delivery of services:⁴

If such efficiencies offset the potential anti-competitive effect, and could reasonably be achieved through measures that reduce competition to a lesser extent, AiTi will conclude that the agreement is not anti-competitive.

Licensees are also prohibited from restricting competition in the domestic market using their affiliations with a firm or operator that is dominant in a

foreign market. Mergers or “Contracts with Third Parties” are subject to approval by AiTi.⁵

Section 5 of The AiTi Interconnection Handbook contains provisions on market dominance. The role of these provisions is to ensure that potential entrants can access and/or connect to infrastructure controlled by a dominant incumbent firm and negotiate access at reasonable prices. A licensee is considered dominant if it has the ability to act in an unconstrained way or if replication of infrastructure is an entry barrier. Market dominance is assessed using both structural and conduct factors. The former include market share or industry concentration metrics, the level of vertical integration and the extent of entry barriers, whereas the latter include the ability to independently raise prices or restrict supply.

INDONESIA

Indonesia is an early adopter of competition law and passed the Law Concerning Prohibition of Monopolistic Practices and Unfair Business Practices in 1999 (henceforth “Law”), which came into effect in March 2000.⁶ The Law is quite comprehensive and covers prohibited agreements, prohibited activities, abuse of dominance, and mergers. Its objectives are to protect the public interest, improve economic efficiency and provide fair and equal business opportunity for all firms regardless of size.⁷

The Law prohibits agreements that lead to the formation of oligopolies, which then have the potential of using monopolistic or other unfair business practices. Two or three firms that control more than 75% of a market segment may draw the attention of regulators. A similar prohibition and structural hurdle applies to oligopsonies. Other prohibited agreements include price fixing, price discrimination, predatory pricing and resale price maintenance. In addition, division of territories or allocation of markets, boycotts, refusal to deal, and other agreements, which create entry barriers are prohibited. The price fixing provisions do not apply to joint ventures or agreements “entered into based on the prevailing laws”.⁸ Cartels, trusts and agreements with foreign parties “which may lead to monopolistic or unfair business practices” are also prohibited, as are vertical agreements with the intent of controlling part of the vertical chain.⁹ The Law also prohibits “Closed Agreements” which essentially include tied sales and other restrictive or exclusionary covenants.¹⁰

Chapter IV of the Law covers prohibited activities (or practices) including monopolistic and monopsonistic practices and other activities, such as limiting distribution, predation with the intent of eliminating competition, bid rigging, and conspiring to obtain secret or classified information about competitors. The structural hurdle to infer monopoly or monopsony is the control of over half the market by “one business actor or a group of business actors”.¹¹ In addition, monopoly or control over the market may be inferred if there are entry barriers or if there are no available substitutes for the product or service in question.

The Law prohibits abuse of dominance, interlocking directorates and cross-ownership of firms in the same field of business through majority equity holdings. The structural hurdle for abuse of dominance and equity holdings is 50% for one or a group of businesses and 75% for two or three businesses or groups of businesses. Mergers that lead to monopolistic practices or unfair business competition are also prohibited and have to be notified to the competition authority within 30 working days (post-notification) if they result in asset values of the merged enterprise exceeding Rp2.5 trillion and/or value of sales exceeding Rp5 trillion. The hurdle for the banking sector is an asset value exceeding Rp20 trillion.¹² Post-notification does not apply to consolidations and acquisitions among affiliated companies. Businesses that fail to notify transactions may be subject to fines of Rp1 billion for every day of delay, up to a maximum of Rp25 billion.¹³

Adjudication rests with the Commission for Supervision of Business Competition (KPPU), whose decisions can be appealed to the District Court within 14 days of the decision. Remedies available to the KPPU include cease-and-desist orders, ordering compensation payments, revocation of business licenses, and levying fines and imprisonment terms.¹⁴ The Law contains a number of exceptions, which include agreements relating to intellectual property rights, technical standards, agency agreements which do not include resale price maintenance clauses, R&D collaboration agreements, export cartels, and activities of cooperatives and small-scale enterprises.

LAO PDR

Competition law in the Lao PDR takes the form of a decree issued by the Prime Minister's Office 2004. The objectives of the decree are to:¹⁵

... promote fair trade competition, protect the rights and legal interests of consumers and to encourage business activities in the Lao PDR to function efficiently in the market economy mechanism ...

The decree prohibits monopolization and mergers and acquisitions that may lead to monopolization. It suggests a structural test for dominance. The test is based on "sales volume or market share" in excess of that recommended by the Trade Competition Commission.¹⁶ While there is no explicit mention of predation, conduct including dumping which indents to "eliminate other business entities" is prohibited.¹⁷ The decree also covers price fixing, collusion, bid rigging, hoarding or otherwise restricting quantities and consumer choice. Exclusive dealing and market allocation are also prohibited, as are cartels that involve foreign entities which seek to limit "opportunity of local businesses".¹⁸

Implementation is the responsibility of the Ministry of Commerce and the Trade Competition Commission, which is chaired by the Minister for Trade. Remedies include orders to cease and desist or indefinitely shutting down the business and "punishment according to the law". In addition the aggrieved party may have to be compensated.¹⁹ Certain sectors or businesses may be exempted from the application of the decree for "socio-economic or security reasons".²⁰

MALAYSIA

In June 2010 the Malaysian House of Representatives (Dewan Rakyat) passed two statutes: The Competition Act (henceforth “Act”) and The Competition Commission Act. Both statutes came into effect on 1 January 2012. The Competition Act seeks to “promote economic development” by “promoting and protecting the process of competition” so as to protect the “interests of consumers”.²¹ The benefits of the competitive process listed in the Act include efficiency, innovation, entrepreneurship, competitive prices, and improvements in product quality and a broader set of choices for consumers. The Act covers commercial activity within Malaysia and also activities in other countries that may have a detrimental impact on competition in the domestic market. In addition, the Act excludes the energy and communications and multimedia sectors, which have sector-specific regulators and legislation that prohibits anti-competitive practices or otherwise regulates market conduct.²² Collective bargaining activities do not fall under the purview of the Act; neither do “revenue-producing” monopolies or enterprises “which have been entrusted with the operation of services of general economic interest”.²³

Broadly the Act lists two anti-competitive practices, which include horizontal or vertical agreements and abuse of dominant position. Chapter 1 (Part II) of the Act prohibits horizontal or vertical agreements that have the “object or effect” of “significantly preventing, restricting or distorting competition”.²⁴ Prohibited horizontal agreements include conspiracy, bid rigging, market sharing, restricting supply, limiting or controlling technological development and investment.²⁵ There are no specifics on prohibited vertical agreements. Malaysia has opted to include what in many jurisdictions is referred to as the “efficiency defence” and usually applied in the context of horizontal mergers. Malaysia has chosen to trade off *all* restrictive agreements and relieve infringing parties of liability if there are technological efficiency or social benefits which could not have been provided in the absence of the agreement and if the agreement does not result in a monopoly or in the elimination of all competition. In addition, the benefits have to be proportional to the detriment. In other jurisdictions that allow such trade-offs, for example, Canada, the benefits or efficiency gains have to be greater and have to offset any detrimental impacts.²⁶ The Competition Act also allows for the Competition Commission to provide individual and block exemptions.

Chapter 2 (Part II) of the Act prohibits abuse of dominant position and specifies that the Commission not rely on a structural test alone to infer dominance.²⁷ Abuse of dominance includes both horizontal and vertical provisions, such as discouraging entry, damaging or evicting competitors that are “no less efficient”, refusal to deal, and predation.

The Act allows the Competition Commission, on its own initiative, to conduct and make public market reviews that would examine market structure and the conduct of firms operating in that market. Remedies include cease-and-desist orders or other steps required to terminate the infringement and the imposition

of financial penalties.²⁸ A leniency regime is also available for firms that bring infringing practices to the notice of the Commission or otherwise cooperate with the Commission, or admit to involvement in the infringement, presumably, at early stages of the investigation. The leniency regime allows for a maximum waiver of all (100% of) penalties.²⁹ The decisions of the Commission can be appealed before the Competition Appeal Tribunal, and any party that has suffered a loss as a result of an infringement has the right to seek relief via civil proceedings.

The Competition Commission Act indicates that the Commission, in addition to a Chairman, shall have four members representing the government and between three and five other (lay) members with experience in competition policy. In addition to implementing and enforcing competition law and advocacy the Commission also has an advisory role and is expected to advise the Minister of Domestic Trade and Consumer Affairs on "all matters concerning competition" and on "all international agreements relevant to competition matters".³⁰

MYANMAR

Myanmar does not have a general competition law, but the 2008 constitution contains an anti-monopoly provision. The constitution states the Myanmar has "a market economy system" which allows all "economic forces", including individuals, the State and cooperative to participate in economic activity:

36. The Union shall:

(b) protect and prevent acts that injure public interests through monopolization or manipulation of prices by an individual or group with intent to endanger fair competition in economic activities;³¹

The State-owned Economic Enterprises Law (SLORC Law 9/89) gives the government (through state-owned enterprises) the exclusive right to carry out the following activities:³²

1. Production, sale and export of teak
2. Forestry – plantation, cultivation and conservation
3. Petroleum and natural gas – exploration, extraction, production and sale
4. Pearl, jade and precision stones – exploration, extraction and export
5. Metals – exploration, extraction and export
6. Breeding and production of fish and prawn in certain fisheries
7. Post and telecommunications
8. Air and rail transport
9. Banking and insurance services
10. Broadcasting and television services
11. Electricity generation (other than permitted private and cooperative generation)
12. Manufacture of defence and related equipment

Violation of the law can result in fines, confiscation of property and imprisonment of up to 5 years.³³ Section 4 of the SLORC Law 9/89 allows for joint ventures in the above activities between government and any other party.

THE PHILIPPINES

While there is no single competition law in the Philippines, a number of statutes contain some basic provisions relating to price-fixing, cartels and monopolization. The constitution has the following provision on restraint of trade:³⁴

The State shall regulate or prohibit monopolies when the public interest so requires. No combinations in restraint of trade or unfair competition shall be allowed.

There are no remedies provided in the constitution, and indeed the State is not obliged to act, but may do so to protect the public interest. Article XV, Section 11, has an almost identical provision, which relates specifically to “commercial mass media”, and the regulatory power in this case is vested in Congress.³⁵ It also restricts foreign ownership of mass media.

The Revised Penal Code contains criminal penalties, including imprisonment and/ or fines between 200 and 6,000 pesos, for conspiracy and monopolization:³⁶

1. Any person who shall enter into any contract or agreement or shall take part in any conspiracy or combination in the form of a trust or otherwise, in restraint of trade or commerce or to prevent by artificial means free competition in the market; and
2. Any person who shall monopolize any merchandise or object of trade or commerce, or shall combine with any other person or persons to monopolize and merchandise or object in order to alter the price thereof by spreading false rumors or making use of any other article to restrain free competition in the market.

The Price Act covers cartels particularly for basic necessities, which include items such as grains, bread, fish, meat, poultry, milk, fresh vegetables, cooking oil, charcoal, soap, detergent, candles and essential pharmaceutical drugs. The intent of the Act is to allow firms a “fair return on investment” while ensuring “the availability of basic necessities and prime commodities at reasonable prices at all times”, but especially during times of emergency.³⁷ As remedies, the Act contains provisions for automatic and mandated price controls and ceilings. The Act defines a cartel as follows and also appears to cover conscious parallelism:³⁸

... any combination of or agreement between two (2) or more persons engaged in the production, manufacture, processing, storage, supply, distribution, marketing, sale or disposition of any basic necessity or prime commodity designed to artificially and unreasonably increase or manipulate its price. There shall be prima facie evidence of engaging in a cartel whenever two (2) or more persons or business enterprises competing for the same market and dealing in the same basic necessity or prime commodity, perform uniform or complementary acts among themselves which tend to bring about artificial and unreasonable increase in the price of any basic necessity or prime commodity or when they simultaneously and unreasonably increase prices on their competing products thereby lessening competition among themselves.

The Corporation Code also contains some provisions to prevent monopolization. Voting trusts for example, may not be used for "circumventing the law against monopolies and illegal combinations in restraint of trade".³⁹ In addition, the National Economic Development Authority may recommend to the Batasang Pambansa (National Assembly), the imposition of limits on stock ownership in certain corporations to "prevent illegal monopolies or combinations in restraint of trade".⁴⁰

A number of sector-specific regulations contain antitrust provisions. The Electric Power Industry Reform Act prohibits anti-competitive behavior in the interest of encouraging and protecting contestable markets.⁴¹ It sets up the Energy Regulatory Commission (ERC) and directs it to issue, within 1 year of the "effectivity" of the Act, a set of rules and regulations which promote competition and penalize the abuse of market power or other anti-competitive behavior. The Act provides ERC a variety of remedies including, but not limited to:⁴²

... the imposition of price controls, issuance of injunctions, requirement of divestment or disgorgement of excess profits and imposition of fines and penalties ...

A similar approach is evident in the telecommunications sector, where the Public Telecommunications Policy Act established the National Telecommunications Commission (NTC). The NTC must promote consumer welfare and prevent the misuse of market power so as to ensure fair and efficient market conduct.⁴³ The NTC has the power to impose fines and or impose price controls.⁴⁴

The Downstream Oil Industry Deregulation Act of 1998 includes explicit antitrust safeguards and provides for criminal sanctions. It directs the Departments of Trade and Industry and Energy to promote competition and prevent the misuse of power within the context of the Revised Penal Code.⁴⁵ In addition, Section 11 prohibits cartels, monopolization and predatory pricing. Penalties include imprisonment of company executives for between three to 7 years and fines between one and two million pesos.⁴⁶

A number of "Competition Act" bills were introduced in the House of Representatives and the Senate in 2010 but none of them have been passed into law.⁴⁷ However, on 9 June 2011, President Benigno S. Aquino III signed an Executive Order designating the Department of Justice as the Competition Authority of the Philippines.

SINGAPORE

Singapore passed the Competition Act (henceforth "Act") in October 2004, which came fully into effect on 1 January 2006. The statute is based on UK law and has three broad prohibitions, including anti-competitive agreements (Section 34), abuse of dominance (Section 47) and mergers that substantially lessen competition (Section 54). Adjudication and enforcement rest with the Competition Commission of Singapore (CCS), which has a Chairman and between two and 16 members.⁴⁸ Decisions of the CCS may be appealed before a panel from the Competition Appeal Board that is chaired by "a person qualified to be a Judge of the Supreme Court".⁴⁹ Decisions of the Appeal Board may be

appealed to the High Court and the Court of Appeal in so far as they relate to a point of law or to financial penalty.⁵⁰

Section 34 of the Act prohibits anti-competitive agreements and concerted practices that prevent, restrict or distort competition. They include price fixing, market sharing or sharing sources of supply, limiting or controlling production, markets, technical development or investment and restrictive covenants. Block exemptions may be granted if agreements improve production or distribution or promote technical or economic progress so long as they do not eliminate competition in a substantial portion of the market.⁵¹ Abuse-of-dominance provisions include predation, limiting or controlling production, markets, technical development or investment and restrictive covenants. Mergers that substantially lessen competition are prohibited.

The third schedule of the Act identifies a number of exclusions from both anti-competitive agreements and abuse of dominance. These provisions exclude many economic activities and do not apply to first-class mail, the supply of water and waste management services, scheduled bus and rail transit services, cargo terminal operations and clearing houses, and the association of clearing houses. Many of these services are regulated by other statutes and could be government-linked or government-provided. Vertical agreements are expressly excluded from Section 34 prohibitions but some may be potentially caught under the abuse-of-dominance provisions.⁵² The exclusions also apply to services that are of a general economic interest, and the Minister (of Trade and Industry) may apply exclusions for “compelling reasons of public policy”.⁵³ Exclusions also apply to agreements that improve production or distribution or promote technical or economic progress so long as they do not eliminate competition in a substantial portion of the market. Thus, a net-benefit test is applied not just to mergers but also for anti-competitive agreements. Regulated industries with sector specific regulators are excluded from the application of the Act to the extent that regulators have the authority to review anti-competitive activities. This excludes energy, telecommunications, media, aviation, casinos and the financial sector.⁵⁴ The problem in sector regulation is that regulators are both promoters and regulators of the industry. However, this appears to be typical of ASEAN countries.

Like many competition authorities, CCS has issued guidelines for various provisions of the Act. They contain structural hurdles even for anti-competitive agreements, where firms with a combined market share of 20% or less may be deemed to have no appreciable adverse impact on competition with the possible exception of price fixing and bid rigging. These are likely meant to exclude small and medium-scale enterprises. Abuse-of-dominance guidelines include both structure and conduct factors, the structural hurdle being 60%. Mergers are not required to be notified and in general may not raise competition issues unless the market share of the merged enterprise exceeds 40% or if the merged enterprise has a post-merger market share between 20 and 40% and the post-merger three-firm concentration ratio

is 70% or higher. Remedies include a maximum penalty of 10% of turnover for each year of infringement up to a maximum of 3 years.⁵⁵ The Act also allows for the right to private action in relation to all competition offences via subsequent civil proceedings.

THAILAND

Thailand was one of the first countries in ASEAN to pass a competition law. The Trade Competition Act (henceforth "Act") was passed in 1999 and all competition offences fall under criminal law. The Act does not apply to farmers' groups, cooperatives or societies, or to state enterprises. In addition, the Minister for Commerce may exempt certain businesses from the application of some or all the provisions of the Act.⁵⁶

The Act has provisions relating to abuse of dominant position, mergers and other restrictive trade practices. The abuse-of-dominance provisions prohibit price fixing, restricting quantities or services, using restrictive covenants, and otherwise intervening in the operation of another person's business operations.⁵⁷ The Act contains a structural test for what might be termed obvious monopolies. Section 30 indicates that if a business has a market share of over 75%, the Trade Competition Commission (henceforth "Commission") can order the business to "suspend, cease or vary the market share".⁵⁸ Other cases are covered by subsequent regulations which indicate that a single firm is considered dominant if its market share is at least 50% and its value of sales in the preceding year was at least one billion Thai Baht, or if it was one of the three largest firms in the industry where the three-firm concentration ratio is at least 75% and the value of sales of the three largest firms is at least one billion Thai Baht. A firm that has a market share of less than 10% or a sales volume of less than one billion Thai Baht is not considered dominant.⁵⁹

Merger pre-notification is required, so mergers that lead to monopoly or unfair competition are not allowed unless the merging parties obtain permission from the Commission. A merger is defined as a full acquisition or an acquisition of assets or equity which essentially transfers control of "business policy, administration and management".⁶⁰ Restrictive practices can be separated into two parts — those that are prohibited and those that need to be notified to the Commission. Prohibited practices include price fixing, agreements which lead to market domination and bid rigging. Notifiable practices include exclusive territories, exclusive dealing including appointing sole distributors, market sharing or restrictive quantity allocation, reducing quality, and restrictive covenants that lead to uniform practices.⁶¹ Upon notification, the Commission may allow a particular practice if it is "reasonably necessary in the business, beneficial to business promotion, has no serious harm to the economy and does not affect material and due interests of general consumers".⁶² Dealings with foreign firms are covered under Section 28, which prohibits domestic business that has any type of relationship with a foreign

business from preventing domestic consumers from dealing directly with the foreign business.⁶³

The Act sets up an administrative body, The Office of the Trade Competition Commission, which is headed by a Director General, in the Department of Internal Trade, Ministry for Commerce.⁶⁴ The adjudicative body is the Trade Competition Commission, which is chaired by the Minister for Commerce and includes two public officials: permanent secretaries of the Ministries of Commerce and Finance. The Council of Ministers can appoint between eight and 12 members. These members cannot be political officials or hold political office and at least half of them have to come from the private sector. The Commission can appoint specialized sub-committees to hear cases and appeals.⁶⁵ Thailand's competition law has criminal provisions for all competition offences:⁶⁶

... Any person who violates section 25, section 26, section 27, section 28 or section 29 or fails to comply with section 39 shall be liable to imprisonment for a term not exceeding three years or to a fine not exceeding six million Baht or to both, and, in the case of the repeated commission of the offence, shall be liable to the double penalty.

There is a right to private action in the Act, which allows for compensation claims before courts within 1 year "from the day the person suffering injury has or ought to have had the knowledge of the ground thereof". However what is unique, at least in ASEAN, is what could be characterized as a class-action compensation claim.⁶⁷ The Act allows for the Consumer Protection Commission to claim compensation on behalf of consumers or a consumer protection association to claim compensation on behalf of its membership.⁶⁸

VIET NAM

Viet Nam passed a Law on Competition (henceforth "Law") in 2004, which applies to trade and professional associations and to all enterprises operating in Viet Nam, including State monopoly industries in so far as they are operating outside their monopoly sector. Within their monopoly sector, for example in public utilities, such enterprises and their market conduct, including price and quantity determination, are under the control of the State. If they operate in other sectors, they are subject to the provisions of the Law.⁶⁹ The interests of the State are clearly protected by Vietnamese competition law, since the right to compete is defined as follows:⁷⁰

Competition must be undertaken on the principles of honesty; non-infringement of the interests of the State, the public interest and the lawful rights and interests of enterprises and consumers ...

The statute also covers the conduct of State administrative bodies, albeit with a qualification for State monopoly sectors, since these bodies cannot:⁷¹

Force an enterprise, organization or individual to purchase or sell goods or services with an enterprise appointed by such body, except for goods and services belonging to the State monopoly sectors ...

International treaty obligations take precedence over the domestic competition law. Competition law takes precedence over other laws. This presumably refers to sector-specific regulations, which may have competition provisions:⁷²

Where there is any difference between the provisions of this Law and the provisions of another law ... the provisions of this Law shall apply.

The Law broadly covers four areas: anti-competitive agreements, abuse of dominance, mergers, and other unfair competitive practices. Bid rigging and agreements that exclude competitors or otherwise impede their ability to participate in the market are prohibited.⁷³ However, price fixing, quantity restraints, market sharing, technical developments or investment and imposing inappropriate contractual obligations are only prohibited if the combined market share of the conspiring parties exceeds 30%.⁷⁴ Like Malaysia, there are exemptions to the application of these provisions "for a definite period", but they are much broader.⁷⁵ Exemptions may be granted if there is an increase in efficiency, technological progress, competitiveness of small and medium enterprises and competitiveness of Vietnamese enterprises in international markets, or if the agreement promotes the uniform applicability of product and/or technical standards, or unifies payment, delivery and trading conditions — essentially non-price factors.

In addition to the usual exclusionary practices, abuse of dominance covers predatory pricing and resale price maintenance. The structural hurdles for determining dominance are a market share of 30% for a single enterprise, 50% for two firms, 65% for three firms and 75% for four firms.⁷⁶ Mergers, or other means of increasing concentration, such as consolidations, acquisitions or joint ventures, are prohibited if the combined market share exceeds 50%. However, exemptions may be provided if the merger avoids bankruptcy of one of the parties or if as a result of the merger, there is an increase in exports or technological progress, or "a contribution to socio-economic development".⁷⁷ Merger pre-notification is required if the merging firms have a combined market share of between 30% and 50%. It is not required if the combined market share is less than 30% or if after the merger, the firm continues to be classified as a small or medium enterprise. Pre-notification is also not required for firms with a combined market share of 50% or more, if they plan to file for an efficiency defense. Instead, they are required to file for an exemption under Article 19. The Minister for Trade makes decisions regarding exemptions on the grounds of avoiding bankruptcy; the Prime Minister makes those where the basis is improvements in efficiency, technological progress or socio-economic development.⁷⁸

Other unfair competitive practices are listed in Chapter III of the Law and include misleading advertising, multi-level marketing and other pyramid selling schemes, coercion, defamation, infringement of business secrets, causing disruptions in the activities of other enterprises and discriminatory practices by trade associations.⁷⁹ Interestingly, the Law has an explicit provision for

third-party interveners who may request to participate either with one of the two parties or independently; they have identical rights and obligations as other parties in the dispute.⁸⁰ While the basic responsibility for administration lies with the Ministry for Trade, Chapter IV of the Law provides for setting up the Viet Nam Competition Administration Department to handle investigations and the Viet Nam Competition Council to serve as an adjudicator.⁸¹ There is a wide variety of remedies, including warnings, fines, amending terms of illegal contracts, revocation of license or business registration certificates, confiscation of facilities, and enterprise restructuring and divestiture.⁸² The Law also sets a maximum fine of 10% of the total turnover in the preceding financial year.⁸³

NOTES TO APPENDIX 5.1

1. Monopolies Act, First Schedule, p. 4.
2. Telecom Order, Part II, section 3(1), p. 1143.
3. AiTi Order, Part III, section 6, pp. 1190–93.
4. SeTi, section 7.6.3(c), pp. 22–23.
5. SeTi, section 7.5, p. 21.
6. There are also various related government regulations and guidelines issued from time to time.
7. Law of Republic of Indonesia, 5/1999, Article 3.
8. Law of Republic of Indonesia, 5/1999, Article 5(2).
9. Law of Republic of Indonesia, 5/1999, Articles 11, 12 and 16.
10. Law of Republic of Indonesia, 5/1999, Article 15.
11. Law of Republic of Indonesia, 5/1999, Articles 17(2)c. and 18(2).
12. Government Regulation 57/2010, Article 5(2).
13. Government Regulation 57/2010, Articles 6 and 7.
14. Law of Republic of Indonesia, 5/1999, Chapter VIII.
15. Decree No. 15, Chapter I, Article 1.
16. Decree No. 15, Chapter I, Article 2.
17. Decree No. 15, Chapter 3, Article 10.
18. Decree No. 15, Chapter 3, Article 12.
19. Decree No. 15, Chapter 4, Article 14.
20. Decree No. 15, Chapter 3, Article 13.
21. Competition Act, p. 7.
22. Part VI, Chapter 2 of the Communications and Multimedia Act 1998 contains competition provisions and section 14 of The Energy Commission Act 2001 directs the Energy Commission to regulate market conduct and prevent the misuse of market power.
23. See Second Schedule of the Competition Act.
24. Competition Act, Part II, Chapter 1, section(4)1.
25. Competition Act, Part II, Chapter 1, section(4)2.
26. See section 96(1) Canadian Competition Act (R.S.C., 1985, c. C-34) <<http://laws-lois.justice.gc.ca/eng/acts/C-34/page-53.html>> (accessed 2 September 2011).
27. Competition Act, Part II, Chapter 2, section 4, states that the market share “shall not in itself be regarded as conclusive”.

28. Maximum financial penalties including maximum imprisonment terms are provided for in Part VI, section 61.
29. Competition Act, Part III, section 41.
30. Competition Commission Act, Part III, section 16.
31. Constitution of Myanmar, Chapter 1, sections 35 and 36.
32. SLORC Law 9/89, Chapter II, section 3.
33. SLORC Law 9/89, Chapter V, section 9.
34. Philippine Constitution 1987, Article XII, section 19.
35. Philippine Constitution 1987, Article XV, section 11(1).
36. Revised Penal Code, Book 2, Title 4, Chapter 3, Section 1, Articles 186(1) and 186(2). Article 186(3) also covers foreign parties engaged in commerce in the Philippines.
37. Price Act, sections 1 and 3.
38. Price Act, section 5(3).
39. Corporation Code, Title VI, section 59.
40. Corporation Code, Title XVI, section 140.
41. Electric Power Industry Reform Act, Chapter IV, section 45.
42. Electric Power Industry Reform Act, Chapter IV, section 45.
43. Public Telecommunications Policy Act, Article III, section 5.
44. Public Telecommunications Policy Act, Article III, section 5 and Article VI, section 17.
45. Downstream Oil Industry Deregulation Act, Chapter II, section 7.
46. Downstream Oil Industry Deregulation Act, Chapter III, section 11.
47. <http://www.congress.gov.ph/legis/search/hist_show.php?congress=15&save=1&journal=&switch=0&bill_no=HB03134> (accessed 4 August 2011).
48. Competition Act, section 5.
49. Competition Act, section 72(5).
50. Competition Act, section 74(1).
51. Competition Act, section 41.
52. Competition Act, Third Schedule, 8(1).
53. Competition Act, Third Schedule, 4(1) and 4(4).
54. See Chapter VIII, [102]–[204], pp. 4–7, in *ASEAN Competition Law*, Issue 0, edited by R. Ian McEwin and Kala Anandarajah (Singapore: Lexis Nexis, February 2011).
55. Competition Act, section 69(4).
56. Trade Competition Act, section 4. McEwin and Anandarajah (2011) indicate that no exemptions have been granted (Chapter IX, [102] p. 3).
57. Trade Competition Act, section 25.
58. Trade Competition Act, section 30.
59. McEwin and Anandarajah (2011), Chapter IX [352], pp. 9–10.
60. Trade Competition Act, section 26.
61. Trade Competition Act, section 26 and section 27(5) through (10) are notifiable.
62. Trade Competition Act, section 37.
63. Trade Competition Act, section 28.
64. Trade Competition Act, section 18.
65. Trade Competition Act, sections 6 and 7.
66. Trade Competition Act, section 51.
67. Trade Competition Act, section 41.
68. Trade Competition Act, sections 40 and 41.
69. Law on Competition, Articles (15)¹ through 3.
70. Law on Competition, Article (4)².
71. Law on Competition, Article (6)¹.
72. Law on Competition, Article 5.

- 73. See Decree 116/2005-ND-CP for implementation guidelines.
- 74. Law on Competition, Articles 8 and 9.
- 75. Law on Competition, Article (10) 1.
- 76. Law on Competition, Article 11.
- 77. Law on Competition, Article 19.
- 78. Law on Competition, Article 25.
- 79. Law on Competition, Article (7) 2 and Chapter IV. See Decree No. 110/2005/ND-CP and Circular 19 (2005) on multi-level marketing.
- 80. Law on Competition, Articles 71 and 66.
- 81. Law on Competition, Article (7)2 and Chapter IV, Decree No. 05/2006/ND-CP, Decree No. 06/2006/ND-CP.
- 82. Law on Competition, Article 117 and Decree 120/2005/ND-CP.
- 83. Law on Competition, Article 118.

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Socialist Republic of Viet Nam. Law on Competition, No. 27-2004-QH11, 2004.

NOTES

1. Summaries of intellectual property laws are available at <<http://www.ecap-project.org/>> (accessed 30 March 2012).
2. The ASEAN Experts Group on Competition (AEGC) was set up in 2007.
3. Concerns still remain according to the US Department of State, Investment Climate Statement for Singapore, March 2011 <<http://www.state.gov/e/eb/rls/othr/ics/2011/157355.htm>> (accessed 4 January 2012). "U.S. and other companies remain concerned about the lack of transparency in some aspects of Singapore's telecommunications regulatory and rule-making process." and "... some private sector companies have said they encountered unfair business practices and opaque bidding processes that appeared to favor incumbent, government-linked firms."
4. The Caribbean Community and Common Market (CARICOM) agreement is another example of a failed attempt at integration and regional competition policy because countries have not been willing to relinquish their sovereignty.
5. See Hsu (2012) in this volume for a discussion of dispute resolution for trade and investment. Hsu indicates that ASEAN trade and investment dispute settlement system was only used once (unsuccessfully) and countries prefer to take their disputes to international forums.
6. NAFTA Secretariat: <<http://www.nafta-sec-alena.org/en/view.aspx?conID=590&mtplID=146>> (accessed 19 December 2011).
7. NAFTA Secretariat: <<http://www.nafta-sec-alena.org/en/view.aspx?conID=590&mtplID=146>> (accessed 19 December 2011).
8. Canada Post acquired 75% of PCL Holdings, the parent company of Purolator in 1993. The transactions was reviewed and allowed by the Competition Bureau. Competitors in the courier market had no objections so long as there was no cross-subsidization between the monopoly and competitive product. The then Director of Investigation and Research concluded that this was unlikely to occur after the merger and Canada Post had provided assurances that its relationship with Purolator would be commercial and on an arm's length basis (OECD 1997, p. 124).
9. Section 14, Canada Post Corporation Act (R.S.C., 1985, c. C-10) <<http://laws-lois.justice.gc.ca/eng/acts/C%2D10/>> (accessed 20 December 2011).
10. The dispute also mentions Sections 1502 and 1503 since they relate to state enterprises and monopolies. The two Chapter 11 issues are not relevant here as they relate to cultural industries and customs regulations.
11. NAFTA Secretariat: <<http://www.nafta-sec-alena.org/en/view.aspx?conID=590&mtplID=146>> (accessed 20 December 2011).

12. See International Centre for Settlement of Investment Disputes, *United Parcel Service of America Inc. v. Government of Canada*, Award on the Merits, 24 May 2007 <<http://italaw.com/documents/UPS-Merits.pdf>> (accessed 19 December 2011). This also includes the separate statement of the dissenting member of the panel Dean Ronald A. Cass. For a detailed discussion of the dispute, see Nafzier and Wanak (2009) and Hauk (2008).
13. USTR was required to undertake annual reviews under Section 1377 of the Omnibus Trade and Competitiveness Act of 1988.
14. See World Trade Organization, "Mexico — Measures Affecting Telecommunications Services", WT/DS204/R, 2 April 2004 <[http://www.worldtradelaw.net/reports/wtopanel/mexico-telecoms\(panel\).pdf](http://www.worldtradelaw.net/reports/wtopanel/mexico-telecoms(panel).pdf)> (accessed 20 January 2012).
15. WTO, GATS: <http://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm> (accessed 20 January 2012). WTO Annex on Telecommunications: <http://www.wto.org/english/tratop_e/serv_e/12-tel_e.htm> (accessed 20 January 2012).
16. WTO, Telecommunications Reference Paper: <http://www.wto.org/english/tratop_e/serv_e/telecom_e/tel23_e.htm> (accessed 20 January 2012).
17. See World Trade Organization, "Mexico — Measures Affecting Telecommunications Services", WT/DS204/R, 2 April 2004 <[http://www.worldtradelaw.net/reports/wtopanel/mexico-telecoms\(panel\).pdf](http://www.worldtradelaw.net/reports/wtopanel/mexico-telecoms(panel).pdf)> (accessed 20 January 2012).
18. Article 1 of The Treaty of Asunción: <<http://www.worldtradelaw.net/fta/agreements/mercosurfta.pdf>> (accessed 1 December 2011). Venezuela's membership has not been ratified. Associate members include Bolivia, Chile, Colombia, Ecuador and Peru.
19. Protocol of Ouro Preto: <http://www.sice.oas.org/trade/mrcsr/ourop/ourop_e.asp> (accessed 1 December 2011).
20. *Protocolo de Defensa de la Competencia del Mercosur* (Protocol on the Protection of Competition in the Mercosur). The English text is in Annex 1 of Azevedo (2005).
21. If a cease and desist order is required, the CDC has to refer the case to MTC.
22. This agreement has no formal dispute settlement mechanism and relies on the goodwill of parties (Commonwealth of Australia 1997, p. 22).
23. Article 1 of ANZCERTA: <<http://www.dfat.gov.au/fta/anzcerta/downloads/anzcerta1.pdf>> (accessed 28 January 2012).
24. Article 12 of ANZCERTA.
25. <<http://www.dfat.gov.au/fta/anzcerta/index.html>> (accessed 28 January 2012).

26. The Memorandum of Understanding Between the Government of New Zealand and the Government of Australia on Coordination of Business Law, 22 February 2006, paragraph 5 <http://www.dfat.gov.au/fta/anzcerta/memorandum_of_understanding_business_law.html> (accessed 28 January 2012).
27. A total of 24 agreements signed between 1992 and 2006 have competition policy chapters and 15 of these are North-South agreements. Twelve agreements do not have competition policy chapters (Sokol 2008, p. 254).
28. WTO TRIPS Agreement: <http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm> (accessed 20 February 2012).
29. See Section 4 of the "Declaration on the TRIPS agreement and public health", Doha WTO Ministerial, 20 November 2001, WT/MIN(01)/DEC/2: <http://www.wto.org/english/thewto_e/minist_e/min01_e/minddecl_trips_e.htm> (accessed 20 February 2012).
30. See <http://en.wikipedia.org/wiki/European_Patent_Litigation_Agreement> (accessed 20 February 2012).
31. See Overview ECAP III: <http://www.ecap-project.org/index.php?q=overview_ecap_III> (accessed 20 February 2012).
32. ASEAN IPRs Action Plan 2011–2015, Final, 31 July 2011 <<http://www.asean.org/documents/ASEAN%20IPR%20Action%20Plan%202011-2015.pdf>> (accessed 20 February 2012).
33. Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights: <http://europa.eu/legislation_summaries/fight_against_fraud/fight_against_counterfeiting/l26057a_en.htm> (accessed 22 February 2012).
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35. C-241-2/91P *Radio Telefis Eireann & ITP v. Commission* [1995] ECR I-743 (*Magill*). C-418/01 *IMS Health GmbH & Co OHG v. NDC Health GmbH & Co* [2004] 4 CMLR 1543.
36. *Walker Process Equipment v. Food Machinery & Chemical Corp.* 382 US 172 (1965).
37. *Professional Real Estate Investors, Inc., v. Columbia Pictures Industries, Inc.* 508 US 49 (1993).
38. C-56 & 58/64 *Etablissements Consten SA & Grundig-Verkaufs-GmbH v. Commission* [1966] ECR 299, 348 [1966] CMLR 418.
39. C-24/67 *Parke Davis & Co v. Probel* [1968] ECR 55, [1968] CMLR 47.
40. In the matter of *Rambus Inc.*, Docket No. 9302, Opinion of the Commission on Remedy, 5 February 2007.
41. C-418/01 *IMS Health GmbH & Co OHG v. NDC Health GmbH & Co* [2004] 4 CMLR 1543.

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6

Subregional Zones and ASEAN Economic Community

Richard Pomfret and Sanchita Basu Das

ASEAN leaders have proclaimed their intention to create an ASEAN Economic Community (AEC) by 2015. The AEC, along with two other “pillars” — the ASEAN Security Community and the ASEAN Socio-cultural Community — make up the ASEAN Community, as declared in Bali Concord II of 2003. The last 5 years have witnessed various steps taken to speed up and strengthen community building: (a) bringing forward the date for meeting the goals of Vision 2020 to 2015, (b) ratifying the ASEAN Charter, (c) implementing the AEC Blueprint, and (d) adopting blueprints for the Socio-Cultural Community and the Political Security Community.

Yet, despite the various ASEAN initiatives toward economic integration, progress has been slow. Non-tariff barriers such as restrictive regulations and technical measures have not been removed. Negotiations to free up trade in services need to be accelerated. Thus, although ASEAN is a market of 600 million people, the region, in reality, remains a chain of disparate markets. Intra-regional trade currently makes up only about one-quarter of ASEAN’s total trade volume, compared to

more than 70% in the European Union. More importantly, a wide economic disparity divides the ASEAN-6 (Malaysia, Indonesia, Singapore, Thailand, Brunei Darussalam and the Philippines) from its four newer members (Cambodia, Lao PDR, Myanmar, and Viet Nam), which is a major hindrance to economic integration.

To address the issue of the economic divide, there are several programs on “hard” and “soft” infrastructure being initiated at the regional and subregional levels. For example, the Initiative for ASEAN Integration (IAI) aims to narrow the divide within ASEAN and enhance ASEAN’s competitiveness as a region. In 2010, ASEAN also came up with the Master Plan on ASEAN Connectivity, which identified strategies and specific actions to speed up regional connectivity in three areas: physical connectivity, institutional connectivity and people-to-people connectivity that is intended to help in bringing about a smoother flow of trade in goods, services, investment and people in the region. The subregional programs, like the Greater Mekong Subregion (GMS), the Indonesia-Malaysia-Thailand Growth Triangle (IMT-GT) and the Brunei Darussalam-Indonesia-Malaysia-The Philippines East ASEAN Growth Area (BIMP-EAGA), aim to strengthen economic linkages between member countries. They also promote the economic integration of the region; assist in the construction of physical linkages among countries; and promote the fairer utilization of limited resources in the subregion.

The goal of this chapter is to assess subregional cooperation as an approach to achieving two explicit goals of the AEC Blueprint: improving connectivity and reducing the development divide within ASEAN. The next section of the chapter gives an overview of subregional cooperation — Sijori, the GMS, the IMT-GT and the BIMP-EAGA — and discusses the potential of subregional zones to promote cooperation among neighbors, improve connectivity and reduce the development gap within ASEAN. It also discusses the issues arising from the experience of the four SRZs. The chapter further looks at ASEAN’s issue of the development divide and discusses the key initiatives to address it. Points of alignment between the subregional programs and the AEC are highlighted in the chapter. Lastly, the chapter gives some policy recommendation on the subregional and regional initiatives that can be brought together to enhance connectivity and narrow the development divide in the region (the third pillar of the AEC Blueprint).

1. Subregional Programs

A distinctive feature of the Southeast Asian trade environment in the 1990s was the emergence of Subregional Economic Zones (SRZs), which crossed national boundaries but did not cover all of the territory of every participating country. The pioneer was the Singapore-Johor-Riau (Sijori) triangle, which first attracted attention as an SRZ around 1990.¹ In 1992, with assistance from the Asian Development Bank (ADB), the six countries of the Greater Mekong Subregion (GMS) launched a program of subregional economic cooperation (see Map 1). ASEAN members identified more subregional zones during the 1990s. The Indonesia-Malaysia-Thailand Growth Triangle (IMT-GT) was launched in July 1993 and now consists of 14 provinces in Southern Thailand, eight northern states of Malaysia and ten provinces of Indonesia (see Map 2). The Brunei Darussalam-Indonesia-Malaysia-The Philippines East ASEAN Growth Area (BIMP-EAGA) was launched in March 1994 and covers Brunei Darussalam and parts of Indonesia, Malaysia and the Philippines.²

It is tempting to see the two older SRZs, and the GMS, as contrasting blueprints, the former bottom-up and the latter top-down, for achieving greater connectivity. This may be misleading, as the historical circumstances behind and the GMS were quite different. Moreover, the GMS clearly involved a development goal, as the four countries which would join ASEAN in the second half of the 1990s and raise concerns of a development divide were all GMS members. IMT-GT and BIMP-EAGA are classic SRZs (like Sijori), because they are not coterminous with national borders (except Brunei Darussalam), but they differ from Sijori because participants have competing (natural resources and tourism) rather than complementary economies. Both IMT-GT and BIMP-EAGA were top-down creations intended to stimulate economic growth in regions that were lagging behind Sijori and other growth poles within ASEAN. Thus, as with the GMS, they were about improved connectivity and promoting development in lagging areas, even though IMT-GT and BIMP-EAGA did not include the four newest ASEAN members.

1.1 *Sijori*

Although there had been confrontation between Malaysia and Indonesia and a less than completely friendly Singaporean secession from the Malaysian Federation in 1965, relations between the three countries

MAP 2
The Indonesia-Malaysia-Thailand Growth Triangle (IMT-GT) and its Four Economic Connectivity Corridors

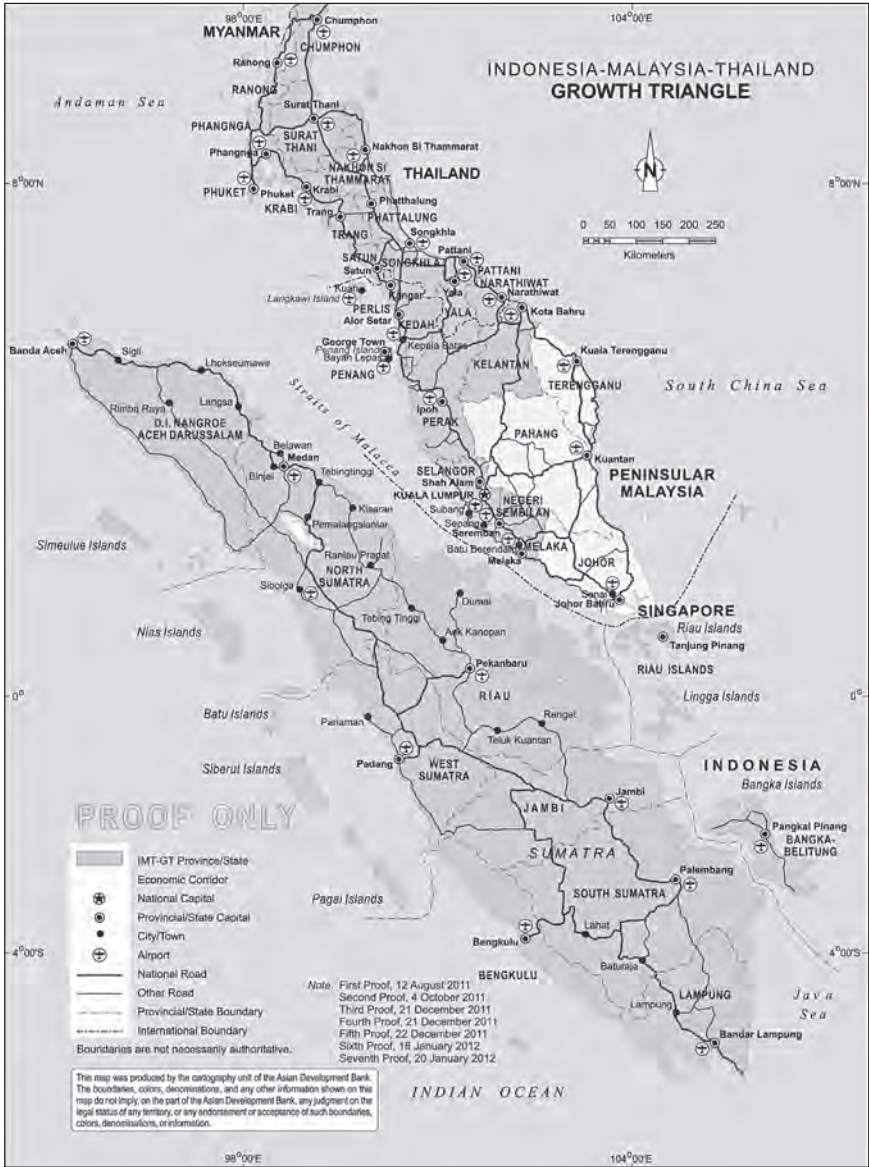


TABLE 6.1
Subregional Economic Zones (SRZs) in Southeast Asia

	GMS	IMT-GT	BIMP-EAGA
Date established	1992	July 1993	March 1994
Population (million people)	326	70	57
Land Area (million square kms)	2.6	0.6	1.6
Website	< www.adb.org/gms/ >	< http://www.imtgt.org >	< http://www.bimp-eaga.org >

Note: Sijori evolved rather than being established and inclusion of territory in the SRZ has been determined by the national governments; the population in all of Riau province, Johor state and Singapore is under 10 million.

Source: ADB website at <<http://beta.adb.org/countries/subregional-programs>>.

had become more amicable through the 1970s and 1980s. All three had by the late 1980s fairly open trade regimes at the national level. Moreover, the economies of the three component parts of Sijori were largely complementary, as Singapore's increasingly skill-based economy was losing comparative advantage in unskilled-labor-intensive activities and lacked physical space. Finally, the physical infrastructure was in place (the causeway between Johor and Singapore) or easy to build (ferry services to the Riau islands).

As wages in Singapore rose in the 1980s the "triangle of growth" became the basis for regionalization. Labor-intensive industries relocated to the neighboring Malaysian state of Johor and the islands of Batam and Bintan in the Indonesian province of Riau. The increased trade within Sijori was largely private-sector driven. Indonesia's unilateral decision in 1978 to make Batam Island a duty-free zone was an important catalyst. In the late 1980s, land prices were US\$4.3 per square meter in Singapore and US\$2.3 in Batam, and wages for unskilled labor were US\$350 per month in Singapore and US\$90 per month in Batam (Chia and Lee 1993, p. 243). Singaporean investors responded to the incentives. Links between Singapore and Johor were historically closer, and there was virtually no public policy role behind the rise in trade and investment flows in the late 1980s (Pomfret 1996, pp. 209–10).

By the end of the 1980s, the three national governments were happy to validate the SRZ arrangement. In 1989, Singapore proposed formalizing the SRZ, and in the following year the suggestion was endorsed by the Indonesian and Malaysian leaders.³ In 1994, the three participating countries signed a Memorandum of Understanding.⁴ There is, however, no official Sijori organization, and many observers believe that Sijori involves ad hoc Singapore-Indonesia and Singapore-Malaysia bilateral relations, rather than being a trilateral SRZ (Chen 2009, pp. 141–69).

Twenty years later, the Sijori region is a major growth pole in ASEAN and an obvious success, although how much of that is due to its conscious status as a SRZ or how much due to natural market-driven development is debatable. The Malaysian government has invested heavily in the region, especially since launching the Iskandar Development Region (IDR) in Southern Johor in November 2006 (Bhaskaran 2008). The IDR is three times the size of Singapore (with about a third of the population), emphasizing the complementarities between land-constrained Singapore and its relatively land-abundant neighbors. At the same time, IDR's large modern port facilities raise issues

of whether Malaysia is complementing or competing with Singapore within the SRZ. Nevertheless, there is no doubt that spillovers from Singapore, with by far the highest per capita income in ASEAN, are benefiting the neighboring regions. Access to adjacent land and low-wage labor have alleviated constraints on sustained Singaporean growth.⁵

1.2 The Greater Mekong Subregion

The Greater Mekong Subregion (GMS), which is now made up of Cambodia, Yunnan Province and Guangxi Zhuang Autonomous Region in the People's Republic of China, Lao People's Democratic Republic, Myanmar, Thailand, and Viet Nam (see Map 1), has the defining natural link of the Mekong River and some historicalities. However, the GMS was established only a little more than a decade after the termination of hostilities which had sharply divided the region. Thus, the GMS was not about bringing together complementary contiguous parts of national economies (as in Sijori), but rather about reinstating links between countries divided by war and reconstructing infrastructure that had been destroyed.⁶ Moreover, the GMS is not a SRZ, as usually defined, insofar as it includes whole countries, not parts of countries (apart from the PRC). The strong role of the Asian Development Bank (ADB) as facilitator and home for a secretariat has also been distinctive.

In 1992, with assistance from the Asian Development Bank (ADB), the six countries of the GMS launched a program of subregional economic cooperation. The GMS Program promotes increased connectivity, improved competitiveness, and a greater sense of community (the three Cs) and covers nine priority sectors: agriculture, energy, environment, human resource development, investment, telecommunications, tourism, transport infrastructure, and transport and trade facilitation. The economic corridor approach, adopted in principle in 1998 but implemented slowly, recognizes that development potentials of specific geographic areas are optimized when improvements in both hard and soft infrastructure for transport and trade facilitation are coordinated.⁷

In contrast to Sijori, the GMS has largely been a top-down organization with a multilateral institution as facilitator. ADB was a crucial catalyst. Initially, the GMS was of only indirect concern to ASEAN; of the six participating countries, only Thailand was in ASEAN. After Cambodia, Lao People's Democratic Republic, Myanmar and Viet Nam joined ASEAN, however, the GMS became an almost entirely intra-

ASEAN grouping, with only the PRC provinces being outside ASEAN. As concerns grew about a development divide between the six older ASEAN members and the newer CLMV group, the GMS could be seen as an important mode for tackling the divide.

ADB has provided the continuity that enabled the GMS to survive two decades despite limited initial achievements. The role of national governments may also be important in this context, even though participation has been largely by Ministers of Finance and at the senior official level rather than by national leaders.⁸ ADB has ensured continued engagement and a process of learning and flexibility. By the early twenty-first century, it had identified and begun to implement a corridor approach as the best way to promote greater connectivity. This has the support of the GMS members and particularly of the PRC and Thailand, which are keen to construct effective north-south links between the PRC and the Gulf of Siam.

The GMS has clearly been less dynamic than Sijori. Initial conditions were far less propitious. It was not just the history of conflict, but also the fact that in 1992 only Thailand had an open economy; the PRC and Viet Nam were still in the process of reforming and opening up their formerly planned economies, Lao People's Democratic Republic and Cambodia were doing so more hesitantly (and the latter was still in political turmoil), and Myanmar hardly at all. One ADB concern was for the GMS to alleviate poverty in the poorer participants, but the poorest countries were the least amenable to facilitating trade.⁹

The GMS highlighted the nexus between hard and soft infrastructure. Even when physical transport links were upgraded their value was often reduced by bureaucratic or other restrictions. Thus, for example, when a bridge was built in 1993 over the Mekong between Vientiane and Nong Kai in Thailand, providing a land link between Lao People's Democratic Republic and the port of Bangkok, the trade-creating value was reduced by requirements that cargoes could only be carried beyond the bridge by national trucks (i.e. Thai goods bound for Vientiane had to be transferred to Laotian trucks for the final few kilometers of the journey, and Laotian goods bound for Thailand or beyond had to be transferred to Thai trucks once they crossed the bridge).

In the face of such problems, the GMS made slow progress. However, with ADB support, arranging frequent GMS meetings and inviting national officials to other ADB meetings, engagement was maintained

and alternative approaches suggested. In 1998, the GMS countries adopted the economic corridors approach to development as a holistic strategy to improve and enhance investments in transport, energy, and telecommunications in the subregion. The first GMS leaders' summit endorsed this in 2002.¹⁰ Four key transport corridors have been identified (see Map 1), along which improvements in hard and soft infrastructure are to be coordinated.

Progress along the corridors has been uneven. The North-South Corridor from Kunming to Bangkok via Chiang Rai, linking major urban areas in the two richest GMS nations, is the most dynamic; the last remaining major infrastructure project is a bridge across the Mekong River on the border of Lao People's Democratic Republic and Thailand (Wiemer 2009, p. 6), which was formally opened on the propitious date of 11/11/11.¹¹ Progress on the East-West Corridor, the Southern Corridor and the Northern Corridor from Nanning to Ha Noi has been slower. Illegal and unreported trade is believed to be large, complicating quantitative assessments based on trade flows.

The private sector's role in the GMS has been minor. The Business Forum (GMS-BF) was founded jointly by the Chambers of Commerce of the six GMS countries in 2000 and began accepting corporate members in 2006.¹² A secretariat has been established in Vientiane, with satellite offices in Bangkok, Ha Noi, and Beijing. A more important practical driving force has occurred when large individual companies see benefits from trading along GMS corridors, e.g., Charoen Pokphand from its activities in Lao People's Democratic Republic.¹³ Otherwise, private activity has followed infrastructure improvement. After a decade-long lag, the corridors have started to become a force for development, primarily due to upgrading roads that have stimulated economic development.¹⁴

Apart from confidence-building through frequent meetings and workshops for officials, ADB has also managed the Phnom Penh Plan for Development Management.¹⁵ The Plan was launched in 2002 to build capacity for development management in the GMS countries by organizing short-term programs for senior-level officials and more in-depth learning programs for other GMS civil servants. In 2004, the *Journal of GMS Development Studies* was launched to promote better understanding of development issues in the GMS among planners, policy-makers, academics, and researchers. To complement the journal, a research program has been initiated to help promote a link between knowledge generation and policy-making.

Although the GMS was intended as a tool for reducing the development gap between nations in Southeast Asia, the main drivers of action have been the two largest countries, the PRC and Thailand. When they want to promote action, it happens with the poorer countries in a subsidiary role at best gaining some benefits from the plans of the big two. The poorer nations have seen little practical impact, except for Lao People's Democratic Republic, which is on the North-South Corridor, and any benefits have come fairly late in the GMS's 20-year history. The corridors approach is showing some success with the improvement of the hard infrastructure, but it is widely recognized that more substantial gains will also require improvements in the soft infrastructure of trade facilitation.

It should, however, be noted that the criteria for judging the GMS may differ from those relevant to Sijori. In contrast to Sijori, whose three participants have cooperated peacefully for three decades without major bilateral conflict, the GMS remains a region of persistent bilateral disputes. In this context any improvements in connectivity may be considered a triumph. Completion of the North-South highway or progress on the North-South rail link are important benefits not just for the drivers, the PRC and Thailand, but also for Lao People's Democratic Republic. Improvements in air connectivity, largely driven by entrepreneurs and companies based elsewhere in ASEAN or beyond (e.g., AirAsia, SilkAir or Jetstar) have also contributed to improved connectivity. Soft infrastructure still has far to go; the GMS Cross Border Transport Agreement is a key initiative, for example, but implementation remains weak.¹⁶

1.3 The Indonesia-Malaysia-Thailand Growth Triangle

The Indonesia-Malaysia-Thailand Growth Triangle (IMT-GT) was established in 1993 with ten provinces from the three countries. Since then, it has grown to include 32 provinces and states (14 provinces in Southern Thailand, 8 northern states in Peninsular Malaysia, and 10 provinces on the island of Sumatra in Indonesia). Together, these areas represent a population exceeding 70 million. The IMT-GT had some private-sector support among Malaysian businesses keen to trade with Northern Sumatra, and although it was a top-down project it was intended to be private-sector driven. The IMT-GT Joint Business Council (IMT-GT JBC) was inaugurated in 1995 as the official vehicle to mobilize private-sector participation and involvement in the IMT-GT.¹⁷

An IMT-GT summit was held in December 2005 in Kuala Lumpur, aiming to reinvigorate the growth triangle. The leaders asked ADB to assist in developing a new roadmap to refocus IMT-GT and to engage more broadly with the subregional cooperation initiative. In 2006, ADB provided support for the development of the *IMT-GT Roadmap for 2007–2011* that was endorsed by the Second Leaders' Summit in Cebu, the Philippines.¹⁸

The IMT-GT Road Map identified four economic connectivity corridors as key to strengthening regional infrastructure to support increased intra- and extra-regional trade, investment and tourism: (i) the Songkhla-Penang-Medan Economic Corridor, (ii) the Straits of Melaka Economic Corridor, (iii) the Banda Aceh-Medan-Pekanbaru-Palembang Economic Corridor, and (iv) the Melaka-Dumai Economic Corridor. The first two involve Malaysia and Thailand, plus the Penang-Medan sea crossing, while the fourth consists solely of the ferry crossing. The third corridor is entirely in Sumatra. Thus, while the corridors may be worth developing for themselves, the only truly SRZ features are for Malaysia-Thailand cross-border trade and two ferry routes across the Strait of Malacca.

At a second summit at ADB in Manila in January 2007, agreement was reached on the need for a secretariat for the growth triangle. The Centre for IMT-GT Subregional Cooperation (CIMT) was established in Putrajaya (Malaysia) in August 2007. CIMT acts as a focal point for coordinating relations with the private sector, potential external investors, and potential donors and development partners. The key partner so far has been ADB.

In September 2007, ADB completed a preliminary assessment of the opportunities in and the challenges to developing the subregion's connectivity: *Expanding Horizons: A Study on the Development of the Indonesia-Malaysia-Thailand Growth Triangle (IMT-GT) Economic Corridors*.¹⁹ The focus of this study was on identifying the status of existing infrastructure assets, potential areas for intervention and other areas where further research was necessary to fully develop and utilize corridor connectivity. Subsequently, following the recommendations of the study, two further studies were undertaken in 2007–08, focusing, respectively on the identification of logistical costs of and constraints on the economic connectivity corridors, *Logistics Development Study of the IMT-GT* (April 2008), and, on mapping maritime links within IMT, including existing cargo and passenger movements, port capacities, and

customs, immigration and quarantine constraints, *Maritime Sector Study of IMT-GT* (August 2008).²⁰

The Sumatra Investment and Trade Survey (SITS) is an important component of ADB's work on trade and investment in IMT-GT. The primary objective of the SITS is to provide an empirical understanding of factors and policies that influence firm performance, including productivity, profitability, investment, growth and links with external markets, particularly in other regions of IMT. The January 2009 Sumatra Investment and Trade Survey obtained responses from 929 manufacturing firms. When asked whether they were familiar with ASEAN, Sijori and IMT-GT, 37.8% said they were familiar with ASEAN, 2.3% with Sijori and 1.6% with IMT-GT.²¹

The October 2009 IMT-GT Ministerial Meeting identified eight potential priority IMT-GT Projects:

1. **Indonesia**
 - (a) Sumatra Ports Development
 - (b) Melaka-Dumai Economic Corridor Multimodal Transport
 - (c) Sumatra Toll Roads Project
 - (d) Melaka-Pekanbaru Power Interconnection
2. **Malaysia**
 - (a) Melaka-Pekanbaru Power Interconnection
3. **Thailand**
 - (a) Southern Thailand Ports Development Programme
 - (b) Pak Bara Cargo Port (Phase 1 of the Lower Thai Land Bridge)
 - (c) Hat Yai-Sadao Toll Road

As with the broader Road Map, many of the priority projects are national projects, with only the Indonesia-Malaysia power connector (1d/2a) and the Melaka-Dumai ferry project directly promoting subregional connectivity.

The IMT-GT subregional zone contains centers of economic dynamism, but it is unclear how much dynamism has been created by the SRZ structure. The corridors approach is not well suited to this SRZ, and attempts to identify corridors have essentially focused on cross-border trade between Malaysia and Thailand and improved connections across the Strait of Malacca between Malaysia and Indonesia. Trade data at the SRZ level do not appear to be available; the CIMT website reports only national-level trade data for the three participating countries.

Moreover, illegal cross-border trade is believed to be large, complicating quantitative assessment.

1.4 Brunei Darussalam-Indonesia-Malaysia-The Philippines East ASEAN Growth Area

BIMP-EAGA is interesting, because the constituent parts have relatively weak infrastructure links to the more economically dynamic parts of their countries, i.e., to Java, the Malay Peninsula and Luzon. The national economic centers are separated from the BIMP-EAGA by water and by poor connectivity, whereas distances within BIMP-EAGA are shorter and potentially easier to overcome, with cross-border cooperation.²² The necessity for government action in overcoming the infrastructure weaknesses within BIMP-EAGA has led Dent and Richter (see also Dent 2008) to call for proactive “developmental regionalism” on the part of the governments concerned.

An early initiative after BIMP-EAGA was launched in March 1994 was to include private sector participation. The BIMP-EAGA Business Council (BEBC) was launched in November 1994 and serves as an umbrella organization for the private sector in the subregion. The BEBC Secretariat was established in Brunei Darussalam in 1996. Among its activities, BEBC sponsored print publications (*EAGA Business Update*, *Weekend Review*) and established a website <www.bimbbc.org>, inaugurated business forums in 1998, and established an EAGA Network of Information. The Secretariat relocated in 2001 to Kuching (Malaysia), and in 2003 undertook a review and restructuring, which shifted authority to centers in the BIMP-EAGA countries.²³ Since the restructuring, the BEBC has refocused its attention toward development of small and medium-sized enterprises.

The BIMP-EAGA subregion has been historically part of the global economy, stretching back to the maritime silk route and spices trade between Asia and Europe. The subregion contains around 60% of the world’s tropical seacoast and coral reefs, as well as major rainforests (Borneo and Papua). Potential for future development lies in agro-industry (e.g., coconut, palm oil, tropical fruits and vegetables, and seaweed-based products), fisheries, ecotourism, transportation services, and energy resources (Dent and Richter 2011, p. 36). One consequence of the specialization is that some of the subregion’s main ports are relatively efficient for bulk exports (e.g., Sandakan, Malaysia, for palm oil, mainly to the PRC, or Bitung, Indonesia, for coconut

products) but less suited for the more diverse cargoes that could spur intra-regional trade.²⁴

Despite the potentially positive features, the impact of BIMP-EAGA has been limited. With little achievement in the first decade after its establishment in 1994, the SRZ in 2005 formulated a *Roadmap* for the next 5 years. The December 2008 *Midterm Review* highlighted the poor institutional setting as a contributor to disappointing progress in implementing the *Roadmap Strategy 2006–10*.²⁵

The zone is administered by central governments rather than by local governments within the SRZ, perhaps due to fears of separatism, especially in the portions of Indonesia and the Philippines included in the SRZ. In 2003, a Facilitation Centre was established in Kota Kinabalu (Sabah), which coordinates and publicizes initiatives, but discussions since 2006 to turn it into a secretariat have stalled. Meanwhile, a rotating presidency and summits held on the fringe of ASEAN summits do not promote continuity of leadership or serious high-level attention to the SRZ.

The *Midterm Review* provided a catalyst for the participating countries to sign Memorandums of Understanding on air transport, commercial buses, sea linkages, and transit and interstate transport of goods. Granting of fifth-freedom traffic rights for designated international airports and removal of restrictions on code-sharing and other arrangements are intended to expand air linkages within BIMP-EAGA (Lim and Narjoko 2011).²⁶ Dent and Richter (2011) provide a list of recently upgraded seaports (Zamboanga and Cagayan in the Philippines, Serasa in Brunei Darussalam, and Bitung in Indonesia) and airports (Kota Kinabalu in Malaysia, Makassar in Indonesia and Brunei Darussalam), but it is unclear to what extent these infrastructure investments are geared toward BIMP-EAGA connectivity. More explicitly targeted at the SRZ is the promotion of Ro-Ro (roll on/roll off) ferry services that can be used by small-scale traders.²⁷ ADB in December 2009 announced substantial funding for infrastructure over the triennium 2010–12, relating it to the success of the GMS transport improvements, although the scale of investment in BIMP-EAGA appears to be much smaller.

In December 2010 a final assessment of the *Roadmap* noted significant gains, while underscoring the need to enhance implementation processes. ADB is providing technical assistance to BIMP-EAGA in formulating an *Implementation Blueprint 2012–2016* that will place emphasis on project implementation. At the 7th BIMP-EAGA Summit

in Jakarta in May 2011, the leaders reiterated their commitments to fast track the implementation of various Priority Infrastructure Projects in the subregion, particularly in transport, energy, trade facilitation, and information and communication technology in line with the Master Plan on ASEAN Connectivity.

Overall, despite an increasing number of SRZ projects or initiatives,²⁸ there are limited concrete achievements. Labor migration remains restricted. Although the SRZ is outward-oriented with, according to the *Midterm Review*, exports of US\$58.3 billion from the SRZ to the rest of the world in 2008, intra-BIMP-EAGA trade was a mere US\$729,000 in 2005 falling to US\$601,000 in 2006. Foreign direct investment approvals in 2007 were around US\$13 billion in 2007, but they were unevenly distributed, with almost 90% (\$11.88 billion) in the Indonesian part of the SRZ, 6.4% in the Malaysian part, 3.4% in Brunei Darussalam and 0.3% (a mere US\$39.8 million) in the Philippine part. It is widely recognized that unofficial trade and migration between the islands is rife, but this is not a consequence of the SRZ.²⁹

2. Issues Arising from the Experience of the Four SRZs

Evaluating the relationship between subregional cooperation and connectivity in ASEAN is complicated by the diversity of the four recognized SRZs. Connectivity is highest within Sijori, reflecting Singapore's world-class standing by all indicators of port efficiency, logistics or ease of trading across borders, and the willingness of Singapore's neighbors to benefit from this. The GMS started under much less propitious conditions and had the fundamentally different aim of creating connectivity by reconstructing an economic zone that had been broken down by half a century of conflict. From an ASEAN perspective, the GMS was also a potential instrument for closing the development gap, as four of the GMS countries would accede to ASEAN in the second half of the 1990s, and be its poorest members. Finally, the IMT-GT and BIMP-EAGA were created with the intention of promoting growth in lagging regions of four of the five original ASEAN members, which were regions with poor connectivity and distant from the major growth poles centered on the national capitals. The limited achievements of IMT-GT and BIMP-EAGA are reflected in

constant references to re-inventing, re-invigorating, etc. These last two SRZs are most similar in intent and (disappointing) performance, but not readily comparable to Sijori or the GMS.

It is difficult to evaluate the success of the SRZs. Although it seems clear that Sijori has boomed, the GMS has begun to have an impact along some of its corridors, and the IMT-GT and BIMP-EAGA have been less successful, these statements are hard to back up with quantitative analysis. A fundamental issue is that data are not readily available at the SRZ level, especially for the last two SRZs. A second difficulty is distinguishing between before-and-after comparisons and more analytically meaningful with-and-without comparisons. Much of the development within Sijori would have happened even without identifying it as an SRZ. Accelerated growth in GMS countries in the 1990s and 2000s owed more to multilateral (WTO accession) and regional (ASEAN membership) trade liberalization than to the subregional zone, and improvements in the main GMS corridor from Kunming to Thailand depended on bilateral PRC-Thai backing rather than GMS blueprints.³⁰

A final issue in assessing the impact of subregional zones within ASEAN concerns the role of ADB.³¹ In each of the SRZs except Sijori, ADB has played a critical role in maintaining momentum, typically by provision of human resources. ADB itself tends to play down its own role (as in Table 6.2, which gives a misleading impression of the scale of the three SRZs), while boosting the SRZs' achievements and publicizing projects in the SRZs on its website (<<http://beta.adb.org/countries/subregional-programs>>).

TABLE 6.2
Institutional Capacity in SRZs

SRZ	Staff — Location and Number
BIMP-EAGA	Facilitation Centre – 4; BEBC – 6
GMS	professional staff at ADB in Manila – 2
IMT-GT	Centre for IMT-GT Subregional Cooperation – 2

Source: ADB (2010), Appendix 2.

3. ASEAN and Its Issue of Development Divide

ASEAN embarked on a bold project of intending to create an ASEAN Economic Community (AEC) to create a single market and production base by 2015. By that time, ASEAN is expected to become an economically integrated region where there is a free flow of goods, services and investments, a freer flow of capital and labor, equitable economic development, and reduced poverty and socio-economic disparities. However, ASEAN currently faces formidable economic challenges, including the development gap between its more developed (ASEAN-6) and newer members — Cambodia, Lao People's Democratic Republic, Myanmar and Viet Nam (CLMV).

The member countries of ASEAN are at different stages of economic development and these development differences are in terms of GDP per capita (income per capita), human development indicators such as the incidence of poverty, life expectancy, literacy, public expenditure on health and education and “soft” and “hard” infrastructure. For example, Singapore has a first-world per capita income level (US\$36,631), which is 87 times higher than Myanmar's per capita income level of US\$419. Tables 6.3 to 6.5 provide economic, human development and poverty indicators that underscore this wide economic and human development divide within ASEAN.

One key development gap also lies in the infrastructure sector. The hard physical infrastructure in CLMV countries such as highway and rail networks, power grids, and gas pipelines, is characterized by various structural weaknesses — low responsiveness to users, organizational inefficiencies, insufficient budgetary funding, heavy dependence on Official Development Assistance (ODAs), lack of FDI, and lack of environmental awareness. The CLMV countries also lack the “soft” infrastructure (information and communication technology), which is an important prerequisite for the next stage of development (Salazar and Basu Das 2007). Table 6.6 presents the “digital divide” among ASEAN members measured in terms of fixed, mobile and internet users.

Beyond these economic and social gaps, significant disparities in institutional capacity and human resources amongst the ASEAN member-countries exist. The current weak human resource capabilities in the CLMV countries, together with weak policies, as well as institutional and legal frameworks, make it difficult for these countries to raise their productive capacities. These further constrain their capacity to make optimum use of foreign aid.

TABLE 6.3
ASEAN Macroeconomic Indicators

	GDP (US\$ bn), 2012	Population (mn), 2012	Per Capita GDP (US\$), 2012	Share of Agriculture in GDP, 2010	Share of Industry in GDP, 2010	Share of Services in GDP, 2010	Imports/GDP (%), 2010	Exports/GDP (%), 2010
Brunei	16.8	0.43	38,801	1	67	32	20	75
Darussalam								
Cambodia	14.2	15.2	934	36	23	41	72	54
Indonesia	894.8	244.5	3,660	15	47	38	21	24
Lao PDR	9.3	6.4	1,453	33	32	35	32	29
Malaysia	307.2	29.0	10,578	11	44	45	67	81
Myanmar	54.0	63.7	849	48*	16*	35*	14	20
Philippines	240.6	97.7	2,462	12	33	55	28	21
Singapore	267.9	5.3	49,936	0	28	72	153	171
Thailand	376.9	64.5	5,848	12	45	43	66	66
Viet Nam	137.6	90.4	1,523	21	41	38	86	78

Note: ^ share pertains to year 2004.

Source: World Bank Statistics.

TABLE 6.4
ASEAN Human Development Indicators

	Human Development Index (Rank) (2011)	GDP Per Capita (PPP US\$) (2012)	Life Expectancy at Birth (years) (2011)	Adult Literacy Rate (% age 15 & above) (2009)	Public Expenditure on Health (% of GDP) (2010)	Public Expenditure on Education (% of GDP) (2010)
Brunei Darussalam	33	50,526	78	95.3	2	2
Cambodia	139	2,398	63.1	77.6*	2	3
Indonesia	124	4,957	69.4	92.2*	1	3
Lao PDR	138	3,004	67.5	72.7^	1	3
Malaysia	61	16,942	74.2	92.5	2	4.1*
Myanmar	149	1,401	65.2	92	0	N.A.
Philippines	112	4,263	68.7	95.4*	1	2.8*
Singapore	26	60,883	81.1	94.7	1	3
Thailand	103	10,023	74.1	93.5^	3	4
Viet Nam	128	3,545	75.2	92.8	3	5.3*

Notes * Data for the year 2008; ^ Data for the year 2005.
Source: UNDP Human Development Report, 2012.

Table 6.5
Incidence of Poverty in ASEAN

	Poverty Head Count Ratio at National Poverty Line (in Percentage)	Poverty Head Count Ratio at \$1.25 (PPP) a Day (in Percentage)
Brunei Darussalam	N.A.	N.A.
Cambodia	30.1 (2007)	22.8 (2008)
Indonesia	12.5 (2011)	18.1 (2010)
Lao PDR	27.6 (2008)	33.9 (2008)
Malaysia	3.8 (2009)	0 (2009)
Myanmar	N.A.	N.A.
Philippines	26.5 (2009)	18.4 (2009)
Singapore	N.A.	N.A.
Thailand	8.1 (2009)	0.4 (2009)
Viet Nam	14.5 (2008)	16.9 (2008)

Note: The number in the brackets gives the latest years.

Source: World Bank Statistics.

TABLE 6.6
ICT Infrastructure Indicators, 2011

	Fixed Line Telephone Subscription Per 100 Inhabitants	Cellular Subscriber Per 100 Inhabitants	Internet User Per 100 Inhabitants
Brunei Darussalam	19.7	109	56
Cambodia	3.7	70	3.1
Indonesia	15.9	98	18
Lao PDR	1.7	87	9.0
Malaysia	14.7	127	61
Myanmar	1.1	3	1.0
Philippines	7.1	92	29
Singapore	38.9	149	75.1
Thailand	9.7	113	23.7
Viet Nam	11.5	143	35.5

Source: International Telecommunications Union, <<http://www.itu.int/ITU-D/ict/statistics/>>

Vo (2005) has raised concerns that deeper economic integration could lead to huge social costs incurred by the CLMV countries due to structural adjustments and the risk of falling into a low-cost labor trap (where there is little incentive for domestic industries to move up the value chain). Appropriate resources should, therefore, be allocated to these countries to ensure the full participation of all member countries in the integration process. This would include financial and technical assistance, transfer of technology, education, training facilities, and other capacity-building activities.

3.1 Initiative for ASEAN Integration

To address the issue of development divide, ASEAN launched in 2001 the Initiative for ASEAN Integration (IAI). The IAI is primarily directed at the newer members of ASEAN, namely, Cambodia, Lao People's Democratic Republic, Myanmar, and Viet Nam. However, it also encompasses subregional groupings, such as the Greater Mekong Subregion, BIMP-EAGA and IMT-GT. This is expected to assist the CLMV countries to meet ASEAN-wide targets and commitments. Over the years, the IAI has evolved from a platform of mutual assistance between the ASEAN-6 and the CLMV to an expanded framework to involve Dialogue Partners and development agencies.

Within this policy framework, the first IAI Work Plan (July 2002–June 2008) was completed. The Work Plan covered more than one hundred projects in four areas: infrastructure, human resource development, information and communication technology and regional economic integration. The first IAI Work Plan also involved the development of legal, institutional and regulatory frameworks and the building of technical capabilities and capacities of the CLMV. The second IAI Work Plan (2009–2015), which was endorsed in 2009, during the 14th ASEAN Summit, is based on key program areas in the ASEAN Political-Security Community Blueprint, the ASEAN Economic Community Blueprint and the ASEAN Socio-Cultural Community Blueprint.

In general, the CLMV countries have professed their satisfaction with the usefulness of the program and most of its projects. However, the descriptions of the projects reveal their uneven nature in terms of quality and relevance to the IAI's purposes — and, therefore, presumably their effectiveness (Severino 2007). The projects seem to lack coherence partly because of inadequate coordination — among national agencies within

the CLMV countries, among their representatives in ASEAN sectoral bodies, between the ASEAN-4 and the ASEAN-6, among the ASEAN-6, and between ASEAN and other international programs focused on the Mekong Basin, where the ASEAN-4 countries are located.

The program seems to suffer also from insufficient participation of the CLMV countries in the projects' design and the consequent lack of a sense of ownership of the projects on the part of those countries. At the other end of the process, most projects carry no provisions for follow-through, for implementation, for the effective dissemination of knowledge or skills gained.

This suggests that there has to be some improvement in the IAI scheme. Coordination has to be strengthened among all agencies. The CLMV countries have to be involved at all stages that is in the conception, selection, and design of each project. The selection of the projects has to be subjected to the same process and to similar criteria as other ASEAN development projects. Each project should include provisions and funding for follow-through, implementation, dissemination and impact assessment.

The Eminent Persons Group (EPG)'s report on the ASEAN Charter, noted that ASEAN's ability to achieve its long-term economic goals would depend on how the development gap is addressed efficiently. Given the limited financial resources that ASEAN countries are willing to make available for this purpose, innovative ways to source development assistance will be needed to narrow the development gap. New strategies to narrow the development gap should be designed to ensure that the less developed member countries are in a position to participate in and fully benefit from the economic integration process.

3.2 Master Plan on ASEAN Connectivity

The 17th ASEAN Summit adopted the MPAC in 2010 in Viet Nam. The plan strives to integrate a region of over 600 million people with a combined GDP of about US\$1.5 trillion. The Master Plan identified several priority projects, including the ASEAN Highway Network, a roll-on roll-off network and the ASEAN Broadband Corridor. It reviewed the achievements made and the challenges encountered to build up linkages in ASEAN. It also outlined key strategies and essential actions with clear targets and timelines to address the challenges. The Master Plan has three components: (a) physical connectivity, (b) institutional connectivity and (c) people-to-people connectivity.

According to the Asian Development Bank (ADB), the complete realization of ASEAN Connectivity requires around US\$596 billion, underscoring the need for cooperation with the ten Dialogue Partners and public-private partnerships. Core initiatives of the Master Plan are to improve the economic resilience of the region through improved production and distribution networks and to optimize benefits from the free-trade agreements of ASEAN. Moreover, greater connectivity not only results in economies of scale, but also higher interaction among countries, boosting multilateral growth and reducing development gaps. Therefore, connectivity is seen as a way of promoting the economic growth of ASEAN as a whole.

4. Effectiveness of SRZs in supporting the AEC

Given that all three subregional cooperation schemes were established before ASEAN took its current form (Cambodia joined ASEAN in 1999, and AEC was adopted in 2007), it is important to examine the effectiveness of the subregional programs in supporting ASEAN's regional drive and the AEC.

4.1 *Similar Strategic Objectives*

The main objective of the AEC was primarily to enhance competitiveness for economic growth and development by achieving a higher level of economic integration. The Vientiane Action Program (VAP) 2004–2010 states that the overall strategy for realizing the AEC involves deepening and broadening economic integration in the product and factor markets, and accelerating the integration process toward creating a single market and production base.

For BIMP-EAGA cooperation, it aims to increase trade, tourism and investments inside and outside the subregion by (a) facilitating the free movement of people, goods, and services, (b) making the best use of common infrastructure and natural resources, and (c) taking the fullest advantage of economic complementation. IMT-GT cooperation aims to accelerate economic transformation in less developed provinces of Indonesia, Malaysia and Thailand. The GMS program focuses on the provision of physical cross-border infrastructure and supports a range of measures to facilitate trade and investment in the region. These include improving procedures and transparency for customs clearance

and enhancing technical skills to improve the application of various regulatory systems.

One can argue that the overall strategic objectives of the regional and the subregional initiatives are the same i.e., that all member countries of ASEAN will be in a position to enjoy the economic benefits of economic integration. While the AEC is envisioned on a much larger scale involving all the ASEAN countries, IMT-GT, GMS and BIMP-EAGA were designed for the economic development of ASEAN provinces or the Mekong Basin countries.

4.2 Building Blocks for Infrastructure

Given the development divide in ASEAN, at the subregional level, activities such as the GMS and others, are needed to assist the integration into ASEAN and its economy of the four CLMV countries. The experience of BIMP-EAGA and IMT-GT can provide lessons on how to reduce the development divide, because the two SRZs aim to address development divides intra- and inter-ASEAN-6.

Infrastructure development is a critical element to improve access and the efficiency and quality of transport and energy infrastructure networks of the less developed ASEAN countries. This, in turn, helps to enhance their productivity and, hence, regional economic competitiveness. Moreover, for any subregional activity or program, the impact could be felt regionally. Regional public goods, such as infrastructure, although built for the subregion, can improve the physical connectivity in the ASEAN region as a whole.

Further, a well-developed physical infrastructure can lead to increased economic activities in terms of trade and investment, tourism, etc., as long as such developments are not obstructed by a lack of soft infrastructure. In this eight GMS, BIMP-EAGA and IMT-GT are, again, effective for providing "soft" infrastructure that would serve as a prerequisite for the next stage of development. Almost all the subregional frameworks include training to build capacity, assistance in policy development, and feasibility studies, to facilitate the development of legal, institutional and regulatory frameworks in regions away from the economic centers.

Trade and investment facilitation measures that are non-discriminatory and WTO-consistent are likely to be promoted in the SRZs, which are expected to strengthen the ASEAN Free Trade Area (AFTA) framework

at the regional level (Menon 2007). Thus, not only would the subregional activities be consistent with AEC, but the former could also be a catalyst for economic liberalization and reforms for the latter.

4.3 “Open” Regionalism

Participation in a subregional zone also brings benefits for the larger ASEAN region. GMS or BIMP-EAGA involves countries that are very strategically located between the fast rising economies of the PRC and India. This provides opportunities for forging greater economic integration beyond the ASEAN region and offers enormous opportunities to boost trade and investment. The subregional programs can be therefore potential building blocks to support greater economic regionalism and to enhance ASEAN’s overall economic competitiveness.

4.4 Narrowing the Development Divide

The basic framework of the subregional programs could be essentially seen as one that allows the ASEAN-6 and ASEAN Dialogue Partners to assist the CLMV countries in achieving their economic development goals and to narrow the economic development divide in the region. Hence, the GMS program and similar subregional programs could potentially be an effective framework to narrow the development gap in the region.

Besides disparity among the members, ASEAN also suffers from economic divides within member countries. Like in Indonesia, the central island of Java is most developed and has a concentration of resources and population, whereas the regions of Sumatra, Sulawesi and Kalimantan lag in terms of economic development. The two SRZs — IMT-GT and BIMP-EAGA — that focus on parts of the member-states can provide lessons for the intra-country development divides and can play a catalytic role in driving up the competitiveness of the region.

4.5 ASEAN Connectivity

In the context of the Master Plan for ASEAN Connectivity, 15 priority projects have been identified.³² Some of these have a major impact on individual subregional cooperation programs. Infrastructure improvements such as the Melaka-Pekan Baru Interconnection in IMT-GT and the West Kalimantan-Sarawak Interconnection in BIMP-EAGA are

expected to improve physical connectivity. Completion of the ASEAN Highway Network and the Singapore–Kunming Rail Link are likely to have an impact on the GMS.

Overall, the projects and activities on infrastructure linkages and capacity building are expected to lead to better integration. In addition, while the newer members will benefit from uplifting their economies, developed members will also enjoy the resulting economies of scale. Indeed, what seems clear is that subregional cooperation can potentially support ASEAN's efforts to realize an AEC by 2015 and beyond.

5. Recommendations

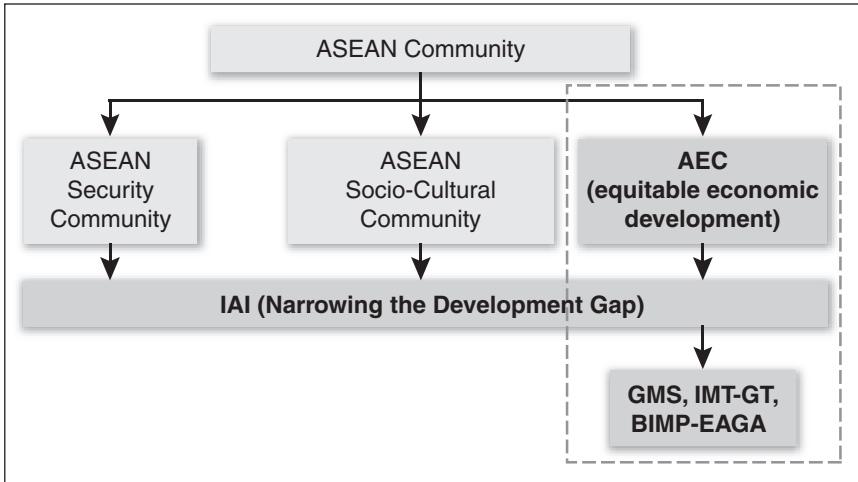
From the above, it is clear that there is scope for better coordination between ASEAN and the subregional frameworks. Moreover, as subregional initiatives are seen to be progressing slowly, more benefits could be garnered if they are linked to the regional activities.

5.1 Support the NDG element of AEC

Thus, while there are many points of alignment between subregional and regional programs, emphasis should be given to narrowing the economic development divide in the region. Given that the AEC deadline of 2015 is only 3 years away, ASEAN policy-makers will have to seriously address the development divide if economic integration is to succeed. If this economic divide is not effectively addressed, a “two-tier” or “three-tier” ASEAN could slow down the integration process. What seems clear here is that narrowing the development gap (NDG) poses one of the greatest challenges for the AEC. Therefore, the subregional activities should work with ASEAN initiatives for NDG.

For ASEAN, while the IAI could remain the main mechanism to narrow the development gap, the initiatives in the subregional frameworks could work with the economic elements of the IAI (see Figure 6.1). But given the short time for realizing the AEC, the subregional projects have to be designed to be more time-sensitive and consistent with the relevant action plans in the AEC Blueprint. It is important to keep in mind the need to streamline approaches and delineate program responsibilities in the light of the many regional and subregional initiatives that often have similar or overlapping objectives, strategies and action plans.

FIGURE 6.1
Framework for Including SRZs in AEC Initiatives



Source: Authors' suggestion.

5.2 Identify the Projects and Activities

The subregional processes can focus on NDG activities that can play a role in accelerating the economic development of the less developed ASEAN provinces or countries. Areas of development and technical cooperation could consist of:

- Trade and investment — the main drivers of economic integration to achieve AEC goals;
- Human resource development — a core component of NDG to meet the needs of the CLMV in capacity building; and
- Transport infrastructure — enhances the physical connectivity in the region and expedites economic integration.

5.3 Coordination and Implementation

The subregional programs and the IAI Work Plan under ASEAN have similar objectives to narrow the development gap. Programs and projects therefore, need to be streamlined to avoid overlap or duplication. Subregional programs and projects have to be

formulated on the basis of their identification as key priority areas that address the needs of the CLMV and are consistent with AEC goals.

As the IAI is the main ASEAN mechanism to support and meet the CLMV's development needs, the IAI Unit can have the overall responsibility of identifying the projects, which may vary from one country to another. The IAI unit can also be responsible for monitoring the progress of the implementation of its own projects and that of subregional programs and projects. They could thus effectively spot the areas of duplication or overlap between the IAI and subregional initiatives, such as GMS, BIMP-EAGA and IMT-GT.

5.4 Engaging Dialogue and Development Partners

All this envisages a more active engagement of donors in the various aspects of the regional and subregional programs. Donor institutions are a rich source of knowledge and development experience that could be brought to bear on sector analysis, program formulation, project design, execution and implementation, and even on impact monitoring and evaluation. Engaging donors at the early stages of the analytical work and program/project design is a factor that can influence funding decisions for projects at a later stage.

However, identifying projects solely on the basis of funding availability should be avoided, especially because most of the "hard" infrastructure projects will need to depend on external assistance. That is why a tight focus on cost-efficient and affordable projects and activities would be essential. While most of these projects would likely be in the "software" aspect of NDG, they nevertheless could play a role in supporting the infrastructure projects.

5.5 Alternative Approaches to Resource Mobilization

To meet the financing requirement, regional and subregional cooperation should look at both traditional and new ways of resource mobilization. While funding and loans from international institutions and Dialogue Partners are able to fill part of the total resource needs, the total amount of the resources mobilized from these traditional sources may not be sufficient to implement all initiatives. Thus, the role of private sector participation through approaches like Public-Private Partnership (PPP) should be increased.

There could be other innovative ways to source development assistance. The Eminent Persons Group (EPG)'s report on the ASEAN Charter, noted that, given the limited finance resources available to ASEAN, innovative ways of sourcing development assistance will be needed for NDG. In this regard, the EPG recommended that a Special Fund for NDG be established with voluntary contributions from member countries. The group suggested that a new innovative funding mechanism should be explored by experts to raise funds for this Special Fund, e.g., through a share of sales or excise taxes, airport taxes or visa fees.

ASEAN has come up with new ways of generating funds for its projects under the Master Plan for ASEAN Connectivity. The regional bloc, in collaboration with the Asian Development Bank (ADB), established an ASEAN Infrastructure Fund (AIF) in September 2011. The objective is to mobilize financial resources within ASEAN to support regional infrastructure development. The fund has a total capital of US\$485.2 million, of which ASEAN will contribute US\$335.2 million (69%), and ADB will contribute US\$150 million (31%). In addition, the hybrid capital of US\$162 million, as a financial instrument that has both debt and equity characteristics, will be issued after the third and last tranche of the initial core equity contributions. Hence, the total capital structure of the AIF is US\$647.2 million. It has been decided that while Malaysia will be the domicile of the AIF, ADB will manage and administer the AIF on behalf of ASEAN. The ASEAN member states and ADB aims to complete the first contribution by 30 June 2012.

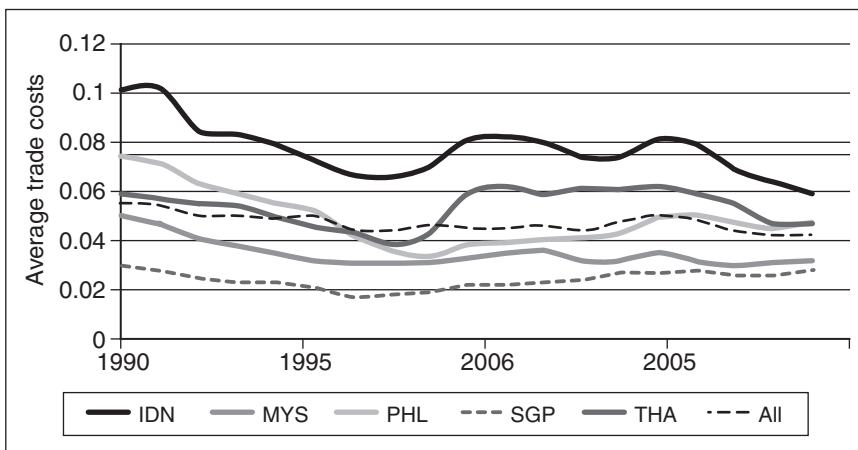
6. Conclusions

Connectivity within ASEAN has proceeded on a multi-vector and multi-speed pattern. A striking feature of ASEAN is the wide range of trade costs by any measure; the 2010 World Bank *Logistics Performance Index*, where ASEAN members ranked from 2nd to 146th out of 155 countries surveyed, is representative. Such survey-based measures are increasingly being complemented by an aggregative measure of actual trade costs, the gap between cost, insurance, freight (cif) and free on board (fob) values.³³ Figure 6.2 illustrates the convergence of ASEAN-5 trade costs between 1990 and 2008 toward the Singapore best practice of around

2%–3% of the value of exports. Singapore has provided a benchmark for low trade costs — expanded to neighbors via the Sijori subregional zone. The other ASEAN–5 countries converged to Singaporean low trade costs during the 1990s by adopting trade facilitation measures such as the Single Window, illustrating the connection between policy and trade costs.³⁴ In sum, we know that trade costs are an important determinant of the level of trade flows and of opportunities to benefit from comparative advantage.

Can trade costs be reduced and connectivity increased by creating subregional zones? The GMS illustrates the lengthy time that it takes for confidence to be built and working regional institution to be established. Even with consistent and substantial support from ADB, the GMS took almost two decades to focus on the corridors approach and to begin the necessary improvements in hard infrastructure, even as improving the “soft infrastructure” is largely still in the “to do” box. Nevertheless,

FIGURE 6.2
Average Trade Costs on Exports, 1990–2008:
Indonesia, Malaysia, Philippines, Singapore, and Thailand



Note: trade costs measured as the average (cif-fob)/fob on imports to Australia, Brazil, Chile and the United States.

Source: Patricia Sourdin and Richard Pomfret, “Monitoring Trade Costs in Southeast Asia”, *ERIA Discussion Paper Series 2009–12*, Economic Research Institute for ASEAN and East Asia, Jakarta, April 2009, available at <www.eria.org>.

toward the end of the second decade, there were tangible benefits to one of the CLMV countries, Lao People's Democratic Republic, which may not have enjoyed them without the GMS and its corridors approach. Top-down approaches to promote connectivity and reduce the development gap in regions further away from the Jakarta/Singapore/KL/Bangkok growth poles have been tried with less success in the IMT-GT and BIMP-EAGA zones.

In sum, an SRZ program can play a role in reducing development and connectivity gaps, but the process takes a long time.

In the next 3 years, ASEAN policy-makers have to seriously address the region's economic divide. This economic divide is not only in terms of per capita income, but also in terms of infrastructure and human development indicators. If this economic divide is not effectively addressed, a "two-tier" or "three-tier" ASEAN would clearly slow down the integration process and undermine the AEC initiative. For ASEAN, the IAI is the main mechanism to narrow the development gap, which takes a holistic multi-disciplinary approach to NDG.

As the SRZs have objectives of economic development and connectivity similar to ASEAN's goal of achieving equitable economic development in the region, the activities of SRZs would be aligned with ASEAN-wide measures. Subregional frameworks would focus on the economic NDG elements of the IAI. This would give the implementation of subregional projects more focus and coherence.

There is a need for better coordination and convergence of priorities and objectives among the ASEAN-driven NDG initiatives such as the IAI and subregional ones such as the GMS, the IMT-GT and the BIMP-EAGA. This would not only minimize the duplication of activities but would also give the donor agencies a better idea of areas in which they could provide technical and capacity-building assistance. A tight focus on cost-efficient and affordable projects and activities would be crucial.

For resource mobilization, new mechanisms need to be explored for the development fund. Private-sector participation can play an important role in the economic development of the CLMV. But the investment needs of the CLMV — such as physical infrastructure — have to be translated into commercially-viable projects for the private investors to take interest. In this regard, higher-quality information on investment opportunities in the CLMV has to be made available to the businesses.

On the whole, one can conclude that although IMT-GT and BIMP-EAGA pre-date ASEAN's enlargement in the 1990s and hence do not directly address the development divide between the older and the newer members, the two SRZs covered poorer regions of ASEAN-6 and offer lessons relevant to the issue. One of the main lessons could be that as long as the SRZs were top-down programs they had little impact, but that started to change when there was decentralization (as in Sijori), and local decision-makers could identify and reduce obstacles to connectivity (the RoRo ports in BIMP-EAGA are a good example). The GMS, with its large ADB input, showed that hard infrastructure projects can help, but the corridor concept emphasizes that hard and soft infrastructure are complementary, as demonstrated in the North-South corridor through Lao People's Democratic Republic.

Improved connectivity within parts of ASEAN depends crucially on national governments' political will. A crucial stimulus for Sijori was the Indonesian decision to create a duty-free zone. Liberalization of Indonesia's service sector may play a similar role for BIMP-EAGA, insofar as the more extensive liberalization of hotels and restaurants may favor Indonesia's eastern provinces (see the chapter by Deunden Nikomborirak). Within the GMS, increased benefits for Lao People's Democratic Republic have been triggered by PRC commitment to improving the north-south road corridor. The size of these benefits will be influenced by the degree to which Laotian policies facilitate enterprise and trade along the route. The halting progress of proposed hi-speed rail links between Kunming, Bangkok and Singapore through Malaysia is perhaps the best illustration of the irrelevance of blueprints without political and financial support by all governments involved.

What role can ASEAN as an institution play? ASEAN-wide projects for common standards and mutual recognition arrangements and so forth will facilitate trade within SRZs. It is striking that many assessments of the GMS emphasize the role of multilateral trade liberalization in driving growth in the SRZ. ASEAN can continue to be a force for such liberalization. Perhaps most of all, for the SRZs which do not include major economic growth centers, easing visa (and other border-crossing) requirements and developing information and communication infrastructure and skills would stimulate people-to-people connectivity as well as intra-SRZ trade and investment flows. The ASEAN Infrastructure Fund, announced in September 2011, can also play a role, but with a target of around six projects per year its impact will be strategic or

marginal for any individual SRZ. However, too much time spent by senior policy-makers on planning international transport routes and so forth can be counterproductive, if it is associated with a proliferation of bodies without operational relevance. These examples illustrate the important, if not always explicit, role that ASEAN plays in bringing together the national governments involved in SRZs and providing improved conditions for the SRZs' operations, as well as the limits of top-down control.

Thus, the concept of subregional zones can be helpful in highlighting cross-border connectivity within ASEAN and as a framework for realizing the goals of the AEC Blueprint. ASEAN can play an overarching role of providing agreed norms and standards relevant to improved cross-border connectivity, especially in soft infrastructure. However, member governments will have to play the principal role, especially in prioritizing within SRZ projects. The record on this has been mixed, with some positive successes. The inclusion of local governments in SRZ design and operation has been less consistent, and their absence (or weak inclusion) has been a disadvantage, especially for BIMP-EAGA.

NOTES

1. The other pioneer was the Pearl River Delta SRZ, but with the imminent return of Hong Kong, China to PRC sovereignty in 1997 this was a less obvious national-boundary-crossing region (Pomfret 2011, pp. 39–57).
2. Both the IMT-GT and BIMP-EAGA originally covered smaller areas in the participating countries.
3. Even earlier, in 1979, the Indonesian Minister of State for Research and Technology, B.J. Habibie, had discussed the possibility of joint development of Batam Island and Singapore with Prime Minister Lee Kuan Yew, arguing that policies of free entry and exit of people, goods and services were necessary if the neighboring economies were to be linked.
4. Apart from the formal public involvement, the two major industrial parks on Batam and Bintan were developed in the early 1990s by firms with close government connections, JTC International and Sembcorp from Singapore and Selim Group from Indonesia (Lim 2009, p. 226).
5. More negative assessments of Sijori emphasize socio-economic issues, usually related to unequal benefits for the three components (e.g., Sparke et al. 2004) or to cultural factors such as dealing with Malaysian regulations for ethnic Malay participation in joint ventures or satisfying sharia law (e.g., Sloane-White 2011).

6. The conciliation role remains significant as tensions recur among GMS members. Border tensions between Thailand and Cambodia may limit progress on the East-West corridor, but keeping the two neighbors talking is itself of value. Similarly progress on the Northeast corridor between the PRC and Viet Nam is occurring despite territorial disputes between the two countries over the Paracel and Spratly Islands (Spratly disputes also involve Brunei Darussalam, Malaysia and the Philippines). As Myanmar's relations with the PRC warm and cool (e.g., after halting the Myitsone project in 2011 Myanmar appeared to signal a limit to the PRC's favored investment position), the GMS offers a forum for continuity.
7. The complementarity between improving both hard and soft infrastructure is explicitly recognized in the Cross Border Transport Agreement (ADB 2009).
8. An important positive element has been that the GMS is driven by Ministers of Finance rather than Foreign Ministries, so that diplomatic or territorial disputes have not derailed economic cooperation.
9. Menon and Warr (2008), however, show that road projects in Lao People's Democratic Republic, often ADB-funded, have had a significant impact in alleviating poverty. Whether strictly GMS projects or not, road improvements improve connectivity.
10. During the 1990s, activity consisted mainly of piecemeal infrastructure projects managed at national level, and the 1997–98 Asian Crisis disrupted even this limited activity.
11. At the official opening, however, Thai Prime Minister Yingluck Shinawatra referred to the bridge as a link in the UN-backed Asian Highway rather than as a GMS project.
12. In addition to corporate membership fees, ADB and UNESCAP also contribute funding. Services provided by GMS-BF include management of a web-based business directory, operation of a web-based marketplace to facilitate business dealings, counselling of small and medium-sized enterprises, facilitation of trade financing, and organization of conferences.
13. Since 2006, when CP Foods, Thailand's top chicken producer, formed a subsidiary CP Laos Co., the company has been an important lobbyist for upgrading the GMS North-South corridor.
14. The cross-border activities profiled in *Corridor Chronicles* (ADB 2008) illustrate the range of small-scale specialization from short-distance trading to horticulturalists in Kunming exporting fresh-cut flowers to Bangkok. The case studies also illustrate the social benefits from better infrastructure, especially the improved access to healthcare activities of villagers previously without all-weather roads (microeconomic confirmation of the CGE-based conclusions of Menon and Warr).

15. The New Zealand Agency for International Development, Agence Francaise de Développement, PRC Regional Cooperation and Poverty Reduction Fund, and Republic of Korea e-Asia and Knowledge Partnership Fund provide financial assistance to the Phnom Penh Plan. New Zealand had also founded in 1996 the Mekong Institute in Khon Kaen, which provided 2–10 week long training programs for mid-level public officials from the Mekong countries; since 2003 the Mekong Institute has been an independent training institution governed by the six GMS member countries. With over 2,700 alumni, the Mekong Institute has played a role in people-to-people connectivity, as well as through training.
16. See Asian Development Bank: *Transport and Trade Facilitation in the GMS: Issues and Proposed Program of Actions*, July 2010 — available at <http://beta.adb.org/sites/default/files/02-Issues-Plan-of-Actions-TF-GMS_0.pdf>. An important driver of unilateral trade facilitation has been preparation for WTO accession by the PRC (joined 2001), Cambodia (joined 2004), Viet Nam (joined 2007), and Lao People's Democratic Republic (in process). ASEAN models could be useful (e.g., the ASW as a model for national single windows), but as yet have had little impact at the CLMV borders. In their positive assessment of the GMS after 20 years, Menon and Melendez (2011) emphasize the benefits of greater openness, rather than subregional cooperation.
17. The Joint Business Council has established wholesale markets along the borders called IMT-GT plazas, one-stop investment centers, and border townships. A Business Opportunities Directory has been launched. The JBC has facilitated trade delegations and trade fairs, investments in local businesses, and the standardization of port operations and other logistics services <<http://www.imtgt.org/Private-Sector.htm>>.
18. *Building a Dynamic Future: A Roadmap for Development 2007–2011* is available at <<http://www.imtgt.org/Documents/Books/roadmap-development.pdf>>. At the Summit, the leaders endorsed ADB's role as Development Partner for IMT-GT.
19. Available at <<http://www.imtgt.org/Documents/Studies/expanding-horizons-study.PDF>>.
20. Available at <<http://www.imtgt.org/Documents/Studies/Logistics-Development-Study.pdf>> and at <<http://www.imtgt.org/Documents/Studies/Maritime-Sector-Study.pdf>>.
21. Reported on the CIMT website at <<http://www.imtgt.org/Data.htm>>.
22. The only land borders are between Indonesia and Malaysia on the island of Borneo. Although small-scale border trade flourishes due to substantial price and income differences, more substantial trade is inhibited by restrictions on Indonesian trucks travelling into Malaysia and by Malaysian requirements that containers be unloaded at the border (mainly because

- unbalanced trade would lead to many containers not being returned to Malaysia). Indonesian data from 2004–06 for the main border crossing point between Sarawak and Kalimantan, Entikong-Tebedu, show about ten vehicles per day passing through in each direction (Green 2010, p. 57). BIMP-EAGA is credited with initiating through bus services from Pontianak to Kuching and to Brunei Darussalam.
23. The BEBC is governed by a Board consisting of three Directors from each of the four country focal points: BIMP-EAGA Brunei Business Council, the ASEAN Committee of the Indonesian Chamber of Commerce and Industry, the BIMP-EAGA Malaysia Business Council and the Mindanao Business Council. ADB appoints a senior officer to sit as advisor to the Board. The BEBC Secretariat is headed by an Executive Director appointed by and answerable to the Board.
 24. The analysis of BIMP-EAGA draws in part on ADB documents that are not in the public domain. ADB review of the agro-food industry documents the "EAGA Advantage" in palm and coconut oils (in both of which EAGA accounts for 40%–50% of global supply), fruits (banana, mango and pineapple), cacao and coffee, fish and canned tuna, seaweed and its product (carrageenan), spices (pepper, cloves and vanilla), banana chips and natural rubber. The review highlights supply chain inefficiencies as the major challenge, and in particular transport routes that use domestic ports rather than more efficient neighboring-country hubs.
 25. The *Roadmap* is available at <http://beta.adb.org/sites/default/files/BIMP-EAGA-Roadmap-Development-2006-2010_0.pdf> and the *Midterm Review* is available at <<http://www.asiandevbank.org/BIMP/Documents/BIMP-EAGA-Final-MTR.pdf>>. David Green (2010, p. 3) states that, with the exception of Brunei Darussalam, BIMP-EAGA "has not met the earlier hopes".
 26. The freedoms of the air grant a country's airlines the privilege to enter and land in another country's airspace. The fifth freedom allows an airline operating from its own country to carry revenue traffic between foreign countries, e.g., a Malaysian airline flying from Kota Kinabalu to Davao on Mindanao (the Philippines) and onto Manado on Sulawesi (Indonesia) will be allowed to carry passengers between the Philippine and Indonesian airports. Low-cost carriers already operate flights to EAGA airports from other ASEAN cities, e.g., Air Asia flies from Kota Kinabalu and Kuching to Bali and Jakarta and Cebu Pacific flies between Manila and Kota Kinabalu.
 27. Provision of Ro-Roservices has been pioneered in the Philippines since 2000. Extension to international routes, however, raises issues of reciprocal vehicle licensing and insurance, as well as the minor problem that the Philippines drives on the right while the other three BIMP-EAGA countries drive on the left.

28. Green (2010, p. 67) lists 27 clusters or value chains, mainly in the agro-food sector, that have been identified by ADB, IFC, USAID, GTZ/GIZ or BIMP-EAGA itself.
29. Unofficial trade may be strictly illegal (e.g., trafficking in people or endangered species, illegal logging, or trade in narcotics or weapons) or smuggling to avoid customs duties (as in sugar or petroleum from Indonesia or Malaysia to the Philippines), or simply small-scale trade (e.g., in dried fish) in isolated locations. Green (2010, p. 10), referring to work by JN Mak for the GTZ, points out that different authorities treat the latter trade differently, e.g., Malaysia welcomes non-conventional small ships to conduct barter trade in its ports whereas Indonesian and Filipino authorities suspect all such ships of being smugglers.
30. Improvements in road and rail links between the PRC and Myanmar are bilateral arrangements, although they will improve Myanmar's connectivity to a GMS partner. Completing the Kunming-Singapore rail link is a specific action plan of the *AEC Blueprint* (paragraph 49), but without mention of the GMS. PRC initiatives to develop a high-speed rail network for Asia, including a Kunming-Singapore line, would go beyond the ASEAN priority project to improve the current rail link, but will only happen if the PRC takes the lead and provides resources and technology. Although an Asian high-speed rail network sounds futuristic, the PRC's capability should not be underestimated; the first high-speed trains in the PRC were introduced in April 2007, and by June 2011 the PRC had 9,676 kilometers of high speed rail in service, the largest national network in the world.
31. Other external institutions also play a role, e.g., Germany's GTZ/GIZ has provided significant technical assistance to BIMP-EAGA, but ADB has been in the vanguard in promoting SRZs, and in providing material support to the GMS. Bilateral assistance may be forthcoming; Japan, ASEAN's second-biggest trading partner after the PRC, has established a Task Force on ASEAN Connectivity, and is considered the most technically appropriate partner to cooperate in developing Ro-Ro (roll-on and roll-off) networks for shipping.
32. For more information, see *ASEAN Focus* (Singapore: ASEAN Studies Centre, ISEAS, October–November 2011).
33. The fob figure measures a shipment's value at the port of export while the cif figure is the cost to the importer before domestic distribution costs. The cif-fob gap captures the difference between the costs of domestic and international trade. The main operational problem is that the cif and fob values must be on the same quantity flows, which makes mirror statistics useless and the number of countries reporting suitable data is limited (Hummels 2007; Pomfret and Sourdin 2010a and 2010b).

34. Reduced trade costs could also be due to improved hard infrastructure or to exogenous technical change in transportation. The cif-fob gap measures the level of trade costs, but cannot be used to decompose the causes of changes in the level. For further discussion, see the ERIA report by Urata and Okabe (2010). It is not feasible to use measures such as the cif-fob gap to measure improvements in trade within ASEAN's subregional zones because we do not have sufficiently detailed subregional trade data, although we could examine indicators of trade facilitation, such as those developed by the OECD (Moisé et al. 2011) or in ADB-ESCAP (2009) handbook on trade facilitation.

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7

ASEAN FTAs: State of Play and Outlook for ASEAN's Regional and Global Integration

Razeen Sally¹

ASEAN free trade area agreements are emblematic of Southeast Asia's shift from non-discriminatory unilateral and multilateral liberalization in the 1980s and 1990s to preferential liberalization over the past decade. But this has not resulted in much external opening or domestic structural reforms. AFTA, ASEAN countries' bilateral FTAs and ASEAN+1 FTAs are "trade-light", at best fairly strong on tariff elimination, but also weak to very weak in tackling non-tariff barrier and regulatory barriers. The proliferation of Ranks of Origin (ROOs) adds to the Asian noodle bowl. The region's political and economic diversity results in weak FTAs. It also precludes the emergence of strong regional institutions, hard policy coordination and deep integration, while leaving the door open to relatively weak and flexible regional institutions, soft cooperation and shallow integration. These reasons also preclude the emergence of strong region-wide FTAs, e.g., in ASEAN+3 or ASEAN+6. If such FTAs materialize, they will likely be even weaker than ASEAN+1 FTAs. In essence, ASEAN FTAs are too weak to promote intra-ASEAN, wider regional or global economic integration. Grand designs for them would be wishful thinking, and distract attention from what is both feasible and desirable. Rather, they should be improved through modest, incremental

reforms that work with the grain of ASEAN and wider Asian realities. But this is a second-order priority to achieve further regional and global economic integration. Rather, the first priority should be to revive unilateral (country-by-country) liberalization of trade and FDI, now extended to next-generation, behind-the-border reforms. That would spark competitive emulation within and beyond ASEAN. That is the key to extending multi-national enterprise supply chains in the region, spreading wider across manufacturing and into services and agriculture, and even opening up regional markets for intra-regional producers and consumers.

1. Introduction

Free Trade Agreements (FTAs) have been the centrepiece of trade policy in Southeast Asia over the last decade, for individual countries and for ASEAN collectively. In this respect, ASEAN has followed a wider Asian and global trend: trade policy has shifted from non-discriminatory unilateral liberalization, backed up by (non-discriminatory) GATT/WTO commitments, to preferential (i.e., discriminatory) liberalization through FTAs.

This chapter focuses on “ASEAN+1” FTAs, i.e., FTAs that ASEAN has negotiated collectively with other countries (the PRC, Japan, Republic of Korea, India and Australia-New Zealand). But, of course, these FTAs cannot be seen in isolation; rather, they must be put in the context of ASEAN countries’ national trade and investment regimes, their WTO commitments, the ASEAN Free Trade Area (AFTA) and associated agreements, and, not least, their numerous bilateral FTAs with other countries.

The big question this chapter addresses is whether, and to what extent, ASEAN FTAs further ASEAN’s goals of regional *and* global economic integration. Regional goals relate to the “centrality” of the ASEAN Economic Community (AEC) and its commitments to be achieved by 2015. How strong (or weak) are these FTAs — relative to AFTA, AEC and related agreements, but also to WTO commitments, ASEAN countries’ bilateral FTAs, “deep-integration” US and EU FTAs in the region, and, finally, existing national practice? These are institutional questions, but behind them lurks the bigger question of further real-world trade-and-investment integration between ASEAN and the wider world — with the wider East Asia and South Asia, and with the non-Asian world, notably the Western core of the global economy.

Section 2 reviews AFTA and related agreements, as well as ASEAN countries' bilateral FTAs with other countries. It also reviews the three US and EU FTAs extant in East Asia (US-Singapore, US-Republic of Korea and EU-Republic of Korea). One purpose of this review is to set benchmarks to assess the strength of ASEAN+1 FTAs and their fit with other (multilateral, regional and bilateral) trade agreements ASEAN countries are engaged in. Section 3 assesses ASEAN+1 FTAs against the abovementioned benchmarks. Section 4 broadens to the political economy of ASEAN FTAs, evaluating economic and political motives that drive FTA outcomes. It links ASEAN FTAs to Asian regional-economic-integration initiatives.

Section 4 concludes that ASEAN bilateral and “+1” FTAs are too weak to have contributed much to regional and global integration. On the other hand, there is no hard evidence that they have retarded regional or global integration, and perhaps there is some value in “strategic” engagement between ASEAN and its major regional partners. This conclusion leads to several recommendations to improve ASEAN FTAs to make them more compatible with regional and global integration objectives. Modest, incremental reforms — not grand designs — are the answer. Market-access commitments should be strengthened. Agreements should be simplified, not least to iron out inconsistencies within and across FTAs. And they should have stronger transparency mechanisms.

2. Benchmarks: AFTA, AEC and Bilateral FTAs

2.1 AFTA, AEC and Related Agreements

On paper AFTA and its offshoots are strong agreements — exemplars of strong regional economic cooperation. The Common Effective Preferential Tariff (CEPT) led to a tariff-free zone among the old ASEAN countries (ASEAN-6) in 2010. It is also mandatory to remove quantitative restrictions and other NTBs. The new ASEAN countries (ASEAN-4) have until 2015 to comply. AFTA has some of the simplest rules of origin in the world — 40% of regional value content (RVC) across the board, save for product-specific rules in textiles and clothing.²

Then there are the ASEAN Framework Agreement on Services (AFAS) and the ASEAN Investment Area (AIA).³ The AIA stipulates

that all investors and investments outside services, excepting specifically excluded sectors, should be accorded unconditional national treatment by 2010 (for ASEAN investors) and 2020 (for non-ASEAN investors), with a longer time frame for the ASEAN-4. There is also a Framework Agreement on Mutual Recognition Arrangements, with Mutual Recognition Arrangements (MRAs) on standards already negotiated for a few sectors.

The next advance was the blueprint for the ASEAN Economic Community (AEC).⁴ A single market for goods, services, capital and skilled labor is supposed to come into effect for the ASEAN-6 by 2015 and for the ASEAN-4 by 2020. This includes the "fast-tracking" of 11 priority sectors that account for over half of intra-ASEAN trade. There are comprehensive work programs for trade facilitation and customs issues. An ASEAN Single Window is supposed to integrate ten separate national windows for customs clearance. Expanded coverage and accelerated negotiations in AFAS are supposed to result in a single market for services by 2015. An "ASEAN-x" formula is to be employed to facilitate liberalization, allowing some countries to go faster in certain sectors. Standards harmonization and MRAs in goods and services are to be negotiated. The AIA deadline is advanced to 2015. Work visas and employment passes are to be facilitated. All ASEAN countries should have competition rules by 2015. Cooperative projects are enumerated in transport, energy and ICT. And the AEC is to have an "enhanced" dispute settlement mechanism, an ASEAN Consultation to Solve Trade and Investment Issues (ACT), an ASEAN Compliance Body (ACB), and an AEC scorecard to monitor implementation.

Then followed the ASEAN Charter, in force since 2008. This gives the group a common legal personality. The Charter ranges well beyond economics, with political, social and cultural components. On the economic front, two other new agreements were negotiated: the ASEAN Trade in Goods Agreement (ATIGA), which has been in force since 2010 and the ASEAN Comprehensive Investment Agreement (ACIA).⁵ These integrate separate agreements into single consolidated legal texts on trade in goods and FDI, respectively. ACIA improvements on AIA include the extension of national treatment to ASEAN-based foreign investors from the start, with a shorter deadline for full liberalization (2015); wider scope of investments covered; a single negative list for scheduling reservations; and a new investor-to-state dispute settlement

mechanism to complement existing ASEAN state-to-state dispute settlement. AFAS remains unchanged.

All this looks good on paper, but the track record indicates otherwise. Take-up of CEPT preferences is less than 5% of intra-ASEAN imports. Seen in a positive light, unilateral MFN (non-discriminatory) liberalization by the ASEAN-6 has matched CEPT tariff reduction. This reduces both trade diversion and administrative costs, an example of regionalism and multilateralism going hand in hand. But many businesses lack awareness of the CEPT and complain of compliance costs for often very low preference margins (Menon 2005). Moreover, the ASEAN-4 have not "multilateralized" their CEPT tariff reductions, i.e., extending concessions to non-ASEAN countries on a non-discriminatory basis, thereby widening the gap between their intra-ASEAN and MFN tariffs. This increases potential trade diversion as well as increasing the burden on their limited capacity to operate multiple tariff schedules (Menon 2011).

More importantly, AFTA has made scant progress on non-tariff and regulatory barriers, far bigger obstacles to intra-ASEAN trade than tariffs. AFAS commitments are sometimes barely stronger than in the WTO's General Agreement on Trade in Services (GATS), sometimes weaker (as in basic telecom services), but mostly fall short of existing national practice. They have not had a net liberalizing effect. Nor have AIA commitments. The ACIA has not yet been ratified by several ASEAN countries. Implementation of the ASEAN Single Window has been delayed. ASEAN is not meeting its deadlines to abolish quantitative restrictions and other NTBs in goods trade, or even to compile adequate inventories of them (also true of services barriers). Harmonization of technical regulations and product standards lags behind. Also, AFTA does not cover government procurement, which remains highly discriminatory in all ASEAN countries except Singapore.

Implementation is the biggest deficit. Take the AEC implementation scorecard. The first assessment prepared by the ASEAN Secretariat stands accused of being no more than an uncritical checklist of individual members' actions; and it has not been made public. Under the ASEAN Charter, enforcement of dispute settlement ultimately relies on the good offices of the ASEAN Chair, the Secretary General and referral to the ASEAN Summit (ADB 2010, pp. 123, 124, 213). The

Enhanced Dispute Settlement Mechanism, modelled on strong, legalistic WTO procedures, has hardly been used (if at all) (Haggard 2011, pp. 23–24). Investor-state dispute settlement has not taken off either.

To the realist, these developments are predictable. Political, economic, cultural and institutional gaps in Southeast Asia are historically large, larger than they are in Europe. There is precious little of a common tradition, cultural and otherwise, to draw on for anything more than quite shallow integration. ASEAN economic integration in practice has largely been limited to tariff elimination. It has barely scratched the surface of “deep integration” through tackling non-tariff and regulatory barriers. Hence any talk of emulating the “EU model” in terms of building common institutions and strengthening common policies is way off-track, indeed risible. Given ASEAN’s track record, it has no prospect of coming close to an EU-style single market by the AEC’s 2015 deadline — or even by 2020 or 2025.

Hence ASEAN’s method of loose intergovernmentalism — the “ASEAN Way” — is understandable. That entails operating by consensus, non-interference in members’ internal affairs, flexible inter-governmental decision making, a weak central secretariat, lack of precise, binding rules, and weak enforcement (Haggard 2011; Nesadurai 2008). This keeps a disparate (now expanded) membership together. It cannot take economic integration “deep”. That argues for realistic goals rather than lofty rhetoric, and ambitious visions and blueprints. The fact that the latter are not met in reality makes them look like paper-tiger exercises — not taken seriously by foreign governments, businesspeople, and perhaps by ASEAN governments themselves. More productive would be modest, concrete goals to improve the transparency, surveillance and assessment of policies, such as independent assessment of the AEC implementation scorecard and its public dissemination. Incrementally stronger dispute settlement would be a bonus (Haggard 2011, pp. 25–28).

2.2 ASEAN Countries’ Bilateral FTAs

As of July 2011, the ASEAN countries have 88 FTAs in total that are signed and in effect. If common plurilateral FTAs (mainly AFTA, ASEAN+1 FTAs and the P4 FTA involving Singapore and Brunei Darussalam) are stripped out, they are left with a total of 25 bilateral (country-to-country) FTAs (see Box 7.1).⁶ To consider the bilateral FTAs of each country in turn:

BOX 7.1
Trade Agreements in East Asia

ASEAN (Brunei Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Viet Nam)

Trading Partners	Nature of Agreement	Status of Agreement 2011
Australia and New Zealand	Free Trade Agreement	Signed and in effect
EU	Free Trade Agreement	Under negotiation
India	Comprehensive Economic Cooperation Agreement	Signed and in effect
Japan	Comprehensive Economic Cooperation Partnership	Signed and in effect
Republic of Korea	Comprehensive Economic Cooperation Agreement	Signed and in effect
PRC	Comprehensive Economic Cooperation Agreement	Signed and in effect
East Asia, CEPEA/ASEAN+6 (PRC, Japan, Republic of Korea, India, Australia, New Zealand)	Comprehensive Economic Partnership for East Asia (CEPEA)	Proposed/under consultation and study
ASEAN+3 (PRC, Japan, Republic of Korea)	East Asia Free Trade Area	Proposed/under consultation and study

Regional Agreements — the agreements that include some (highlighted) but not all ASEAN countries.

Trading Partners	Nature of Agreement	Status of Agreement 2011
Asia-Pacific (APTA) (Bangladesh, PRC, India, Republic of Korea, Lao People's Democratic Republic , Sri Lanka, Nepal)	Trade Agreement	Signed and in effect

BOX 7.1 (Cont'd)

Trading Partners	Nature of Agreement	Status of Agreement 2011
Bay of Bengal (Bangladesh, Bhutan, India, Myanmar , Nepal, Sri Lanka, Thailand)	Initiative for Multi- Sectoral Technical and Economic Cooperation (BIMSTEC) Free Trade Area	FA signed/FTA under negotiation
Organisation of Islamic Cooperation (57 member states, including Afghanistan, Indonesia , Pakistan, Brunei Darussalam , Bangladesh, Malaysia)	Trade Preferential System	FA signed/FTA under negotiation
Shanghai Cooperation Organization (PRC, Kazakhstan, Kyrgyz Republic, Tajikistan, Uzbekistan, Russian Federation)	Free Trade Agreement	Proposed/under consultation and study
Trans-Pacific Partnership (TPP) (Australia, Brunei Darussalam , Chile, Malaysia , New Zealand, Peru, Singapore , United States, Viet Nam)	Regional Trade Agreement	FA signed/FTA under negotiation
Trans-Pacific Strategic Economic Partnership Agreement (P4) (Brunei Darussalam , Chile, Singapore, New Zealand)	Strategic Economic Partnership Agreement	Signed and in effect

Brunei Darussalam (ASEAN)

Trading Partners	Nature of Agreement	Status of Agreement 2011
Japan	Free Trade Agreement	Signed and in effect
Pakistan	Free Trade Agreement	Proposed/under consultation and study

BOX 7.1 (Cont'd)

Trading Partners	Nature of Agreement	Status of Agreement 2011
United States	Free Trade Agreement	Proposed/under consultation and study
Organisation of Islamic Cooperation (57 member states, including Afghanistan, Indonesia, Pakistan, Brunei Darussalam , Bangladesh, Malaysia)	Trade Preferential System	FA signed/FTA under negotiation
Trans-Pacific Partnership (TPP) (Australia, Brunei Darussalam, Chile, Malaysia , New Zealand, Peru, Singapore, United States, Viet Nam)	Regional Trade Agreement	FA signed/FTA under negotiation
Trans-Pacific Strategic Economic Partnership Agreement (P4) (Brunei Darussalam , Chile, Singapore, New Zealand)	Strategic Economic Partnership Agreement	Signed and in effect

Indonesia (ASEAN)

Trading Partners	Nature of Agreement	Status of Agreement 2011
India	Comprehensive Economic Cooperation Arrangement	Proposed/under consultation and study
Australia	Free Trade Agreement	Under negotiation
Chile	Free Trade Agreement	Proposed/under consultation and study
EFTA	Free Trade Agreement	Under negotiation
Japan	Economic Partnership Agreement	Signed and in effect

BOX 7.1 (Cont'd)

Trading Partners	Nature of Agreement	Status of Agreement 2011
Republic of Korea	Free Trade agreement	Proposed/under consultation and study
Pakistan	Free Trade Agreement	FA signed/FTA under negotiation
Group of Eight Developing Countries	Preferential Tariff Arrangement	Signed but not yet in effect
Organisation of Islamic Cooperation	Trade Preferential System	FA signed/FTA under negotiation
United States	Free Trade Agreement	Proposed/under consultation and study
Organisation of Islamic Cooperation (57 member states, including Afghanistan, Indonesia , Pakistan, Brunei Darussalam , Bangladesh, Malaysia)	Trade Preferential System	FA signed/FTA under negotiation

Lao People's Democratic Republic (ASEAN)

Trading Partners	Nature of Agreement	Status of Agreement 2011
Thailand	Preferential Trading Arrangement	Signed and in effect
Asia-Pacific (APTA) (Bangladesh, PRC, India, Republic of Korea, Lao People's Democratic Republic , Sri Lanka, Nepal)	Trade Agreement	Signed and in effect

Malaysia (ASEAN)

Trading Partners	Nature of Agreement	Status of Agreement 2011
Japan	Economic Partnership Agreement	Signed and in effect

BOX 7.1 (Cont'd)

Trading Partners	Nature of Agreement	Status of Agreement 2011
Australia	Free Trade Agreement	Under negotiation
Chile	Free Trade Agreement	Signed but not yet in effect
EU	Free Trade Agreement	Under negotiation
EFTA	Free Trade Agreement	Proposed/under consultation and study
Gulf Cooperation Council	Free Trade Agreement	Proposed/under consultation and study
India	Comprehensive Economic Cooperation Agreement	Signed and in effect
Republic of Korea	Free Trade Agreement	Proposed/under consultation and study
New Zealand	Free Trade Agreement	Signed and in effect
Pakistan	Closer Economic Partnership Agreement	Signed and in effect
Syria	Free Trade Agreement	Under negotiation
Turkey	Free Trade Agreement	Under negotiation
Group of Eight Developing Countries	Preferential Tariff Arrangement	Signed but not yet in effect
United States	Free Trade Agreement	Under negotiation
Organisation of Islamic Cooperation (57 member states, including Afghanistan, Indonesia, Pakistan, Brunei Darussalam , Bangladesh, Malaysia)	Trade Preferential System	FA signed/FTA under negotiation

BOX 7.1 (Cont'd)

Trading Partners	Nature of Agreement	Status of Agreement 2011
Trans-Pacific Partnership (TPP) (Australia, Brunei Darussalam, Chile, Malaysia , New Zealand, Peru, Singapore, United States, Viet Nam)	Regional Trade Agreement	FA signed/FTA under negotiation

Myanmar (ASEAN)

Trading Partners	Nature of Agreement	Status of Agreement 2011
Bay of Bengal	Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC) Free Trade Area	FA signed/FTA under negotiation

The Philippines (ASEAN)

Trading Partners	Nature of Agreement	Status of Agreement 2011
Japan	Economic Partnership Agreement	Signed and in effect
Pakistan	Free Trade Agreement	Proposed/under consultation
United States	Free Trade Agreement	Proposed/under consultation

Singapore (ASEAN)

Trading Partners	Nature of Agreement	Status of Agreement 2011
Canada	Free Trade Agreement	Under negotiation
Sri Lanka	Comprehensive Economic Partnership Agreement	Proposed/under consultation and study

BOX 7.1 (Cont'd)

Trading Partners	Nature of Agreement	Status of Agreement 2011
EFTA	Free Trade Agreement	Signed and in effect
Gulf Cooperation Council	Free Trade Agreement	Signed but not yet in effect
India	Comprehensive Economic Cooperation Agreement	Signed and in effect
Japan	Economic Agreement for a New-Age Partnership	Signed and in effect
Republic of Korea	Free Trade Agreement	Signed and in effect
New Zealand	Closer Economic Partnership	Signed and in effect
Pakistan	Free Trade Agreement	Under negotiation
PRC	Free Trade Agreement	Signed and in effect
Australia	Free Trade Agreement	Signed and in effect
Bahrain	Free Trade Agreement (now GCC-Singapore FTA)	Signed but not yet in effect
Costa Rica	Free Trade Agreement	Signed but not yet in effect
EU	Free Trade Agreement	Signed but not yet in effect
Egypt	Comprehensive Economic Cooperation Agreement	Under negotiation
Jordan	Free Trade Agreement	Signed and in effect
Kuwait	Free Trade Agreement (now GCC-Singapore FTA)	Under negotiation
Mexico	Free Trade Agreement	Under negotiation
Panama	Free Trade Agreement	Signed and in effect

BOX 7.1 (Cont'd)

Trading Partners	Nature of Agreement	Status of Agreement 2011
Peru	Free Trade Agreement	Signed and in effect
Qatar	Free Trade Agreement (now GCC-Singapore FTA)	Under negotiation
Ukraine	Free Trade Agreement	Under negotiation
United Arab Emirates	Free Trade Agreement (now GCC-Singapore FTA)	Proposed/under consultation and study
United States	Free Trade Agreement	Signed and in effect
Trans-Pacific Partnership (TPP) (Australia, Brunei Darussalam , Chile, Malaysia , New Zealand, Peru, Singapore , United States, Viet Nam)	Regional Trade Agreement	FA signed/FTA under negotiation

Thailand (ASEAN)

Trading Partners	Nature of Agreement	Status of Agreement 2011
Bay of Bengal	Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC) Free Trade Area	FA signed/FTA under negotiation
India	Free Trade Area	FA signed/FTA under negotiation
Japan	Economic Partnership Agreement	Signed and in effect
Republic of Korea	Free Trade agreement	Proposed/under consultation and study
Lao People's Democratic Republic	Preferential Trading Arrangement	Signed and in effect

BOX 7.1 (Cont'd)

Trading Partners	Nature of Agreement	Status of Agreement 2011
Pakistan	Free Trade Agreement	Proposed/under consultation and study
PRC	Free trade Agreement	Signed and in effect
Australia	Free Trade Agreement	Signed and in effect
Bahrain	Free Trade Agreement	FA signed/FTA under negotiation
Chile	Free Trade Agreement	Proposed/under consultation and study
EFTA	Free Trade Agreement	Under negotiation
MERCOSUR	Free Trade Agreement	Proposed/under negotiation
New Zealand	Closer Economic Partnership Agreement	Signed and in effect
Peru	Free Trade Agreement	FA signed/FTA under negotiation
United States	Free Trade Agreement	Under negotiation

Viet Nam (ASEAN)

Trading Partners	Nature of Agreement	Status of Agreement 2011
Chile	Free Trade Agreement	Under negotiation
Japan	Economic Partnership Agreement	Signed and in effect
Republic of Korea	Free Trade Agreement	Proposed/under consultation and study
Customs Union of Belarus, Kazakhstan and Russia	Free Trade Agreement	Proposed/under consultation and study

BOX 7.1 (Cont'd)

Trading Partners	Nature of Agreement	Status of Agreement 2011
EFTA	Free Trade Agreement	Proposed/under consultation and study
Trans-Pacific Partnership (TPP) (Australia, Brunei Darussalam, Chile, Malaysia , New Zealand, Peru, Singapore, United States, Viet Nam)	Regional Trade Agreement	FA signed/FTA under negotiation

Cambodia (ASEAN) – Does not have any separate agreements except the one signed under ASEAN

Additional: PRC and India

PRC

Trading Partners	Nature of Agreement	Status of Agreement 2011
ASEAN	Comprehensive Economic Cooperation Agreement	Signed and in effect
Asia-Pacific		
New Zealand	Free Trade Agreement	Signed and in effect
Australia	Free Trade Agreement	FA signed/FTA under negotiation
Chile	Free Trade Agreement	Signed and in effect
Costa Rica	Free Trade Agreement	Signed and in effect
Gulf Cooperation Council	Free Trade Agreement	Under negotiation
Hong Kong, China	Closer Economic Partnership Arrangement	Signed and in effect
Iceland	Free Trade Agreement	FA signed/FTA under negotiation

BOX 7.1 (Cont'd)

Trading Partners	Nature of Agreement	Status of Agreement 2011
India	Regional Trading Arrangement	Proposed/under consultation and study
Japan-Republic of Korea-PRC	Free Trade Agreement	Proposed/under consultation and study
Republic of Korea	Free Trade Agreement	Proposed/under consultation and study
Macao	Closer Economic Partnership Arrangement	Signed and in effect
Mongolia	Free Trade Agreement	Proposed/under consultation and study
Norway	Free Trade Agreement	Under negotiation
Pakistan	Free Trade Agreement	Signed and in effect
Peru	Free Trade Agreement	Signed and in effect
Singapore	Free Trade Agreement	Signed and in effect
Southern African Customs Union	Free Trade Agreement	Under negotiation
Switzerland	Free Trade Agreement	Under negotiation
Taipei, China	China Economic Cooperation Framework Agreement	Signed and in effect
Thailand	Free Trade Agreement	Signed and in effect
Shanghai Cooperation Organization	Free Trade Agreement	Proposed/under consultation and study

BOX 7.1 (Cont'd)**India**

Trading Partners	Nature of Agreement	Status of Agreement 2011
Bay of Bengal	Initiative for Multi-Sectoral Technical and Economic Cooperation (BIMSTEC) Free Trade Area	FA signed/FTA under negotiation
Afghanistan	Preferential Trading Agreement	Signed and in effect
Australia	Free Trade Agreement	Under negotiation
Bhutan	Trade Agreement	Signed and in effect
Canada	Economic Partnership Agreement	Under negotiation
Chile	Preferential Trading Agreement	Signed and in effect
Colombia	Preferential Trading Arrangement	Proposed/under consultation
Egypt	Preferential Trade Agreement	Under negotiation
EFTA	Free Trade Agreement	Under negotiation
EU	Free trade Agreement	Under negotiation
Gulf Cooperation Council	Free Trade Area	FA signed/FTA under negotiation
Indonesia	Comprehensive Economic Cooperation Arrangement	Proposed/under consultation and study
Israel	Preferential Trade Agreement	Under negotiation
Republic of Korea	Comprehensive Economic Partnership Agreement	Signed and in effect

BOX 7.1 (Cont'd)

Trading Partners	Nature of Agreement	Status of Agreement 2011
MERCOSUR	Preferential Trade Agreement	Signed and in effect
Mauritius	Comprehensive Economic Cooperation and Partnership Agreement	Under negotiation
Russian Federation	Comprehensive Economic Cooperation Agreement	Proposed/under consultation
Singapore	Comprehensive Economic Cooperation Agreement	Signed and in effect
Southern African Customs Union	Preferential Trade Agreement	FA signed/FTA under negotiation
Sri Lanka	Free Trade Agreement	Signed and in effect
Thailand	Free Trade Area	FA signed/FTA under negotiation
Turkey	Free Trade agreement	Proposed/under consultation and study
Uruguay	Preferential Trading Arrangement	Proposed/under consultation and study
Venezuela	Preferential Trading Arrangement	Proposed/under consultation and study
Nepal	Trade of Trade	Signed and in effect

Singapore

Singapore was the first to blaze the FTA trail in ASEAN, and it has the biggest number of FTAs of any ASEAN country. In addition to plurilateral

FTAs, it has FTAs in force with the United States, EFTA, India, the PRC, Japan, Republic of Korea, Australia, New Zealand, Panama, Peru and Jordan. It is negotiating bilaterally with the EU, Canada and several others, and plurilaterally in the Trans-Pacific Partnership (TPP).

Singapore has the strongest FTAs in ASEAN and among the strongest in the world. That is not surprising, given its free-port economy, centralized city-state politics, efficient administration and world-class regulatory standards. But it also has weaker FTAs; indeed there is considerable variability in Singapore's FTAs — an indication that its approach is flexible, depending on its negotiating partner (Heydon and Woolcock 2009, p. 147).

Singapore's FTAs contain complete and immediate tariff elimination (easy, since all but a handful of tariffs are at zero duty). ROOs vary from the simple (AFTA) to the very complex (US-Singapore FTA). Services commitments are generally GATS-plus, sometimes on negative lists (e.g., with the United States and Australia) and sometimes on positive lists. Investment commitments are also generally strong, using a NAFTA model covering pre- and post-establishment disciplines and investor-state dispute settlement, and again with a mix of positive and negative lists. Many FTAs have WTO-plus commitments on MRAs, government procurement, trade-related intellectual property, technical barriers to trade, sanitary and phytosanitary measures, movement of business persons, competition rules, and labor and environmental standards (Heydon and Woolcock 2009, pp. 138–41).

The US-Singapore FTA is the strongest of all Singaporean FTAs and one of the three strongest in Asia (alongside the US-Republic of Korea and EU-Republic of Korea FTAs). It is a "deep-integration" FTA. Both sides eliminated nearly all tariffs immediately. It has an MRA in telecommunications equipment and mutual recognition of professional qualifications, e.g., for lawyers. Services and investment are covered comprehensively on negative lists, with investor-state dispute settlement. Business visas improve on previous national practice. Government procurement commitments have lower bid thresholds than in the WTO's Government Procurement Agreement (GPA). Intellectual-property commitments go way beyond the WTO's TRIPS agreement. Singapore committed to implement a new, overarching competition law. Labor and environmental standards are covered. Otherwise complex ROOs are relaxed to allow for imported inputs used for export production in Singapore, e.g., through an Integrated Sourcing Initiative that encompasses

IT components made in neighboring countries. There are also cargo security commitments (Nanto 2008).

Singapore's other FTAs are not as strong. At the stronger end of the spectrum are FTAs with Australia and New Zealand; and at the weaker end are FTAs with developing countries in Asia, the Middle East and Latin America. The Singapore-Jordan agreement covers only preferential tariff liberalization, modest services commitments, no investment liberalization, and no coverage of most other issues. Some FTAs have less-than-comprehensive tariff elimination by Singapore's partners (e.g., the PRC, India and Japan); some also have modest services and investment commitments, leave out government procurement, and have no WTO-plus commitments in other areas (e.g., the PRC and India).

Thailand

Singapore is a misleading indicator of the strength of ASEAN countries' FTAs — other ASEAN countries have more complicated developing-country politics and economics. They have weaker negotiating capacity (to varying degrees) and, crucially, more protectionist interests to defend, especially in agriculture, services, investment and government procurement.

Thailand is a better indicator for the reasons mentioned above, and because it was the first ASEAN country to follow Singapore on the FTA trail. It has FTAs in force with Japan, Australia, New Zealand, the PRC (modest tariff elimination in advance of the ASEAN-PRC FTA) and Lao People's Democratic Republic (a preferential-tariff agreement dating back to 1991). It is also part of BIMSTEC, which covers seven South and Southeast Asian developing countries. This is essentially another preferential-tariff agreement since at least 23% of tariff lines are exempted. Many other FTAs, including one with the United States, were in the pipeline but stalled after the military coup in 2006. Even before the coup, FTA negotiations with the United States ran into heavy domestic opposition due to the deep commitments that Thailand would have had to make (Sally 2007). Thailand is not part of the TPP negotiations.

At the stronger end of the spectrum are Thailand's FTAs with Australia and New Zealand. Over 90% of tariff lines were eliminated, but with long transition periods (up to 2025) for some agricultural products. The Thailand-Australia FTA has modest GATS-plus

commitments in services (on a negative list), modest investment commitments (Australian investors are allowed up to 60% of equity in several sectors), and modest commitments on cross-border workers (e.g., Australian business visitors in Thailand and Thai chefs in Australia). The Thailand-NZ FTA does not cover services and investment, because Thai offers were so weak. The Japan-Thailand FTA is even weaker. It exempts a slew of agricultural products, has long transition periods for agricultural and some industrial products, is hedged with restrictive ROOs, has very modest services and investment commitments, and is not WTO-plus on other issues.

Malaysia

Malaysia was next on the FTA trail in ASEAN. It has FTAs in force with Japan, New Zealand, Pakistan and India, and is negotiating with Australia, the EU and Turkey. It is also part of the TPP negotiations. A Malaysia-Chile FTA has been signed but is not yet in effect. It is also part of a preferential trade agreement with seven other Islamic developing countries. Its most serious FTA negotiation — with the United States — foundered because US demands went too deep into “sensitive issues”, such as services, investment and government procurement — all of which include restrictions on foreign competition as part of *Bumiputera* policies to favor Malay-owned companies. The Japan-Malaysia FTA and the Malaysia-NZ FTA are more WTO-plus than other Malaysian FTAs. They eliminate tariffs on well over 90% of goods trade, with transition periods up to 2016 for other products. The Malaysia-NZ FTA eliminates many tariffs 5 years before they are due to be phased out in the ASEAN-Australia-NZ FTA. In the FTAs with both Japan and New Zealand, there are modest GATS-plus commitments in services, e.g., liberalization of foreign-equity limits in the Malaysian education sector. The Malaysia-NZ FTA has side agreements on labor and environmental standards — essentially agreements on cooperation rather than binding commitments. The FTA stipulates 48-hour maximum customs clearance and self-declared origin for exports. There are higher investor-protection provisions than in the ASEAN-Australia-NZ FTA, which includes investor-state dispute settlement. Commitments on the movement of business persons improve on previous national practice. There are marginal WTO-plus commitments on trade remedies and dispute settlement. Government procurement is not covered.⁷

The Malaysia-India FTA eliminates tariffs on about 90% of goods trade, but, at India's behest, excludes "special products" — plantation crops such as palm oil, pepper, tea and coffee. High duties will remain on these goods. India gets GATS-plus access in some professional services; and commitments on the movement of business persons are better than in the ASEAN-India FTA.

In sum, Malaysia's FTAs that go beyond preferential tariff-reduction agreements (i.e., with New Zealand, Japan and India) are modestly WTO-plus. Apart from tariff elimination, they involve at best marginal changes to the *status quo*.

Indonesia and the Philippines

Indonesia and the Philippines have only one bilateral FTA each — with Japan. Indonesia is negotiating with Australia, EFTA and the D8 (eight Islamic countries). Neither country is part of the TPP negotiations.

The FTAs with Japan cover over 90% of goods trade, but they exclude rice and have long transition periods (up to 15 years) on other agricultural products. They are barely WTO-plus in other areas. Japan has modest GATS-plus commitments to allow a limited number of nurses and caregivers into its market. The Japan-Philippines FTA has wider goods coverage than in the Japan-ASEAN FTA, but ROOs in the latter are less restrictive as they allow for cumulation of value-added production within ASEAN (Medella et al. 2010).

Brunei Darussalam and CLMV

Brunei Darussalam has an FTA with Japan and is part of the P4 FTA. It is part of the TPP negotiations. Viet Nam has a bilateral trade agreement (BTA) with the United States, in force since 2001, which was a crucial stepping stone to its WTO accession in 2006. It has an FTA with Japan and is negotiating with Chile. It is part of the TPP negotiations. Cambodia, Lao People's Democratic Republic and Myanmar have no bilateral FTAs.

2.3 US and EU FTAs in Asia

The US-Singapore FTA was summarized above. The Republic of Korea-US FTA (KORUS) was signed in 2007 but remained unratified. Incremental changes were made to parts of it in 2010. The US Senate consented to its ratification only in October 2011. It is the US's second

most important FTA (after NAFTA) and its most important in Asia. It is a strong, deep-integration FTA.

KORUS removes most tariffs within 3 years, with longer transition periods in agricultural products and light trucks. Republic of Korea has excluded rice from the agreement. There are disciplines on Korean NTBs, especially in cars. This encompasses transparency and dispute-resolution measures. In case of non-compliance, the United States has recourse to a "snapback" provision to reinstitute a 2.5% tariff on cars. The renegotiated agreement on cars includes an auto-specific safeguards measure. Performance requirements on technology transfer as a condition for foreign investment are banned, going beyond WTO commitments. Services and investment are covered comprehensively on negative lists. This automatically covers new services after the FTA comes into effect. Korea Post is to have an independent regulator. US financial-services providers are allowed to establish branches in Republic of Korea. One hundred per cent US equity is allowed in the Korean telecommunications sector for the first time. However, the FTA does not improve on existing national practice as far as the cross-border movement of workers is concerned (Schott 2007, 2010).

The EU-Republic of Korea FTA was signed in 2010, but ratification was delayed due to opposition from European car lobbies. It was finally ratified in 2011. It is the EU's strongest and most important FTA outside Europe, and its first in Asia. It can be considered as a deep-integration FTA.

The EU eliminates all manufacturing tariffs immediately and abolishes agricultural tariffs, with few exceptions, with longer transition periods. Nearly all Korean tariffs will go in transition periods of up to 5 years, although Republic of Korea exempts more agricultural tariffs than the EU. Like KORUS, ROOs in the EU-Republic of Korea FTA are product-specific and complex, generally with 55% local content provisions. Republic of Korea is allowed to keep its duty-drawback mechanism in cars (mainly for imported inputs from the PRC), but there are disciplines to prevent its abuse. The EU has recourse to a tariff snapback in cars and an auto-specific dispute resolution mechanism (similar to KORUS provisions). There are sector-specific disciplines on NTBs — for the first time in an EU FTA. These cover electrical and electronic equipment, cars, and (more cautiously) pharmaceuticals and medical equipment. They eliminate duplicative testing for health and safety standards and align product standards with relevant international conventions.

Services remain on a positive list, but they are more widely covered than in other EU FTAs. Their coverage is much wider than in Asian FTAs, with the exception of Singaporean FTAs. Korean commitments go well beyond those in the GATS, although commitments in Korean telecoms are modest and EU commitments do not go much beyond the EU's revised Doha Round offer. Both sides remain restrictive on the cross-border movement of workers. On investment, there is a basic framework for unrestricted local establishment in manufacturing and (in principle) services, although it is unclear if this applies to services not specifically listed. There is no provision for investor-state dispute settlement.

The FTA has the strongest intellectual-property provisions of any EU FTA. Copyright periods go beyond TRIPS time limits (though not so in patents), geographical indicators (GIs) go beyond wines and spirits to cover a range of agricultural products, and there is precise and binding language on the domestic enforcement of intellectual-property rights. Government-procurement provisions are slightly GPA-plus. There are general (but non-binding) principles on competition rules, including prohibiting cartels. A "sustainable development" chapter commits both sides to adhere to international labor, environmental and human rights standards, including adherence to the Kyoto Protocol. Overarching dispute settlement is modelled on KORUS provisions; it excludes anti-dumping and safeguard measures, NTBs and SPS measures (Dreyer et al. 2009, pp. 44–49).

2.4 Assessment of FTA Benchmarks

This review of FTAs involving or relevant to ASEAN countries reveals the following. At the weaker end of the spectrum are most bilateral FTAs involving ASEAN countries except Singapore. Even the stronger ones, advertised as WTO-plus, are weak in reality. They hardly go beyond tariff elimination; their commitments in services, investment, government procurement and other areas are modest to non-existent. They hardly make a dent in non-tariff and regulatory barriers. Even on tariffs there are significant exceptions, especially on agricultural products, and with a noodle bowl of overlapping, contradictory ROOs. These FTAs are clothed in strong sounding nomenclature, such as Comprehensive Economic Partnership Agreements (CEPAs) with Japan, and Comprehensive Economic Cooperation Agreements

(CECAs) with India. But this is Orwellian Newspeak that diverts attention from trade-light content.

Many of these FTAs — indeed the majority of Asian FTAs — are advertised as WTO-plus — not least by ADB studies (Kawai and Wignaraja 2009, pp. 15–18). This might be literally true. But it is extremely misleading about the real strength of these agreements. WTO-plus means little in practice, for WTO disciplines on export restrictions, services, investment, government procurement and a host of other regulatory barriers are also weak to very weak.

The exceptions to the rule are some of Singapore's FTAs, especially the US-Singapore FTA. But even this is unlikely to make much difference to real world trade and investment involving Singapore, given its very high pre-existing external openness.

In the middle of the spectrum is AFTA. It has been a paper success on tariffs, including relatively simple ROOs. The CEPT is making more of a difference to the ASEAN-4, since relatively high tariffs have to come down to zero by 2015. But the ASEAN-4 are not multilateralizing these tariff preferences. And the CEPT's success is compromised by its very low take-up rate. More importantly, strong general commitments on non-tariff and regulatory barriers (in goods, services, investment, customs clearance and standards), especially in the AEC, are bedevilled by poor implementation and — that catch-all explanation — lack of political will. General commitments have not been translated into detailed procedures for implementation, and deadlines have come and gone. This undermines ASEAN's credibility; it makes its commitments look like paper tigers.

At the stronger end of the spectrum are the three US and EU FTAs in East Asia. There are variations among them, but they are deep-integration FTAs that deal substantially with tariffs and regulatory barriers to trade and investment. From a multilateral standpoint, their main advantage is that their commitments on procedural rules for limiting domestic regulatory discretion and improving transparency are automatically multilateralized (i.e., made non-discriminatory) or can easily be multilateralized. Their main disadvantage is restrictive, product-specific ROOs; and, of course, they do not deal seriously with trade remedies and agricultural subsidies.

Box 7.1 lists the FTAs of ASEAN countries. Box 7.2 captures the relative strengths of AFTA, ASEAN countries' bilateral FTAs, and EU and US FTAs in Asia.

BOX 7.2
Strength of AFTA, ASEAN countries' bilateral FTAs, and US and EU FTAs in Asia

FTA indicators/ Countries and regions	Tariff elimination	NTBs in goods	Services	Investment	Govt. Procurement
AFTA	Comprehensive	Strong general commitment, weak implementation	Strong general commitment, weak specific commitments	Strong general commitment, weak specific commitments	Absent
Singapore FTAs	Comprehensive (less so for some FTA partners)	Strong in some FTAs	Generally GATS+, esp. with the United States	Generally strong, esp. with the United States	Generally GPA+
Thailand FTAs	Mixed. 90%+ elimination in some FTAs, big agriculture exemptions, long transition periods	Weak	Weak (barely GATS+)	Weak	Absent
Malaysia FTAs	Mixed. 90%+ elimination in some FTAs, big agriculture exemptions, long transition periods	Weak	Weak (barely GATS+)	Weak	Absent

Indonesia-Japan FTA	Mixed. 90%+ elimination, big agriculture exemptions, long transition periods	Weak	Weak (barely GATS+)	Weak	Absent
Philippines-Japan FTA	Mixed. 90%+ elimination, big agriculture exemptions, long transition periods	Weak	Weak (barely GATS+)	Weak	Absent
US FTAs (with Singapore and Republic of Korea)	Comprehensive. Short transition periods, some agriculture products exempted (with Republic of Korea)	Strong	Strong (GATS++). Negative list	Strong. Negative list, pre/post establishment disciplines	GPA+. Lower bid thresholds, negative list in services
EU-Republic of Korea FTA	Comprehensive. Short transition periods, some agriculture products exempted	Strong sector-specific disciplines	Middling. GATS+, positive list	Basic framework. No investor-state DSM	Slightly GPA+
AFTA	Not TRIPS+	Strong commitments, weak implementation	Some MRAs, weak implementation	Simple. 40% RVC	Quite strong commitments but weak in practice

BOX 7.2 (Cont'd)

FTA indicators/ Countries and regions	Tariff elimination	NTBs in goods	Services	Investment	Govt. Procurement
Singapore FTAs	TRIPS+, esp. with the United States	Strong	Strong	Varied. Differs between FTAs	Strong. Investor-state DSM
Thailand FTAs	Not TRIPS+	Weak	Weak	Varied. Differs between FTAs	Weak-to-middling
Malaysia FTAs	Not TRIPS+	Weak	Weak	Varied. Differs between FTAs	Weak-to-middling
Indonesia-Japan FTA	Not TRIPS+	Weak	Weak	Quite restrictive	Weak-to-middling
Philippines-Japan FTA	Not TRIPS+	Weak	Weak	Quite restrictive	Weak-to-middling
US FTAs (with Singapore and Republic of Korea)	TRIPS+	Strong	Quite strong	Product-specific, restrictive	Strong. Investor-state DSM
EU-Republic of Korea FTA	Slightly TRIPS+. Strong on copyright and GIs	Strong	Strong	Product-specific, restrictive	Strong

Notes: *Brunei Darussalam, due to its small size and an oil-based economy, is not included.

** Viet Nam: Commitments in the BTA with the United States were essentially folded into WTO commitments. Otherwise only an FTA with Japan.

*** Cambodia, Lao People's Democratic Republic and Myanmar: No bilateral FTAs, rather relying on ASEAN+1 FTAs.

3. ASEAN+1 FTAs

This section assesses the strength of existing ASEAN+1 FTAs (see Box 7.1). EU-ASEAN FTA negotiations were launched in 2008 but did not get anywhere, hence the EU's resort to bilateral negotiations with Singapore, Malaysia and Viet Nam. The EU found that it was impossible to get ASEAN members to agree on common negotiating positions that would come close to the EU's requests on market access and rules. Relatedly, ASEAN's cumbersome, consensus-driven intergovernmental negotiating machinery was not up to the task of negotiating a "serious" FTA. There has been no US-ASEAN FTA negotiation to date — for the same reasons.

To take each existing ASEAN+1 FTA in turn.

ASEAN-PRC FTA (ACFTA)

ACFTA is Asia's biggest, most important FTA. It is the world's third largest by trading volume (after the EU and NAFTA) and the largest by population (1.8 billion). It is the pioneer of ASEAN+1 FTAs, indeed triggering the others. The PRC is ASEAN's biggest trading partner in merchandise goods (see Table 7.1), although the PRC FDI stock in ASEAN is well behind that of the EU, the United States and Japan (see Table 7.2).

The Framework Agreement for the FTA — the initiative of then PRC premier Zhu Rongji — was signed in 2001. The Agreement on Trade in Goods came into effect in 2005. An Early Harvest Package (EHP) eliminated trade in selected agricultural and fisheries products between 2005 and 2010. But the core of the FTA is tariff elimination between the PRC and the ASEAN-6, covering almost 90% of tariff lines (on Normal Track One) by 2010, with the ASEAN-4 complying by 2015. A Normal Track Two eliminates some tariffs by 2012. The EHP and the two Normal Tracks cover 90% of tariff lines. A Sensitive Track covers lists of "sensitive" and "highly sensitive" products (the remaining 10% of tariff lines). It stipulates that the PRC and the ASEAN-6 must reduce these tariffs to 0%–5% by 2018, with the ASEAN-4 having until 2020 to comply. Rules of origin follow AFTA (40% RVC).

A Trade in Services Agreement was signed in 2007, and an Investment Agreement was implemented in 2010. Services commitments do not really go beyond GATS commitments. Investment provisions follow the template of ASEAN's AIA, but they do not entail substantial

TABLE 7.1
Total ASEAN trade, 2009 (in billion US\$)

Country	PRC			EU-27			Japan			United States		
	Im	Ex	total	Im	Ex	total	Im	Ex	total	Im	Ex	total
Brunei Darussalam	0.1	0.3	0.4	0.25	0.01	0.25	0.2	3.3	3.5	0.31	0.04	0.36
Cambodia	0.9	0.0	0.9	0.12	0.71	0.83	0.1	0.1	0.2	0.09	1.55	1.64
Indonesia	14.0	11.5	25.5	8.68	13.64	22.32	9.8	18.6	28.4	7.09	10.89	17.98
Lao PDR	0.1	0.0	0.1	0.01	0.08	0.09	0.1	0.0	0.1	0.0	0.02	0.02
Malaysia	17.2	19.1	36.3	14.39	17	31.4	15.4	15.4	30.8	13.79	17.18	30.97
Myanmar	0.8	0.5	1.3	0.08	0.08	0.16	0.3	0.2	0.4	0.03	0.0	0.03
Philippines	4.0	2.9	7.0	3.47	7.88	11.35	5.7	6.2	11.9	5.44	6.75	12.19
Singapore	25.9	26.3	52.2	33.99	26.01	60	18.7	12.3	31.0	29.22	17.71	46.92
Thailand	17.0	16.1	33.2	12.13	18.21	30.34	25.0	15.7	40.8	8.44	16.68	25.12
Viet Nam	16.5	4.9	21.4	5.66	9.37	15.03	7.4	6.3	13.7	2.96	11.37	14.33
ASEAN total	96.6	81.6	178.2	78.79	92.99	171.79	82.8	78.1	160.9	67.37	82.20	149.57

Country	Korea, Rep. of			Australia			India			New Zealand		
	Im	Ex	total	Im	Ex	total	Im	Ex	total	Im	Ex	total
Brunei Darussalam	0.1	0.8	0.9	0.04	0.52	0.56	0.03	0.61	0.64	0.01	0.31	0.32
Cambodia	0.2	0.0	0.2	0.03	0.02	0.05	0.04	0.0	0.04	0.0	0.0	0.0
Indonesia	4.7	8.1	12.9	3.44	3.26	6.7	2.21	7.43	9.64	0.56	0.35	0.91
Lao PDR	0.0	0.0	0.0	0.00	0.11	0.11	0.0	0.0	0.0	0.0	0.0	0.0
Malaysia	5.7	6.0	11.7	2.69	5.67	8.36	2.23	4.82	7.05	0.47	0.54	1.01
Myanmar	0.2	0.1	0.3	0.05	0.01	0.06	0.20	0.96	1.17	0.0	0.0	0.0
Philippines	3.1	1.8	5.0	0.78	0.3	1.07	0.53	0.2	0.73	0.31	0.03	0.34
Singapore	14.0	12.6	26.6	4.00	10.57	14.57	5.63	9.36	14.89	0.57	1.36	1.94
Thailand	5.4	2.8	8.2	3.79	8.58	12.37	1.73	3.22	4.95	0.31	0.54	0.85
Viet Nam	6.9	2.0	8.9	0.00	0.00	0.0	0.0	0.0	0.0	0.0	0.0	0.0
ASEAN total	40.4	34.3	74.7	14.81	29.04	48.85	12.6	26.52	39.12	2.24	3.14	5.38

Source: "ASEAN Community in Figures (ACIF) 2010", (Jakarta: ASEAN Secretariat, April 2010).

TABLE 7.2
Inward FDI stock in ASEAN from FTA partners, 2009
 (in million US\$)

	PRC	EU-27 ²	Japan	United States	Korea, Rep. of	Australia	India	New Zealand
Brunei	n/a	n/a	5.82 ³	0.92	n/a	n/a	n/a	0.30
Darussalam								
Cambodia	892	n/a	4.76	1,209	120	3.20	75	n/a
Indonesia	65	17.6	678	322	624	79	26	n/a
Lao PDR	474	n/a	12	2,144	70.46	0.755	1.53	0.350
Malaysia	46	24.7	1,997	665.3	129	91	23.5	n/a
Myanmar	2.5	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Philippines	50.2	6.6	1,480	271.5	201.8	16.8	13.3	n/a
Singapore	8,825.1 ⁵	95.8	70.9	2,881.4	n/a	n/a	n/a	n/a
Thailand	204	13.3	1,720	746.4	183	19.7	107	n/a
Viet Nam	209	n/a	327	9,801.3	1,660	91	n/a	n/a
ASEAN total⁴	1,505	7,523	5,961	3,006	1,500	671	970	231

Notes: ¹ <<http://www.asean.or.jp/en/asean/know/statistics/5.html>>.

² Eurostat trade statistics — in billions of EUR.

³ Data for 2008.

⁴ <<http://www.aseansec.org/18144.htm>> — in millions of US\$.

⁵ <<http://www.singstat.gov.sg/stats/themes/economy/biz/foreigninvestment.pdf>>.

liberalization. Significant items such as MRAs, government procurement, intellectual property and the movement of business persons are absent. ASEAN countries accord the PRC “market-economy status” (MES) — unlike the United States, EU and many other PRC trading partners. Hence, the ASEAN countries agree not to apply sections 15 and 16 of the PRC’s Protocol of Accession to the WTO. The latter allow the PRC’s trading partners who do not accord it MES to use extra-generous procedures for the application of anti-dumping and safeguard measures. Finally, ACFTA includes provisions on economic cooperation. It lists five priority sectors and infrastructure projects, such as the Mekong River Basin and the Singapore-Kunming Rail Project.⁸

Economic modelling of ACFTA shows substantial mutual gains from trade (i.e., trade creation substantially outweighing trade diversion) from full-fledged free trade in goods (Park et al. 2008). These are two large, geographically proximate economic spaces, which should reinforce trade creation, but with bad infrastructure links. Hence, the importance of improving infrastructure connections to boost gains from trade. In essence, ACFTA, if it becomes a complete free trade area, should strengthen the *complementary* trade patterns that have been created since the 1990s; each side would specialize further in productive niches in vertically-integrated supply chains (Park et al. 2008, pp. 5–9).

That said, given ASEAN’s diversity, ACFTA’s effects differ significantly within ASEAN. Singapore, Malaysia and Thailand, which account for the bulk of ASEAN-PRC trade, stand to gain most. Park et al. (2008) estimate a 32.5% increase in ASEAN-PRC trade overall, with gains ranging from 20%–60% for individual countries (the lower end Cambodia, Lao People’s Democratic Republic and Myanmar, and at the higher end by Thailand and Viet Nam). Overall output growth is modest but varies significantly among countries. Losses are concentrated in particular sectors and countries. Output contracts in most sectors in Cambodia, Lao People’s Democratic Republic and Myanmar, but they and Viet Nam see an 11%–15% increase in manufacturing exports. Other ASEAN countries see a contraction in manufacturing exports, particularly in labor-intensive industries. Some ASEAN countries see export expansion in tropical agricultural products (Thailand and the ASEAN-4) and commodities (e.g., palm oil and rubber for Malaysia and Indonesia, and natural gas for Malaysia). The PRC sees output contraction in agriculture and in extractive and services industries, but expansion in manufactures (Park et al. 2008, pp. 10–14).

The biggest changes in trade flows occur in sectors with high pre-FTA tariffs, notably car parts (the PRC), textiles, clothing and footwear (several ASEAN countries), and agriculture (both sides). It is in these competitive trade sectors (high pre-FTA protection, horizontally-integrated sectors and head-on competition) where most tensions arise. Thai agricultural producers have complained of a flood of imports from the PRC since the EHP came into effect. But most complaints have come from Indonesian manufacturers in iron, steel, textiles, clothing, footwear and electrical-goods sectors. That prompted the Indonesian government to request longer transition periods for tariff elimination, only to be rebuffed by the PRC.⁹

In sum, ACFTA is a relatively weak FTA. It is strong on tariff elimination and has relatively simple ROOs, but that is about the extent of it. It does not really tackle NTBs in goods trade, nor does it liberalize services, investment and government procurement. Hence modelling predictions of ACFTA's substantial gains — which, to repeat, assume full-fledged free trade — should be taken with a pinch of salt. The benefits from cross-border infrastructure projects may well outstrip any gains from trade liberalization through ACFTA. But such projects do not need an FTA to proceed: they could be add-ons to reciprocal liberalization and rule-making, or they could be agreed separately and on their own.

ASEAN-Japan Comprehensive Economic Partnership Agreement (AJCEP)

Japan is ASEAN's third largest trading partner in goods (see Table 7.1), and Japanese FDI stock is the second largest in ASEAN (see Table 7.2).

One big difference between the PRC's and Japan's approaches to FTAs with ASEAN is that the PRC, from the start, prioritized an FTA with ASEAN collectively while Japan prioritized bilateral FTAs with individual ASEAN countries. In addition to ACFTA, the PRC has just one bilateral FTA (with Singapore). Japan, in contrast, has (rather weak) FTAs with seven ASEAN countries, a wider coverage than any of ASEAN's other FTA partners. AJCEP was essentially a reaction to ACFTA: Japan feared being upstaged by the PRC and marginalized in terms of its political and economic influence in ASEAN. Also, given Japan's bilateral priorities in ASEAN, AJCEP comes across as more of an agglomeration of bilateral FTAs than a genuine "value-added" FTA.

The AJCEP Framework Agreement was signed in 2003 and the full agreement came into effect in 2008. The Agreement on Trade in Goods aims to eliminate tariffs on 93% of import volume for Japan and the ASEAN-6 within 10 years, with the ASEAN-4 having 15–18 years to comply. For Japan and the ASEAN-6, tariff elimination follows CEPT rates, or a maximum tariff of 5%, to 2010. Other tariffs have transition periods of 6–16 years. Much of agriculture is excluded, subject to tariff reduction (not elimination) over long transition periods, or subject to tariff-rate quotas (TRQs). To make it more complicated, there is considerable variation in tariff schedules, including transition periods, between Japan and individual ASEAN countries. This reinforces the impression of AJCEP as an “umbrella” agreement for several bilateral FTAs. ROOs follow AFTA (40% RVC) but with more product-specific exemptions, reflecting product-specific ROOs in Japan’s FTAs with individual ASEAN countries.

Conspicuously, Japan and ASEAN have not yet concluded agreements on services and investment. The movement of business persons, government procurement and intellectual property rights are not covered. As with other Japanese FTAs, AJCEP emphasizes economic cooperation, most noticeable perhaps in cooperation mechanisms for SPS and TBT.¹⁰

AJCEP is a weak FTA — indeed, weaker than ACFTA. It has longer transition periods for tariff elimination, excludes more agricultural products, and has more restrictive ROOs for many products. The complexity of the agreement, especially the variation in bilateral schedules, makes it less of a genuine FTA than ACFTA. Not least, most major non-tariff items are simply not covered. Finally, AJCEP follows the general pattern of Japanese FTAs. They do not have a standard template, indeed displaying substantial variation. They have varying and restrictive ROOs. And they are generally defensive (Heydon and Woolcock 2009, pp. 20–21).

ASEAN-Republic of Korea FTA (AKFTA)

Republic of Korea is ASEAN’s fifth largest trading partner in goods (see Table 7.1), and Korean FDI stock is the fourth largest in ASEAN, roughly on a par with the PRC (see Table 7.2).

ASEAN and Republic of Korea signed a Framework Agreement in December 2005 and AKFTA came into force in 2008. Thailand did not

ratify the agreement initially due to concerns over agriculture, but it came on board in 2009. The Trade in Goods Agreement eliminates 90% of tariffs for Republic of Korea and the ASEAN-6 by 2010 (about 95% for Republic of Korea, less than 90% for the ASEAN-6). The ASEAN-6 have until 2012 to eliminate another 5% of their tariffs (on Normal Track Two). A Sensitive List contains tariffs that have to come down to 0%–5% by 2016; and a Highly Sensitive List has five tariff groups with tariff caps up to 50%, TRQs and excluded products. The ASEAN-4 have until 2016–18 for the bulk of their tariff elimination, with an extra 5% of tariffs to be eliminated by 2018–20. ROOs follow AFTA (40% RVC), with several additional product-specific rules.

Agreements on services and investment came into effect in 2009 (although Indonesia did not ratify the services agreement). No MRAs have been negotiated so far. AKFTA excludes government procurement and government services. The movement of business persons and intellectual property rights are not covered either. There is a framework agreement on economic cooperation.

AKFTA is clearly stronger than AJCEP in eliminating more tariffs with shorter transition periods, and with agreements on services and investment. It resembles ACFTA in its width of coverage. But, like ACFTA, it excludes government procurement, and does not take other issues such as the movement of business persons and intellectual property rights, beyond WTO disciplines.

ASEAN-India FTA (AIFTA)

ASEAN's trade in goods with India, although increasing fast, is still lower than it is with its other FTA partners (see Table 7.1). Indian FDI stock is the sixth largest in ASEAN (see Table 7.2).

ASEAN-India trade differs substantially from ASEAN's trade with its Northeast Asian trading partners in one important respect: India is not part of East Asian supply chains. ASEAN trade with the PRC, Japan and Republic of Korea is largely complementary, characterized by vertically-integrated, FDI-driven production in manufacturing supply chains, and with intra-industry trade in parts and components. Manufactures account for a larger share of ASEAN-India trade, but the latter still relies heavily on raw materials and other commodities (such as iron, steel, chemicals and petroleum products), with little intra-industry trade. That said, there is huge potential for intra-industry

trade to expand. Indian companies would like to have hubs in ASEAN for cars and car parts (in Thailand), and IT services. And Japanese and Korean MNEs would like to use ASEAN hubs to export cars and consumer electronics to India (Francis 2011).

An ASEAN-India Framework Agreement was signed in 2003, but AIFTA only came into effect in October 2010. The Philippines only joined AIFTA in 2011, while it has not yet been ratified by Cambodia. Negotiations were held back due to opposition from Indian lobbies — oilseed producers fearing palm-oil imports, manufacturers worried about ROOs and cheap PRC imports via ASEAN, and plantation-crop producers (of tea, coffee, pepper and rubber) in the south. That resulted in an initial Indian exclusion list of 1,410 tariff lines, eventually whittled down to 900 tariff lines.¹¹

The Trade in Goods Agreement rivals AJCEP in its complexity. Only 80% of Indian tariffs are subject to tariff elimination (a higher percentage for ASEAN). On Normal Track One, India and the ASEAN-5 (Singapore, Malaysia, Thailand, Brunei Darussalam and Indonesia) eliminate tariffs by 2013, while India and the Philippines are schedule to do so by 2016 the ASEAN-4, have until 2018 to comply. On Normal Track Two, India and the ASEAN-5 have until 2016 to eliminate tariffs, while India and the Philippines, and India and the ASEAN-4, have until 2019 and 2021, respectively, to comply. The Sensitive Track covers 10% of tariffs and brings them down to a maximum of 5% by 2016 for India and the ASEAN-5 (2019 for India and the Philippines, and 2021 for India and the ASEAN-4). These AIFTA provisions relating to the ASEAN-4 are non-reciprocal. A Highly Sensitive List reduces tariffs to 25% or 50% for India, Malaysia, Thailand, the Philippines, Cambodia and Viet Nam. Then there are Special Products, such as palm oil and pepper, that are subject to tariff reductions but still with very high caps. Finally, an Exclusion List contains, *inter alia*, about 10% of Indian agricultural products. ROOs are complex and quite restrictive: the general rule is 35% RVC, but there is also CTSH (change of tariff sub-heading), and product-specific rules still to be negotiated. India's schedules with individual ASEAN countries vary considerably.

MRAs, services, investment, government procurement, intellectual property rights, and the movement of business persons are not covered. Services negotiations are ongoing, but India is unhappy with ASEAN's offers, which do not go beyond revised offers in the Doha Round. The

Philippines, for example, is wary of opening its services markets to Indian professionals.¹²

AIFTA is the weakest of ASEAN+1 FTAs. It eliminates well under 90% of tariffs, excludes swathes of agriculture, and has long transition periods, considerable variation in bilateral schedules, and restrictive ROOs. Moreover, it hardly covers non-tariff items. This fits the pattern of Indian FTAs: they are among the weakest and dirtiest of all FTAs in Asia, India is the most defensive major FTA player in Asia (Sally 2006, pp. 12–13).

AIFTA may leave much to be desired on tariffs, but NTBs and regulatory barriers hinder India-ASEAN trade far more than tariffs. Improvements in trade infrastructure, e.g., by disciplining NTBs, concluding MRAs on standards and simplifying customs procedures, would deliver bigger gains than tariff reductions (Kumar 2009). India performs awfully on customs-related issues such as the cost of importing and exporting containers, and the time and documentation required for clearance. As mentioned earlier, there is great variation within ASEAN on these matters: Singapore is excellent, Malaysia and Thailand do pretty well, Indonesia and Viet Nam are worse but still better than India, and Cambodia and Lao People's Democratic Republic are even worse than India (Table 7.3, also see Tables 7.4 and 7.5). AIFTA does nothing to tackle these trade bottlenecks.

ASEAN-Australia-New Zealand FTA (AANZFTA)

ASEAN's trade in goods with Australia and New Zealand amounted to over US\$50 billion in 2009, with New Zealand accounting for only about US\$5 billion of it (see Table 7.1). Australia's and New Zealand's FDI stock in ASEAN is lower than it is from any of ASEAN's other FTA partners (see Table 7.2).

AANZFTA was signed in February 2009 and came into effect at the beginning of 2010. Unlike ASEAN's other FTAs, but like Australia's and New Zealand's other FTAs, it is a "single undertaking": all major components — goods, services and investment — were negotiated and concluded concurrently, rather than leaving services and investment to be negotiated after a trade-in-goods agreement. Cambodia and Indonesia have ratified but not yet implemented AANZFTA; Lao People's Democratic Republic has not yet ratified it. This is ASEAN's first region-to-region FTA, given that Australia and New Zealand have a Closer Economic Relations (CER) agreement.

TABLE 7.3
Indicators for Trading Across Borders (2012)

	Ease of Trading Across Borders (World Ranking – DB 2012)	Documents for export (number)	Time for export (days)	Cost to export (US\$ per container)	Documents for import (number)	Time for import (days)	Cost to import (US\$ per container)
Brunei	35	6	19	680	6	15	745
Darussalam							
Singapore	1	4	5	456	4	4	439
Thailand	17	5	14	625	5	13	750
Indonesia	39	4	17	644	7	27	660
Malaysia	29	6	17	450	7	14	435
Philippines	51	7	15	630	8	14	730
Viet Nam	68	6	22	580	8	21	670
Cambodia	120	9	22	732	10	26	872
Lao PDR	168	9	44	1,880	10	46	2,035
Myanmar	n/a	n/a	n/a	n/a	n/a	n/a	n/a
PRC	60	8	21	500	5	24	545
India	109	8	16	1,095	9	20	1,070

TABLE 7.4
Trade Enabling Index (2010)

Country	Overall Rank		Market Access		Border Administration		Transport and Communication Infrastructure		Business Environment	
	Rank	Score	Rank	Score	Rank	Score	Rank	Score	Rank	Score
Brunei Darussalam	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Singapore	1	6.06	1	5.97	1	6.56	7	5.74	2	6.00
Thailand	60	4.13	113	3.48	41	4.61	40	4.19	71	4.24
Indonesia	68	3.97	60	4.21	67	3.99	85	3.04	60	4.42
Malaysia	30	4.71	31	4.71	44	4.57	24	4.95	51	4.59
Philippines	92	3.72	64	4.13	74	3.82	83	3.31	103	3.61
Viet Nam	71	3.96	50	4.41	88	3.46	68	3.62	64	4.34
Cambodia	102	3.57	40	4.62	96	3.27	116	2.53	88	3.87
Lao PDR	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
Myanmar	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a	n/a
PRC	48	4.32	79	3.87	48	4.53	46	4.13	41	4.74
India	84	3.81	115	3.42	68	3.98	81	3.34	58	4.48

TABLE 7.5
Trade Restrictiveness in ASEAN Member Countries

Country	Tariffs Only		Tariffs and NTBs		Tariffs and NTBs Ag. Only		Tariffs and NTBs Mfg. Only	
	OTRI	MA-OTRI	OTRI	MA-OTRI	OTRI	MA-OTRI	OTRI	MA-OTRI
Brunei Darussalam	0.095	0.081	0.139	0.126	0.410	n.a.	0.097	0.126
Indonesia	0.056	0.066	0.098	0.145	0.341	0.324	0.061	0.129
Cambodia	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Lao PDR	0.115	0.174	0.248	0.235	0.288	0.382	0.241	0.219
Myanmar	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Malaysia	0.061	0.041	0.260	0.079	0.553	0.341	0.236	0.067
Philippines	0.040	0.062	0.240	0.094	0.477	0.649	0.212	0.060
Singapore	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.
Thailand	0.130	0.093	0.153	0.140	0.579	0.675	0.112	0.084
Viet Nam	0.160	0.157	0.368	0.238	0.541	0.535	0.349	0.170
ASEAN	0.094	0.096	0.215	0.151	0.456	0.484	0.187	0.122
World	0.107	0.099	0.181	0.166	0.357	0.422	0.156	0.110

Source: Kee et al. (2006).

The ground for AANZFTA was prepared by the “Angkor Agenda”, a report by a joint High Level Task Force in 2000. It envisaged a strong, deep-integration FTA that would eliminate all tariffs and NTBs on goods, and fully liberalize services and investment, with a deadline of 2010 for Australia and New Zealand, and 2020 for ASEAN. The agreement would have strong disciplines on trade remedies, standards, import licensing, SPS and price undertakings. It would have a negative list on services.¹³

AANZFTA does not go as far as the Angkor Agenda, but it is still probably the strongest of ASEAN+1 FTAs. Overall, 90% of tariffs are eliminated immediately (in 2010), with an extra 6% (mainly agricultural products) to be eliminated by 2020. The rest are excluded. Australia and New Zealand have long transition periods for textiles, clothing and leather goods, and (for Australia) cars and car parts. Indonesia has excluded sugar. There is a 10-year transition period for dairy products. Australia eliminates 96.5% of tariffs by 2013 and the rest by 2020. New Zealand eliminates 90% of tariffs by 2013 and the rest by 2020. Singapore eliminates all tariffs immediately. Three ASEAN countries (Malaysia, Indonesia and the Philippines) eliminate 90% of tariffs by 2013. Five ASEAN countries (Brunei Darussalam, Malaysia, Thailand, the Philippines and Viet Nam) eliminate 95% or more of tariffs by 2020. Indonesia eliminates only 93% of tariffs by 2025. Cambodia, Lao People's Democratic Republic, Myanmar and Indonesia have transition periods up to 2025. The ASEAN-4 have low tariff elimination in the first phase (0%–29% by 2013), but a big jump to eliminate 80%–90% of tariffs by the end of their transition periods.

ROOs follow AFTA (40% RVC), with additional product-specific rules. They reflect ROOs in Australia's and New Zealand's FTAs with individual ASEAN countries. The difference is that in AANZFTA cumulative value-added applies to all 12 countries covered.

The services agreement operates on a positive list (not the negative list envisaged by the Angkor Agenda), with annexes on financial and telecommunications services. It is essentially a “standstill” agreement that binds existing national practices; it does not entail substantial new liberalization. There are GATS-plus commitments by some ASEAN countries in education, financial and telecom services (e.g., GATS-plus disciplines on transparency and the speed of processing licensing applications in financial services, and national treatment *vis-à-vis* domestic suppliers of telecom services).

The investment agreement has some post-establishment disciplines as well as investor-state dispute settlement. It is basically an investor-protection agreement but not an investment-liberalization agreement. For example, it does not affect Australia's Foreign Investment Review Board thresholds, unlike the US-Australia FTA.

In addition, AANZFTA has modest WTO-plus commitments on the movement of business persons (business visas and intra-corporate transferees). There are provisions on negotiating future sectoral MRAs and for cooperation on SPS. General principles and cooperative mechanisms are set out on competition rules. There are chapters on e-commerce and economic cooperation. Intellectual-property provisions are very modestly TRIPS-plus, with extra disciplines on copyrights and transparency. There are no WTO-plus provisions on trade remedies, except that Australia and New Zealand accord Viet Nam market-economy status. Government procurement is not covered. Dispute settlement, modelled on WTO procedures, excludes SPS, e-commerce, economic cooperation and competition rules.¹⁴

AANZFTA is more complicated than other ASEAN+1 FTAs in that it is an umbrella for bilateral pairings among 12 countries. Australia already has FTAs with Singapore, Brunei Darussalam and Thailand, and is negotiating with Malaysia and Indonesia. New Zealand has FTAs with Singapore, Malaysia, Thailand and Brunei Darussalam. Australia, New Zealand, Singapore, Brunei Darussalam, Malaysia and Viet Nam are in the TPP negotiations. New Zealand gives duty-free access to exports from all least developed countries (LDCs), including Cambodia, Lao People's Democratic Republic and Myanmar. And it has a Memorandum of Agreement with the Philippines on labor and environmental standards — although this is not part of AANZFTA. There are marginal commitments by the more developed ASEAN countries in AANZFTA that go beyond their commitments in bilateral FTAs with Australia and New Zealand, e.g., shorter transition periods for eliminating some tariffs, and in education, financial and telecom services.

AANZFTA is probably the strongest of ASEAN+1 FTAs. That reflects Australia's and New Zealand's other FTAs, which are "harder" than most Asian FTAs. But AANZFTA is still relatively shallow in that it does not seriously liberalize, or provide much harder WTO plus disciplines on non-tariff and regulatory issues such as services, investment, MRAs and SPS. And it does not cover government procurement. Hence, it is far from being a deep-integration FTA.

Assessment of ASEAN+1 FTAs

AANZFTA is probably the strongest ASEAN+1 FTA in its coverage of tariff elimination and WTO-plus commitments on services and investment. The next strongest is AKFTA. In the middle is ACFTA, which has fairly good coverage of tariff elimination and has relatively simple ROOs, but it is not WTO-plus on other issues. At the weaker end of the spectrum is AJCEP, with longer transition periods for tariff elimination, larger exclusion of agricultural products, restrictive ROOs, and more variation and complexity in bilateral schedules. That is testament to Japan's effete FTA policy one would expect a developed country, especially the world's second biggest, to have stronger FTAs than a developing country like the PRC. Bringing up the rear is AIFTA, which has less than 90% tariff elimination, excludes swathes of agriculture, has long transition periods, considerable variation in bilateral schedules, and restrictive ROOs.

Now compare ASEAN+1 FTAs with the FTA benchmarks set out before. In general, they replicate ASEAN countries' bilateral FTAs (except for Singapore). They have reasonable coverage of tariff elimination — more or less. They have varying degrees of WTO-plus commitments — hence, their occasional advertisement as “strong” FTAs. But, like ASEAN countries' bilateral FTAs, this is less than meets the eye, for “real” commitments rarely go beyond tariff elimination: commitments on services, investment, government procurement and standards are weak to non-existent. They hardly tackle NTBs and regulatory barriers. This is also true of AANZFTA, the strongest of ASEAN+1 FTAs. ROOs differ widely within and between ASEAN+1 FTAs, a fact made more complex by the agglomeration of bilateral schedules within each ASEAN+1 FTA. Generally, ASEAN+1 FTAs fold in bilateral FTA commitments but do not advance on them (excepting modest improvements in AANZFTA). In several instances, ASEAN+1 FTA commitments are weaker than they are in bilateral FTAs.

How do ASEAN+1 FTAs compare with AFTA? AFTA is stronger on tariff elimination, coupled with shorter transition periods (to 2015). Its general commitments on NTBs and regulatory barriers are stronger, and tied to the AEC's deadline of 2015. But its specific commitments are weak and implementation is poor. That mirrors the weakness of ASEAN+1 FTAs on non-tariff items.

ASEAN+1 FTAs also fall well short of deep-integration FTAs, such as the US-Singapore, US-Republic of Korea and EU-Republic of Korea FTAs.

ASEAN+1 FTAs have less comprehensive tariff elimination and longer transition periods, although their ROOs are generally less complex. More importantly, their commitments on non-tariff and regulatory issues are much, much weaker.

Finally, ASEAN+1 FTAs pose more of a problem for the ASEAN-4 than for the ASEAN-6. For the latter, relatively low MFN tariffs overall and multilateralization of the CEPT reduce trade diversion and administrative costs that might result from ASEAN+1 FTAs. But the ASEAN-4 have not multilateralized their CEPT commitments and retain higher MFN tariffs. If not rectified, this could make ASEAN+1 FTAs costly for them through trade diversion and the burden of operating multiple tariff schedules with a bewildering assortment of ROOs (Menon 2011).

In all, ASEAN+1 FTAs, like the ASEAN countries' bilateral FTAs, follow two patterns. First, they follow the pattern of partner countries' FTAs, from weak-and-defensive (Japan and India) to stronger (Republic of Korea, Australia and New Zealand). Second, they follow the ASEAN Way as inscribed in AFTA: they are relatively shallow FTAs that do not venture much beyond tariff elimination.

That begs the question of their economic effects. There is little or no evidence that ASEAN+1 FTAs have diverted much trade so far, although it is too early to pronounce definitively, given their recent vintage. That reflects the record of FTAs in Asia more generally, and indeed the aggregate global record. But, equally, there is little evidence that these FTAs have created much trade either, aside from asinine correlations between FTAs and increases in bilateral trade volumes in the same period.¹⁵ Many econometric studies do make heroic claims about future benefits, but these are based on full-fledged free trade. Given that these FTAs are decidedly *not* about full free trade, these claims must be taken with a pinch (or perhaps a bucketful) of salt. In particular, given that NTBs and regulatory barriers are far bigger obstacles than tariffs to intra-Asian trade, one should remain sceptical about the ability of these FTAs to create trade, and associated FDI, in the region.¹⁶

Box 7.3 captures the relative strengths of ASEAN+1 FTAs alongside AFTA, ASEAN countries' bilateral FTAs, and EU and US FTAs in Asia.

BOX 7.3
Strength of ASEAN+1 FTAs, AFTA, ASEAN countries' bilateral FTAs, and US and EU FTAs in Asia

FTA indicators/ Countries and regions	Tariff elimination	NTBs in goods	Services	Investment	Govt. Procurement
AFTA	Comprehensive	Strong general commitment, weak implementation	Strong general commitment, weak specific commitments	Strong general commitment, weak specific commitments	Absent
Singapore FTAs	Comprehensive (less so for some FTA partners)	Strong in some FTAs	Generally GATS+, esp. with the United States	Generally strong, esp. with the United States	Generally GPA+
ASEAN countries' bilateral FTAs	Mixed. 90%+ elimination in some FTAs, big agriculture exemptions, long transition periods	Weak	Weak (barely GATS+)	Weak	Absent
ASEAN-PRC FTA	Middling. 90% elimination by 2012/15. 10% of tariffs 0-5% by 2018/20.	Weak	Weak (not GATS+)	Weak	Absent

BOX 7.3 (Cont'd)

FTA indicators/ Countries and regions	Tariff elimination	NTBs in goods	Services	Investment	Govt. Procurement
ASEAN- Japan FTA	Mixed. 93% elimination by 2018/26, big agriculture exemptions, long transition periods, complex bilateral schedules	Weak	Not concluded	Not concluded	Absent
ASEAN- Republic of Korea FTA	Fairly strong. 95% elimination by 2012/20. Agriculture exemptions	Weak	Weak (GATS compatible)	Weak	Absent
ASEAN-India FTA	Weak. <90% tariff elimination (80% for India) by 2016/21. Big exclusion list, particularly in agriculture. Long transition periods. Complex bilateral schedules	Weak	Not covered yet	Not covered yet	Absent

ASEAN-Australia-NZ FTA	Fairly strong. 96% elimination by 2020. Complex bilateral schedules	Weak	Weak. Slightly GATS+, positive list	Weak-to-middling. Post-establishment disciplines, investor-state DSM, but no liberalization	Absent
US FTAs (with Singapore and Republic of Korea)	Comprehensive. Short transition periods, some agriculture products exempted (with Republic of Korea)	Strong	Strong (GATS++). Negative list	Strong. Negative list, pre/post establishment disciplines	GPA+. Lower bid thresholds, negative list in services
EU-Republic of Korea FTA	Comprehensive. Short transition periods, some agriculture products exempted	Strong sector-specific disciplines	Middling. GATS+, positive list	Basic framework. No investor-state DSM	Slightly GPA+

BOX 7.3 (Cont'd)

FTA indicators/ Countries and regions	Intellectual Property	Trade Facilitation	Standards (MRAs, SPS, TBT)	Rules of Origin	Dispute Settlement
AFTA	Not TRIPS+	Strong commitments, weak implementation	Some MRAs, weak implementation	Simple. 40% RVC	Quite strong commitments but weak in practice
Singapore FTAs	TRIPS+, esp. with the United States	Strong	Strong	Varied. Differs between FTAs	Strong. Investor-state DSM
ASEAN countries' bilateral FTAs	Not TRIPS+	Weak	Weak	Varied. Differs between FTAs	Weak-to- middling
ASEAN-PRC FTA	Not TRIPS+	Weak	Weak	Simple. 40% RVC	Similar to WTO in theory
ASEAN-Japan FTA	Not TRIPS+	Weak	Weak	Quite restrictive. 40% RVC plus product-specific rules	Similar to WTO in theory
ASEAN- Republic of Korea FTA	Not TRIPS+	Weak	Weak	40% RVC plus product-specific rules	Similar to WTO in theory

ASEAN-India FTA	Not TRIPS+	Weak	Weak	Restrictive. 35% RVC, CTSH, product-specific rules	Similar to WTO in theory
ASEAN-Australia-NZ FTA	Slightly TRIPS+ (copyrights and transparency)	Weak	Weak	40% RVC plus product-specific rules	Similar to WTO plus investor-state DSM
US FTAs (with Singapore and Republic of Korea)	TRIPS+	Strong	Quite strong	Product-specific, restrictive	Strong. Investor-state DSM
EU-Republic of Korea FTA	Slightly TRIPS+. Strong on copyright and GIs	Strong	Strong	Product-specific, restrictive	Strong

4. Political Economy and Asian Regional Economic Integration

This section puts ASEAN FTAs in a broader context: political motives shaping FTAs; and how these FTAs link up with bigger initiatives for Asian economic integration.

4.1 *Political Economy of ASEAN FTAs*

There are several motives, economic and political, that have resulted in the proliferation of FTAs in ASEAN, in Asia more generally, and indeed across the world. Among them are a stalled Doha Round in the WTO; the shock of the Asian crisis in the late 1990s, impelling countries in the region to work together more closely; the desire to export ASEAN economic cooperation and the ASEAN Way to other parts of East and South Asia; the desire to (partially) imitate seemingly successful North American and European regional economic cooperation; the fear of being left out of preferential deals and the resulting “domino effect” of multiplying FTAs; and, not least, foreign-policy and geopolitical considerations. The latter loom large; note the prominent role of foreign ministries, not only trade or commerce ministries, in negotiating these FTAs. “Strategic” motives are to the fore, notably strengthening economic *and* political relations with key partners inside and outside Asia. This is clearly a two-way street: ASEAN and its FTA partners are keen to engage more closely with each other generally and on multiple fronts. FTAs — whatever their content — are seen as potent and visible symbols of closer engagement.

But why are ASEAN (and other Asian) FTAs so weak — so trade-light? It is in the nature of the ASEAN Way to avoid such an uncomfortable question. Much of the answer is obvious. Countries are at widely different stages of development with competing producer interests, significant barriers to trade with each other, and without a culture of deep cross-border cooperation. Hence, low common denominators in most FTAs. Foreign-policy motives are real, but are usually poorly related to commercial priorities. Economic strategy — a serious assessment of FTA costs and benefits — is conspicuous by its absence. The lobbying void tends to be filled by import-competing producer interests who seek restrictive ROOs and exemptions from tariff elimination, in addition to the preservation of regulatory barriers/ and other NTBs.

4.2 Asian Regional Economic Integration

There is much talk in the region of folding bilateral FTAs and ASEAN+1 FTAs into larger, integrated FTAs that would cover East Asia, perhaps include South Asia, and even stretch across the Pacific.

APEC's FTAAP is one such initiative. But it has got nowhere: political and economic differences in such a large, heterogeneous group are manifold and intractable. The best APEC can hope for is to encourage "best-practice" trade-related policies through research, exchange of information and mutual surveillance — akin to what the OECD does for its members. But even that may be too much to expect.

The TPP is a more realistic initiative, but it sits uncomfortably with — some would say in contradiction to — an Asian regional-integration agenda. It splits East Asia, and indeed ASEAN, down the middle: the PRC is not part of it, nor are several ASEAN countries. A TPP with all (or almost all) ASEAN countries would be less uncomfortable, although it would still exclude the PRC. Also, given its diverse membership, it is unlikely that the TPP, if concluded, will be a deep-integration FTA like other US FTAs; it might well end up being trade-light.

More geographically comfortable — and ambitious — would be an ASEAN+3 (APT) FTA. There is also talk of an ASEAN+6 FTA that would subsume APT plus India, Australia and New Zealand. The first East Asia Summit (EAS), held in Kuala Lumpur in 2005, gave impetus to these ideas. An ASEAN+6 FTA has been promoted by the Japanese government as a counter to what Japan sees as an inevitably PRC-centered APT.

ADB advocates a region-wide FTA as part of its general promotion of Asian regional economic integration. In *Emerging Asian Regionalism*, it argues that the consolidation of Asian FTAs into a single FTA would yield substantial welfare gains (ADB 2009, p. 3). CGE modelling shows large income gains to FTA members, with small losses for the rest of the world and an overall gain to world income. The gains from an ASEAN+6 FTA or an East Asia-plus-India FTA would be larger than from an East-Asian FTA due to the inclusion of more countries with more complementary trade possibilities, especially between India and East Asia. These gains would flow from greater specialization, economies of scale, FDI and technology

transfer that free access to a much bigger market would facilitate. A region-wide FTA would also substantially reduce trade diversion and other market-distorting effects from the noodle bowl of overlapping bilateral and subregional FTAs. ASEAN+6, with half the world's population and one third of global GDP, would be the third pole of the global economy.

This logic prompts some observers to call for an APT FTA, connecting ASEAN's AEC, ASEAN+1 FTAs and possibly a Northeast-Asian FTA (the PRC, Japan and Republic of Korea). An APT FTA could then be expanded into an ASEAN+6 FTA. ASEAN would be the central platform, given its longer history of institutionalized regional cooperation, its realization of AFTA and AEC, and, not least, ASEAN+1 FTAs. The latter would be core stepping stones to wider regional FTAs (Kawai and Wignaraja 2009, pp. 18–25; Kumar 2007, pp. 11–15).

A clean, comprehensive, deep-integration East-Asian or pan-Asian FTA, with simple, generous and harmonized ROOs, would indeed yield benefits. Ideally, MFN tariffs should be lowered to minimize any trade diversion. If such conditions were met, regional supply and demand would be stimulated, and there would be stronger regional market integration. A structural shift would take place toward manufacturing and services, and away from agriculture and commodities. Economic integration would extend beyond manufacturing parts and components in East Asian production-sharing arrangements to encompass final goods and services. This would be flanked by more integrated markets for labor and capital. And such integration would spread from East Asia to South Asia. In short, there would be regional production for regional consumption.

In *Institutions for Asian Integration*, ADB goes on to argue that such deep integration cannot be achieved by existing methods. Unilateral liberalization, the ASEAN Way and WTO commitments have reduced border barriers to trade and FDI in East Asia, resulting in “shallow integration”. But they have reached their limit. To overcome entrenched interest-group opposition, much harder policy coordination and stronger regional institutions are needed. Only then can next generation reforms (tackling remaining tariffs and NTBs on final goods, as well as regulatory barriers in services, investment, capital and labor markets) be pushed through (ADB 2010).

But the case for a region-wide FTA is flawed, as is the case for strong regional institutions.

Start with the economics of a region-wide FTA. It must factor in the continuing, overwhelming dependence of existing (East Asian) regional integration on extra-regional (Western) demand, mediated by regional production networks, processing trade and global supply chains (Athukorala 2009). Intra-Asian trade, and trade between Asia and other emerging markets, is growing faster than North-South trade, but from a low base. It is not going to make a serious dent into reliance on Western demand for final products in the short-to-medium-term.

Hence, a region-wide FTA, while promoting intra-regional trade in finished goods, could compromise processing trade linked to extra-regional markets where tariff barriers still exist. Negative effects would be worse with complicated ROOs: identifying products for tariff classification, tracing their origin, measuring their value-added, among other compliance issues, are time-consuming and costly for trade in parts and components in which production is fragmented and shared across many countries — much more so than for trade in final goods with simpler, “start-to-finish” production concentrated in one or two countries. The biggest risk is that a region-wide FTA, by maintaining barriers to non-members while freeing up trade among members, would thwart the expansion of global supply chains beyond ICT into other areas of manufacturing, and indeed into services and agriculture (Athukorala and Kohpaiboon 2009, pp. 15–17).

Economic holes in the case for a region-wide FTA become wider when political reality intrudes. The reality is that FTAs in the region, — including AFTA, ASEAN countries’ bilateral FTAs and ASEAN+1 FTAs — remain trade-light; there is no serious prospect of them becoming deep-integration FTAs. Therefore it is pie-in-the-sky to expect very large group cooperation to produce a strong, clean, comprehensive FTA in Asia — not for a long time to come. It will take Herculean policy-making to iron out wide differences in tariff rates, treatment of quantitative restrictions and regulatory barriers, sectoral exemptions, ROOs and other provisions spread across so many bilateral and plurilateral FTAs, and fold them into a sensible regional FTA. Rather, the result is likely to be a very low common denominator — another trade-light FTA with complicated ROOs, adding to (not subtracting from) an expanding noodle bowl (Menon 2008, p. 14). This would be an “ASEAN-minus”, not an “ASEAN-plus”, FTA.

The same reasoning — taking account of reality, that is — should make one even more sceptical of a leap to strong regional institutions. Such top-down thinking is flavoursome for the bureaucrat, the politician, the academic and the NGO activist, but it does not go with the grain of reality for Asian producers and consumers. It relies too much on the “EU model” — which is *sui generis* and does not fit a far more diverse Asian political, economic and social reality. It neglects the faults of the EU model: bureaucracy-heavy institutions, lack of accountability of elites, over-centralized, illiberal economic policies, and an unhealthy obsession with institutions and bureaucratic processes. This kind of top-down thinking also neglects Asian geopolitics. Bitter nationalist rivalries (especially between the PRC, Japan and Republic of Korea, and between India and Pakistan), will continue to stymie Asian regional integration efforts for a long time to come. This applies to East Asia; it applies even more to South Asia.

Rather, working with the grain of Asian reality demands a continued reliance on bottom-up approaches. The primary bottom-up approach is unilateral, non-discriminatory liberalization and the competitive emulation it stimulates. This is not exhausted, and ways must be found to extend it to next generation reforms. Arguably, FTA over-activity has distracted attention from further unilateral trade and FDI liberalization and domestic structural reforms. Politically unrealistic initiatives for Asian economic integration will make that distraction worse. More realistic would be “soft cooperation” in East and South Asia — modest, incremental reforms that might be achievable. Independent assessment and monitoring of cross-border policies, exchanging ideas and information, greater transparency, improvements to dispute settlement — these would fit the groove of Asian reality better than grand designs (Haggard 2011).

5. Conclusion

ASEAN FTAs — AFTA and related agreements, ASEAN countries’ bilateral FTAs and ASEAN+1 FTAs — are emblematic of Southeast Asia’s shift from non-discriminatory unilateral and multilateral liberalization in the 1980s and 1990s to preferential liberalization over the past decade. But this has not resulted in a second wind of external

opening, nor has it unleashed a new wave of domestic structural reforms.

AFTA, reinforced by the AEC and the ASEAN Charter, looks good on paper. But actual liberalization beyond tariffs has been weak and tardy, making most of the ambitious general commitments look like paper tigers. AFTA's ASEAN Way is reflected in ASEAN countries' bilateral FTAs. With the exception of some of Singapore's FTAs (notably the US-Singapore FTA), they are trade-light, at best fairly strong on tariff elimination, but also weak-to-very weak in tackling NTBs and regulatory barriers. And their proliferation of ROOs adds to the Asian noodle bowl. This is in turn reflected in ASEAN+1 FTAs. In general, they are "AFTA-minus": the stronger ones (AANZFTA and AKFTA) go far on tariff elimination but are weak in other areas; the weaker ones (especially AIFTA) are also less than comprehensive and overly complex on tariff elimination. The weakness of all these FTAs is highlighted when compared with the three US and EU FTAs in Asia.

It does not require reams of political science analysis to explain the weakness of these FTAs. The region's diversity — countries at widely different stages of development and differing levels of protection, competing producer interests, a history of intra-regional conflict and lack of a culture of cross-border cooperation, geopolitical divisions — preclude the emergence of strong regional institutions, hard policy coordination and deep integration, while leaving the door open to relatively weak and flexible regional institutions, soft cooperation and shallow integration. These reasons also preclude the emergence of strong region-wide FTAs. If such FTAs materialize, they will likely be even weaker than ASEAN+1 FTAs.

Now to answer the big question asked at the beginning of this chapter: Do ASEAN FTAs promote ASEAN's regional and global economic integration? My answer is "hardly". Do they help ASEAN achieve the AEC's commitments by the 2015 deadline? Certainly not, for ASEAN+1 FTA commitments are generally much weaker than AEC commitments, and they reflect the ASEAN Way's inability to tackle non-tariff and regulatory barriers seriously. Do they further the cause of ASEAN's economic integration with the wider Asia and beyond? No, for their content is too trade-light and they have noodle-bowl complications.

On the economic front, the best that can be said for ASEAN+1 FTAs is that there is little or no evidence to show that they have been a big obstacle to the region's further regional and global economic integration — apart from distracting attention from unilateral liberalization and the WTO's Doha Round. And politically, there is something to be said — up to a point — for FTAs as an expression of “strategic” engagement between ASEAN and its major regional partners.

Even if these FTAs were stronger, they would still face the challenge of reconciling regional-integration and global-integration objectives. ASEAN cannot afford any contradiction between the two: it is the most integrated subregion in East Asian production-sharing arrangements (through imports and exports of intermediate goods and related FDI), but the latter still rely overwhelmingly on Western demand for finished goods. Preventing FTAs from compromising existing and future global supply chains will be an enduring challenge.

ASEAN FTAs are a reality and cannot be wished away. The point is to make them as compatible as possible with regional and global integration objectives. The answer is not new grand designs that indulge in wishful thinking and distract attention from what is both feasible and desirable. Rather, it should be modest, incremental reforms that work with the grain of ASEAN and wider Asian realities. These could include the following:

- Fill in gaps in tariff elimination, e.g., by reducing exclusion lists, accelerating transition periods and harmonizing bilateral schedules.
- Encourage the ASEAN-4 to multilateralize CEPT tariff commitments to avoid trade diversion and reduce administrative costs from bilateral and ASEAN+1 FTAs.
- Iron out inconsistencies between ASEAN+1 FTAs and ASEAN countries' bilateral FTAs with the same external partners. Often, bilateral FTAs have marginally stronger tariff commitments than ASEAN+1 FTAs, but in some instances the latter are stronger, in addition to having cumulative ROOs. The rule of thumb should be to harmonize tariff commitments to the strongest, not the weakest, common denominator.
- Simplify and harmonize ROOs within and between FTAs, e.g., by substituting AFTA's 40% RVC rule for product-specific rules wherever possible.

- Strengthen work programs and implementation systems on NTBs in goods, standards and trade facilitation.
- Strengthen investor-protection provisions and dispute settlement, including investor-state dispute settlement.
- Establish third-party mechanisms to assess FTA commitments and outcomes, and make their findings public.
- Aim for transparency and other rule-strengthening measures that can easily be multilateralized, i.e., made non-discriminatory.
- Better market-access commitments on services and investment in the stronger FTAs, such as AANZFTA and AKFTA. If so, multilateralize them through unilateral liberalization.

These, however, are second-order priorities for regional and global integration. It is easy to call for more priority to be given to the Doha Round and a credible post-Doha agenda in the WTO, but that is also wishful thinking. Rather, the first priority should be to revive unilateral (country-by-country) liberalization of trade and FDI, now extended to next-generation, behind-the-border reforms. That would spark competitive emulation within and beyond ASEAN. This was the real driver of ASEAN's regional and global integration from the 1980s. That is the key to extending MNE supply chains in the region, spreading wider across manufacturing and into services and agriculture, and even opening up regional markets for intra-regional producers and consumers.

This is indeed a steep hill to climb. But I think it is more scalable than top-down liberalization through international and regional institutions. First, the economically sound case for unilateral liberalization must be made by experts and assorted opinion-formers for a policy-making and broader public audience. Second, policy-makers should take advantage of events and circumstances — including crises and perceptions of flagging national competitiveness — to push through unilateral reforms. That has happened so often before — and there will be plenty of future opportunities. Third, they should scan the environment to emulate best practice examples abroad rather than wait for cumbersome, time-consuming international and regional negotiations to deliver desired outcomes. And fourth, all the above would be more achievable without the distraction of ambitious new initiatives and grand designs for regional integration, which invariably promise much but deliver little.

NOTES

1. Visiting Associate Professor, Lee Kuan Yew School of Public Policy and Institute of South Asian Studies, NUS; and Director, European Centre of International Political Economy, Brussels.
2. See <<http://www.aseansec.org/12375.htm>>.
3. See <[http://www.fta.gov.sg/afta/9cframework_agreement_on_the_asean_investment_area_\(1998\).pdf](http://www.fta.gov.sg/afta/9cframework_agreement_on_the_asean_investment_area_(1998).pdf)>.
4. See <http://www.aseansec.org/5187-10.pdf?bcsi_scan_D4A612CF62FE9576=0&bcsi_scan_filename=5187-10.pdf>.
5. See <<http://www.aseansec.org/21069.pdf>>; <<http://www.aseansec.org/16646.htm>>; <<http://www.aseansec.org/22218.htm>>.
6. See <<http://aric.adb.org/FTAbCountryAll.php>>.
7. See <<http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Malaysia/Key-Outcomes.php>>.
8. On CAFTA's various agreements, see
<http://www.fta.gov.sg/acfta/framework_agreement_05112002.pdf>;
<http://www.fta.gov.sg/acfta/agreement_on_trade_in_goods_china_21112004.pdf>;
<[http://www.fta.gov.sg/acfta/asean-china_tis_\(main_agreement\).pdf](http://www.fta.gov.sg/acfta/asean-china_tis_(main_agreement).pdf)>;
<[http://www.fta.gov.sg/acfta/asean-china_inv_agreement\(certified_copy\).pdf](http://www.fta.gov.sg/acfta/asean-china_inv_agreement(certified_copy).pdf)>.
9. See, for example, "Chamber of Commerce calls for ACFTA renegotiation", *Jakarta Post*, 23 April 2011; "Southeast Asia embraces [the People's Republic of] China trade, but how's the relationship? It's complicated", *Christian Science Monitor*, 8 February 2011.
10. On AJCEP agreements, see
<<http://www.fta.gov.sg/ajcep/chap2.pdf>>;
<<http://www.fta.gov.sg/ajcep/chap3.pdf>>;
<<http://www.fta.gov.sg/ajcep/chap4.pdf>>;
<<http://www.fta.gov.sg/ajcep/chap5.pdf>>;
<<http://www.fta.gov.sg/ajcep/chap6.pdf>>;
<<http://www.fta.gov.sg/ajcep/chap7.pdf>>;
<<http://www.fta.gov.sg/ajcep/chap8.pdf>>;
<<http://www.fta.gov.sg/ajcep/chap9.pdf>>;
<<http://www.fta.gov.sg/ajcep/chap10.pdf>>.
11. Sanjaya Baru, "Look East policy comes of age", *Business Standard*, 21 October 2009.
12. On AIFTA agreements, see
<<http://www.aseansec.org/15278.htm>>;
<<http://www.fta.gov.sg/aifta/agreement%20on%20trade%20in%20goods%20under%20the.pdf>>;

- <<http://www.fta.gov.sg/aifta/agreement%20on%20dispute%20settlement%20mechanism.pdf>>.
13. <http://www.dfat.gov.au/trade/fta/asean/the_angkor_agenda.pdf>.
 14. On AANZFTA agreements, see
 <<http://www.fta.gov.sg/aanzfta/chapter%202.pdf>>;
 <<http://www.fta.gov.sg/aanzfta/chapter%203.pdf>>;
 <<http://www.fta.gov.sg/aanzfta/chapter%205.pdf>>;
 <<http://www.fta.gov.sg/aanzfta/chapter%206.pdf>>;
 <<http://www.fta.gov.sg/aanzfta/chapter%208.pdf>>;
 <<http://www.fta.gov.sg/aanzfta/chapter%209.pdf>>;
 <<http://www.fta.gov.sg/aanzfta/chapter%2011.pdf>>;
 <<http://www.fta.gov.sg/aanzfta/chapter%2017.pdf>>;
 <<http://www.fta.gov.sg/aanzfta/chapter%2013.pdf>>.
- Also see:
 <http://www.dfat.gov.au/fta/aanzfta/aanzfta_overview_and_outcomes.html>;
 <<http://www.asean.fta.govt.nz/assets/Downloads/asean-factsheet.pdf>>;
 <<http://www.asean.fta.govt.nz/assets/Downloads/asean-national-interest-analysis-2.pdf>>.
15. Which one would expect from official statements and newspaper reports, but less so from “independent” academic studies.
 16. Pomfret (2007) also comes to the conclusion that the net economic effects of FTAs in the region are likely to be trivial.

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8

The ASEAN Dispute Settlement System

Locknie Hsu

1. Introduction

Since its inception in 1967, ASEAN has been an important regional association. It is active in promoting trade liberalization and political stability. ASEAN members have, through the years, signed several treaties to promote trade and investment activities in the region.

Of the numerous ASEAN legal milestones, the most significant and recent one is the ASEAN Charter. Its signing in 2007 coincided with ASEAN's 40th year of existence. The Charter adds to the legal infrastructure of the organization, including elements relating to dispute settlement. It is, however, by no means the only significant treaty of ASEAN, as a number of other agreements had already set up important legal commitments in the areas of trade and investment liberalization and integration.

ASEAN dispute settlement mechanisms deal with a variety of issues. By way of overview, this chapter begins by introducing major

aspects of the dispute settlement system of ASEAN, pre-Charter and in light of the Charter. The chapter discusses briefly the over-arching dispute settlement mechanisms under the ASEAN Charter, after which it focuses on ASEAN's dispute settlement mechanisms for resolving investment and trade disputes. For the former type of dispute, the mechanisms are contained in more than one investment treaty, and these will be discussed. For the latter type of disputes, the key document which will be discussed is the Protocol on Enhanced Dispute Settlement Mechanism ("DSM"). Investment and trade dispute settlement mechanisms forms the main focus of this chapter, as they are key mechanisms supporting the ASEAN economic integration objective, and are therefore the most relevant to the efforts to accelerate the realization of the ASEAN Economic Community (AEC). Finally, the chapter makes a number of recommendations to improve these mechanisms and their support systems and to pave the way for their use if necessary in enforcing the various trade and investment liberalization commitments of ASEAN members in building the AEC.

2. Treaty of Amity and Cooperation

This milestone treaty was signed in February 1976 and is one of the earliest ASEAN documents with a dispute settlement mechanism. The Treaty was established with the following purpose:

to promote perpetual peace, everlasting amity and cooperation among their peoples which would contribute to their strength, solidarity and closer relationship ...

One of its cornerstone principles is the settlement of differences or disputes by peaceful means. Articles 13 to 17 elaborate on how this principle is to be achieved.

A significant dispute settlement body established under these Articles is the High Council, comprising a representative of each of the "High Contracting Parties" at ministerial level. For disputes not settled by negotiations, the High Council may recommend an appropriate means of dispute settlement, offer its good offices, constitute itself (with the parties' agreement) into a committee of mediation, inquiry or conciliation, and may also recommend "appropriate measures".

3. The ASEAN Charter and Dispute Settlement

The ASEAN Charter took effect on 15 December 2008, introducing a separate and over-arching dispute settlement architecture for member states. This architecture does not abrogate existing mechanisms that pre-date the Charter. Indeed, the Charter expressly carves out those disputes that might be subject to specific other agreements of ASEAN.¹ Since the signing of the Charter, its dispute settlement system has been given further structure and detail in the form of the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms, signed in April 2010 (the Charter system).² This Protocol provides important elaboration on the dispute settlement aspects of the Charter. It provides 21 articles on dispute settlement matters, as well as four annexes dealing with rules relating respectively to the use of good offices, mediation, conciliation and arbitration.³

The Charter itself contains a number of specific provisions that pertain to dispute settlement. These are found in Articles 22 to 28. The following are features of the system envisaged in these Articles. Among the broad key principles of the Charter are “reliance on peaceful settlement of disputes”, “adherence to the rule of law, good governance, the principles of democracy and constitutional government” and “adherence to multilateral trade rules and ASEAN’s rules-based regimes ...”.⁴ To help achieve the aims of the Charter and realize its principles, the Charter establishes the ASEAN Coordinating Council, which is comprised of the ASEAN Foreign Ministers. This Council has a role in the new dispute settlement landscape.

The Charter recognizes a variety of dispute settlement methods, ranging from “dialogue, consultation and negotiation” to reference of “unresolved” disputes to the ASEAN Summit, the highest political decision-making body. Forming a new “umbrella” structure on dispute settlement, the Charter recognizes pre-existing dispute settlement mechanisms established in other ASEAN instruments. Where such other mechanisms exist (such as in the area of economic agreements, for which there is the DSM), the Charter carves out such disputes and gives way to those mechanisms. Where they do not exist, however, the Charter envisages the use of a separate, specific Charter-based dispute settlement system to resolve remaining disputes.⁵

To summarize, the Charter divides the dispute settlement systems of ASEAN as follows:⁶

Summary of ASEAN Charter System of Dispute Settlement

(as explained in Articles 24–26 of the Charter and the 2010 Protocol)

- Disputes relating to specific ASEAN instruments — to be settled under those instruments
- Disputes which do not concern interpretation or application of any ASEAN instrument — to be settled under the Treaty of Amity and Cooperation
- Where not otherwise specifically provided for, disputes which concern interpretation or application of ASEAN economic agreements — to be settled in accordance with the DSM
- Disputes concerning interpretation or application of the ASEAN Charter itself, of other instruments with no specific means of dispute settlement, or of other ASEAN instruments which expressly provide that the 2010 Protocol or part thereof shall apply, or disputes in which Parties mutually agree that the 2010 Protocol shall apply — to be settled by the system set out in the 2010 Protocol
- “Unresolved disputes” (whose meaning is explained in the 2010 Protocol) — to be referred to ASEAN Summit for decision

Meaning of “Unresolved Disputes”

One category of disputes that may be referred to political leaders is that of “unresolved disputes”. Article 26 of the Charter refers to a situation when “a dispute remains unresolved, after the application of the preceding provisions of this Chapter ...”. In such cases, the Article provides for referral of the dispute to the ASEAN Summit, which is comprised of political leaders. The 2010 Protocol, however, explains that for a dispute to fall within this category, the dispute must fulfill certain criteria.⁷

Further, Article 27 of the Charter provides that compliance with the findings, recommendations or decisions resulting from “an ASEAN dispute settlement mechanism” (which, therefore, need not be that of the Charter) is monitored at the level of the Secretary-General, Secretariat or other designated ASEAN body, and non-compliance may result in referral of the dispute to the ASEAN Summit. However, as the meaning of an “unresolved dispute” has been defined narrowly by the 2010

Protocol, and Article 2 of the 2010 Protocol carves out disputes which concern the interpretation or application of other ASEAN instruments where “specific means of settling such disputes have already been provided for”, not all trade and investment disputes will be referable to the Summit, since the dispute may not qualify as “unresolved” as defined, and those disputes might also be subject to other specific surveillance mechanisms.⁸

However, conversely, it would appear that even a trade or investment dispute that remains “unresolved” (for example, in the sense that, post-adjudication under the trade/investment agreement, a violation still remains) could be referred to the ASEAN Summit if the criteria of an “unresolved dispute” are met.

4. ASEAN Trade and Investment Dispute Settlement

ASEAN treaties provide two separate, parallel regimes for the settlement of trade and investment disputes. Together, the two regimes provide opportunities to obtain redress for any non-compliance or non-implementation by an ASEAN member of trade or investment treaty obligations. Both systems contain adjudicatory features in a rules-based context, while addressing different types of commitments.

4.1 ASEAN Investment Dispute Settlement

For investment-related disputes, the relevant treaties containing dispute settlement mechanisms under the ASEAN Comprehensive Investment Agreement (2009), ACIA 2009 which has now superseded its predecessor agreements, namely, the Framework Agreement on the ASEAN Investment Area (1998) and the ASEAN Agreement for the Promotion and Protection of Investments (1987). The ACIA 2009 provides ASEAN members with the possibility of state-to-state dispute resolution. In addition, private investors also have a right of claim under some ASEAN investment treaties.

Dispute Settlement under the 1987 Agreement

The 1987 treaty contained important investor-state dispute settlement mechanisms. As these involve private investors these mechanisms raise somewhat different issues.⁹ Such recourse provided investors a direct means of seeking redress from an ASEAN state which is thought not to be in compliance with its investment obligations. The implication of

such a means of recourse was that the investor did not need to rely on its home state to decide to take up the dispute against the host state (alleged to be non-compliant) on its behalf. This mode of dispute settlement has so far been utilized once in ASEAN.

In *Yaung Chi Oo v Myanmar*, an investor based in Singapore, instituted arbitration proceedings under the 1987 Agreement against Myanmar for alleged violations of that treaty.¹⁰ Myanmar argued that the tribunal lacked jurisdiction to hear the dispute. Due to the tribunal's interpretation of the scope and requirements of the Agreement, it agreed and ruled that it lacked jurisdiction. Hence, while the ASEAN investor-state mechanism has been invoked, the case never proceeded beyond the jurisdictional challenge to a full hearing on the merits. This is to be contrasted with the investor-state arbitration mechanism provided for under the North America Free Trade Agreement (NAFTA), which has been used frequently since its inception.¹¹

Dispute Settlement under the 1998 Framework Agreement

While the 1998 Framework Agreement did not include an investor-State mechanism, it (and the other two above Agreements) provides a number of specific treaty commitments to protect investors. However, the Framework Agreement does provide in Article 17 for intra-ASEAN state disputes relating to it to be referred to the trade dispute settlement mechanism, discussed below.

Dispute Settlement under the ACIA 2009

The ACIA 2009 contains two dispute settlement mechanisms: a State-to-State mechanism and an investor-state arbitration mechanism. Unlike the DSM (applicable to ASEAN trade disputes, discussed below) there is no formal surveillance mechanism within the ACIA 2009 system to ensure implementation of an award or a ruling is made. Instead, the ASEAN Investment Area Council has general authority to oversee implementation of the 2009 Agreement (under Article 42). Under the investor-state dispute settlement mechanism, the tribunal appointed may in certain cases request a "joint interpretation" of any provision of the Agreement that is in dispute.¹² This provision follows those in certain recent FTAs. If a joint decision on interpretation by members is arrived at, the tribunal will be bound by it and any decision or award by it must be consistent with the joint decision. This has the potential of detracting from a rules-based approach to tribunal decisions and awards, as the ultimate interpretation may be a political rather than

legal one. On the other hand, it may be said that if all the members by consensus arrive at the interpretation, such an interpretation reflects their intention as the original signatories to the treaty, and should be given effect.

At the end of 2011, the ACIA 2009 had not been fully ratified by all ASEAN members.¹³ However, it was announced at the April 2012 ASEAN Summit in Phnom Penh, Cambodia, that the ACIA 2009 had entered into force with effect from 29 March 2012.¹⁴ Its entry into force brings about termination of the 1987 and 1998 Agreements (by virtue of Article 47 of the ACIA 2009). The ACIA 2009 contains expanded investment protection commitments, as well as a revamped and more self-contained set of investor-state dispute settlement provisions.

4.2 ASEAN Trade Dispute Settlement

Economic disputes arising from specified economic treaties fall under the purview of the ASEAN Protocol on Enhanced Dispute Settlement Mechanism 2004 (referred to in this chapter as the “Protocol” and its mechanism as “the DSM” system).¹⁵ This mechanism bears several striking similarities with that under the World Trade Organization’s Dispute Settlement Understanding (DSU), such as a panel procedure, findings and recommendations that may be made by panels, as well as provisions allowing suspension of concessions (often referred to as retaliatory measures) and the possibility of appellate review. Under the Protocol, a significant role is given to the ASEAN Senior Economic Officials Meeting (SEOM). In several respects the functions of SEOM resemble those of the Dispute Settlement Body under DSU. However, as will be seen in the following discussion, the Protocol system also contains a number of important differences from that of the DSU. This will be elaborated on below. The focus of the remaining discussion will be on the Protocol and its role in the treatment of trade barriers or issues that may impede ASEAN economic integration.

5. ASEAN Trade Dispute Settlement — Assessment and Challenges

5.1. Structural Strengths and Weaknesses

The current dispute settlement system post-ASEAN Charter comprises the mechanisms mentioned in the Charter itself, and the separate dispute settlement systems provided for in other pre-Charter ASEAN

legal instruments. Together they now provide the infrastructure for the systematic settlement of disputes that may arise in different contexts and under different agreements. Of greatest interest in this study of the legal infrastructure of dispute settlement that can facilitate establishment of the AEC by 2015 is the Protocol.

The Protocol establishes a dispute settlement structure that is modelled on the WTO DSU system: there are, therefore, relatively clear steps spelt out in the dispute settlement process, with specific time frames at various stages. Access is equally available to any ASEAN member state that has a dispute with another member state involving an agreement covered under the Protocol. To the extent that the Protocol incorporates familiar features, it lends comfort to potential users who may know how the DSU system works.

On the other hand, this may also inadvertently “import” similar shortcomings in the DSU system. For instance, the DSU’s silence on *amicus curiae* briefs led to vociferous objections by some members when such briefs first appeared in DSU proceedings. As a result, WTO panels and the Appellate Body had to devise working procedures to deal with them in an acceptable way. The Protocol is similarly silent, and questions of how a DSM panel or Appellate Body will deal with any such submissions should they find their way into an ASEAN trade dispute.

In addition, the infrastructure of the DSM may be hampered due to weak financial and institutional support. Although the Protocol introduces the notion of a DSM Fund to take care of panel and Appellate Body expenses and administrative costs of the ASEAN Secretariat, the Fund does not seek to build human (e.g., by way of legal expertise and translation services) and physical infrastructure (e.g., hearing and other building facilities at the Jakarta Secretariat) in support of the DSM.

These are preliminary observations. The following will examine the Protocol and DSM system in greater detail.

5.2 Major Features of the DSM

In 1996, a Protocol on Dispute Settlement Mechanism was first signed by ASEAN leaders in Manila.¹⁶ This first iteration of the DSM system contained a basic panel and appellate process. It was superseded in 2004 by the Protocol on Enhanced Dispute Settlement Mechanism, signed by leaders in Vientiane.¹⁷ The present enhanced DSM system in the 2004

Protocol was established as a result of recommendations made by a High Level Task Force (HLTF) on ASEAN Economic Integration.

The DSM system is modelled after the WTO's Dispute Settlement Understanding System. However, as will be seen later, there are some significant differences. In addition, the ASEAN system provides another "layer" of dispute resolution in the form of the ASEAN Compliance Body. This is a peer adjudication process.¹⁸

The 2004 Protocol's preamble refers to establishing "practical, effective and credible mechanisms" to resolve disputes, and to the "transformation" of ASEAN "into a rules-based organization". While the legal infrastructure for resolution of various types of disputes between/among ASEAN members now exists, it remains to be seen to what extent members will resort to it, and the reasons for hesitation to make use of it.¹⁹

The DSM only envisages participation by ASEAN states. It, therefore, does not permit private entities or investors to participate in the adjudicatory process. This is similar to the WTO's DSU system, which only permits WTO member states to participate as complainants, respondents and third parties.

The DSM is, therefore, a dedicated dispute settlement system for ASEAN members to resolve trade disputes arising under the covered ASEAN economic agreements. The 1996 iteration of the DSM was established a year after the coming into being of the WTO itself. The timing suggests that ASEAN members wished to have a parallel dispute settlement system for disputes relating to ASEAN economic agreements. Where an allegation of a violation relates to a unique ASEAN agreement commitment — as opposed to a commitment that also occurs under a WTO agreement — the DSM would be the appropriate forum for the dispute. In such a case, the ASEAN DSM is separate from and independent of the WTO system.

Where, however, an alleged violation relates both to an ASEAN agreement commitment and to a WTO commitment, a choice between the two forums would be available; this appears to be confirmed by Art. 1 of the Protocol. In such a situation, the DSM appears to provide an alternative forum to the WTO DSU system.

Profile of ASEAN Members

ASEAN is made up primarily of developing and least developed countries. The officials struggle to cope with ongoing discussions,

negotiations and understanding of developments in WTO and other international trade bodies, including disputes and the often complex legal implications of their outcomes. They also have to deal with an increasing number of obligations under bilateral and regional agreements. This is in addition to negotiating the ASEAN-wide (and therefore labor-intensive) trade agreements with ASEAN's trade partners — the latest being those with the EU.²⁰ The limited legal resources in the public sector are strained to cope with the above as well as additional DSMs apart from the WTO.²¹ It needs to be borne in mind that there are significantly differing levels in development, familiarity with international law, treaty obligations and implementation, education and training resources in trade matters in the ASEAN members. Currently, the terms of the DSM do not appear to take into account these differences in a significant manner (whereas by contrast, the WTO DSU system contains several provisions taking into account the development status of members).

5.3 The WTO DSU System and the ASEAN DSM System — What Lessons Can Be Drawn and What Recommendations May Be Made?

Use of the ASEAN DSM and WTO DSU Systems by ASEAN Members

The main trade dispute mechanism used by ASEAN members is that of the WTO. The system was established under the WTO's Understanding on Dispute Settlement ("DSU") in 1995 at the birth of the organization and has, as at the time of writing, already seen 427 disputes brought to it.²²

A small number of intra-ASEAN trade disputes were settled amicably without the parties having to proceed to formal panel hearings in dispute settlement, either under the DSM or the DSU system.

The first such complaint that was settled was one raised under the WTO DSU system. The complaint was initiated by Singapore against Malaysia — two ASEAN countries — regarding the prohibition of imports of polyethylene and polypropylene instituted and maintained by the Malaysian Government under the Customs (Prohibition of Imports) (Amendments) (No. 5) Order 1994 dated 16 March 1994. Although Singapore requested establishment of a panel, this never proceeded to a panel hearing as the matter was eventually settled and the complaint was withdrawn completely.²³

In 2001, Thailand and Malaysia held consultations over Malaysia's delay in phasing certain automotive products from its Temporary Exclusion List to its Inclusion List. The countries settled the matter amicably through consultations without resorting to formal dispute settlement procedures. In 2003, Singapore held consultations with the Philippines over a complaint relating to the Philippines' implementation of the AFTA's Common Effective Preferential Tariff Scheme (CEPT). The complaint was regarding a suspension of tariff reductions by the Philippines for certain petrochemical goods. Again, after consultations, this matter was eventually settled without any formal dispute settlement panel being established; the Philippines first entered into a compensatory arrangement with Singapore in August 2003, and subsequently lifted the tariff-reduction suspension altogether in 2006.²⁴

From 1995 to the present, WTO members from ASEAN which have either initiated a complaint or acted as a responde in a dispute under this system are: Indonesia, Malaysia, the Philippines and Thailand. Singapore and Viet Nam have so far only participated as complainants but not as respondents. In addition, ASEAN countries have participated as third parties in numerous other WTO disputes.²⁵

As recently as 2011, the Philippines and Thailand were involved in a WTO dispute over Thai fiscal and customs measures affecting cigarettes from the Philippines.²⁶

The DSM and the DSU

While at first sight the DSM system created under the Protocol appears to bear striking similarities with the WTO's system created under its DSU, there are in fact several significant differences. This section provides a critical comparison of the two systems.

When one examines the texts of the Protocol and the DSU, important differences between the two systems are observed. While some differences are due to the obvious contextual differences (such as ASEAN substituting the SEOM for the DSU) others appear to be deliberate, legal differences. Differences arising from the Protocol can lead to potential legal uncertainty and unsatisfactory operation of the DSM in practice.

One example is that found in the area of confidentiality at the stage of consultations. It is now known why the confidentiality provision in the DSM for its consultations was not emulated in the Protocol. Likewise, while the Protocol copies the DSU in providing for conciliation

and good offices, again, it has omitted the important confidentiality provision present in the DSU counterpart provision.

A more serious difference is seen in Art. 1 of the Protocol. The DSU system permits only disputes relating to the “covered agreements” of the WTO to be brought under it, and WTO members are required to submit their WTO disputes to that system.²⁷ The DSU does not envisage use of alternative forums to resolve disputes pertaining to its “covered agreements”.

By contrast, the ASEAN Protocol opens with a provision that envisages use of alternative forums:

ARTICLE 1
Coverage and Application

3. The provisions of this Protocol are without prejudice to the rights of Member States to seek recourse to other fora for the settlement of disputes involving other Member States. A Member State involved in a dispute can resort to other fora at any stage before a party has made a request to the Senior Economic Officials Meeting (“SEOM”) to establish a panel pursuant to paragraph 1 Article 5 of this Protocol.

This provision is worded broadly and refers to “disputes involving other Member States”. This potentially includes disputes that fall within this Protocol, i.e., pertain to its “covered agreements”. A choice therefore exists for Member States to opt for other forums (such as the WTO’s DSU system, if the dispute also falls within its “covered agreements”), up to the time of establishment of a panel by the SEOM. The provision does not state clearly what might happen to such an alternative action initiated in another forum before a request for the establishment of a DSM panel is made, but it implies that once such a request is made, the choice of forums ends and only the means offered under the Protocol will apply. As mentioned, by contrast, the WTO’s DSU does not provide for such a choice of dispute settlement forum.²⁸

**5.4 Making the ASEAN DSM More Effectively Workable by 2015:
Factors and Policy Recommendations**

In the above discussion and comparison, it can be seen that structurally, the ASEAN DSM contains a number of clear procedural features which emulate those in the WTO DSU. While the latter still has flaws, it has provided members with a working and effective dispute settlement institution for over 10 years now.

As mentioned, a recent dispute settlement report — issued in 2011 — relates to a trade dispute between two ASEAN members as complainant and respondent. Clearly, the Philippines and Thailand have demonstrated that they are prepared to have their trade dispute dealt with by the WTO.²⁹ If the complaint could also have been brought under the DSM as a complaint of violation of part of an ASEAN “covered agreement”, would the complainants have brought the dispute under the DSM? This would, of course involve examining whether the measure(s) in question could have been argued to also violate an ASEAN “covered agreement”. In such a case, the answer may not only be a legal one but also a strategic and political one. WTO disputes receive more international attention, past and present WTO panelists and Appellate Body members are known, and the WTO system already has a relatively long history (compared with the ASEAN DSM) and a series of interpretative statements from past cases. Several factors may therefore contribute to the choice of forum, where indeed such a choice exists.

One factor which may be difficult to address is the fact that at the WTO, members may draw on the support of other WTO members for their arguments in a dispute. The DSU system permits a WTO member that is not a complainant or respondent and which has a “substantial interest” in a case to participate (to an extent) as a third party. More than one third party may join the proceedings. Third parties may make legal submissions in support of a particular view or in respect of a particular point of law in a case.

In the WTO context therefore, an ASEAN WTO member which has a dispute against a fellow ASEAN WTO member could generate support for its case from fellow WTO members — including non-ASEAN countries — such as the large economies of the United States and the EU. Indeed, in the WTO case between Thailand and the Philippines mentioned above, third parties included Australia; the PRC; the European Union; India; Taipei, China and the United States.

Under the DSM, while third parties with a “substantial interest” are also allowed to participate in the process, such parties would necessarily be limited to fellow ASEAN members. Hence, for a given issue in a case, less third party support may be available if one were to bring a case under the ASEAN DSM.

Apart from other possible reasons for using the WTO system, the above examination leads to the identification of at least **four specific**

starting points, explained below, for improving the structure of the DSM procedures, as well as ASEAN members' familiarity with the ASEAN DSM.

5.4.1. Legal Certainty

(a) *Identifying and Filling of Gaps*

First, a reconsideration of Article 1 of the Protocol is in order, as it currently offers a choice of forums should a trade dispute arise between ASEAN members which might fall under an ASEAN agreement as well as another agreement (such as those under the WTO). As mentioned above, this choice may lead to an ASEAN member opting to bring such a dispute to the WTO, a "tried and tested" system with more than 10 years of "case law" history (and, therefore, known guiding principles) by now.

Secondly, there is no equivalent of the important guiding principles set out in Art. 3 of the DSU. This includes the DSU philosophy on resolution of WTO members' disputes, and the Article's specific reference to the use of customary international law principles of interpretation of treaties. The latter has been expressly applied in several panel and Appellate Body decisions of the WTO. This application and visibility lends certainty to the interpretative process. It is not clear why at least some of the guiding provisions in Art. 3 of the DSU have not been incorporated into the Protocol. For greater certainty of the DSM, an examination of Article 3 DSU needs to be undertaken, to see which parts should be included in the Protocol, *mutatis mutandis*.

In addition, some other gaps in the text of the Protocol exist. For instance, there is no time-limit or confidentiality provisions in respect of DSM consultations. Another example is the omission of a provision on representation on the DSM's Appellate Body. While the WTO's DSU provides for broad representation of its membership in the WTO Appellate Body, this is not the case in the DSM. These are important aspects and include omissions on the confidentiality in the processes of conciliation and use of good offices. There is a lack of special provisions for least developed ASEAN members involved in a trade dispute under the DSM.

Finally, the DSM's Appellate Body does not appear as yet to have a set of Working Procedures (the WTO Appellate Body has a set and these are updated periodically) or a Code of Conduct. These are important for promoting understanding and proper conduct of appeals

in the process. Information on the DSM Appellate Body is, therefore, incomplete at the moment, and this omission needs to be addressed.

Hence, the DSM can be further improved by studying and including any useful procedures already established by the WTO DSU system and the rich case practices of WTO, which may be adopted where possible, or adapted if necessary, for use in the DSM system.

Recommendation:

The above issues and gaps need to be carefully considered and filled to provide a more effective system. Useful procedures already established in the WTO DSU system should be considered for incorporation, either through adaptation or, where possible, adoption, in the DSM system.

(b) Transparency of Processes and Dispute Reports

The WTO DSU system has gained a great deal of exposure through its case reports and ease of availability of these reports. Many reports are complicated, and long and often lead to much debate, but the dissemination of these reports encourage knowledge of the system, reasoning and interpretative processes used by the panels and the Appellate Body.

The various stages and processes of the WTO are also explained comprehensively in layman language in its Web pages (including free e-learning modules, all WTO legal texts, WTO documents and background papers). The dissemination of knowledge and ease of access leads to greater familiarity among members, decision-makers, legal advisers and academics and promotes transparency and confidence in the system.

Recommendation:

The ASEAN website is a useful tool and should be improved to likewise provide much more guiding information about all aspects of the DSM, to promote transparency and confidence in it among ASEAN members.

(c) Composition of Panels and of the Appellate Body

Currently, the publicly available information on panels and the Appellate Body is lacking.

Recommendation:

There should be dissemination of information, for example, making available to ASEAN member states an indicative list of panelists,

publication of the Appellate Body members' names and qualifications, and, when disputes are raised, there should be prompt dissemination and updates of information on these on the Secretariat website.

5.4.2 Legal, Resource and Financial Support

There needs to be better dissemination of information on the available support, assistance and advice, especially for less developed ASEAN members, as well as strengthening of existing support systems.

(a) Human and Physical Resources Supporting the DSM Process

The HLTF envisaged establishment of a new system by 2004, providing for advisory, consultative, and adjudicatory mechanisms as follows:

- Establishment of a legal unit within the ASEAN Secretariat; (This unit will provide legal advice on trade disputes)
- Establishment of the ASEAN Consultation to Solve Trade and Investment Issues (ACT); (the ACT is the ASEAN equivalent of the EU SOLVIT mechanism, set up to provide quick resolution of operational problems); and
- Establishment of the ASEAN Compliance Body (ACB) (this is modelled after the WTO Textile Monitoring Body and makes use of peer pressure); and
- Establishment of the enhanced DSM (to ensure expeditious and legally binding decision in resolving trade disputes).³⁰

ASEAN Legal Unit

The HLTF expectations of the Legal Unit are spelt out as follows:

The ASEAN Legal Unit will be staffed by qualified lawyers specializing in trade laws employed by the ASEAN Secretariat. The unit will offer legal interpretation/advice on potential trade dispute issues upon request from countries. The advice is purely advisory and non-binding in nature.

The ACT

This is adapted from the EU SOLVIT mechanism. According to the HLTF recommendations:

It is a network of government agencies (one from each country) to allow the private sector to cut through red tape and achieve speedy

resolution of operational problems encountered, thus helping to create a pro-business environment in ASEAN.

Private individuals and businesses faced with operational problems related to countries' ASEAN commitments, either at home or in other ASEAN countries, can highlight these problems to the ACT in their country (Host ACT). For problems encountered within the home country, the Host ACT will direct the problem to the appropriate government agencies, and ensure that a proposed solution is sent to the individuals/businesses within 30 calendar days. The 2009 ASEAN Agreement for Trade in Goods (ATIGA) refers specifically to ACT, the ACB as well as the DSM.³¹

For problems encountered in other ASEAN countries, the Host ACT will forward the problem to the other countries' ACT (Lead ACT). The Lead ACT will be responsible for directing the problem to the appropriate government agencies in its country, and ensuring that a proposed solution is sent to the individuals/businesses via the Host ACT within 30 calendar days. To minimize per cent delays, communication between Host and Lead ACTs should be via electronic means, for instance an online database accessible to all member countries.

The ACB

The ASEAN Compliance Monitoring Body (ACB) makes available a non-binding peer review mechanism when a dispute arises. The ACMB is modelled after the Textile Monitoring Body of the WTO. Submission of a dispute to this body is optional, and a complaining member may proceed directly to the procedures provided for under the DSM.

Recommendation:

The above bodies should be adequately staffed and funded to ensure that the requisite expert and manpower are available to serve the needs of ASEAN members which may need to make use of them to obtain legal support to resolve their trade disputes.

(b) Physical/Technological Facilities

On physical and technological facilities, the WTO has its headquarters and Secretariat in Geneva, Switzerland (by no means an inexpensive venue), while the ASEAN Secretariat is in Jakarta, Indonesia. The implication is that DSM disputes will be administered and heard in Jakarta. This means that the physical and electronic infrastructure

needs to be able to support hearings of disputes and disputing parties' related needs. Even the WTO building, already much better equipped than the ASEAN Secretariat, has been undergoing further refurbishment and improvements. As Article 20 of the Protocol provides that substantive hearings are to be held at the ASEAN Secretariat in Jakarta, it must be ensured that the human and physical resources at the Secretariat are adequate and appropriate for hearings of DSM disputes.

In this connection, it is a welcome development that the Secretariat has recently received more physical space with the addition of two buildings next to the existing premises, and it is hoped that the new premises will be fitted out with careful thought to provide suitable administrative as well as dispute settlement facilities.³²

Recommendation:

ASEAN leaders should initiate a study to examine the adequacy and suitability of physical and technological facilities at the ASEAN Secretariat's Jakarta premises. The availability and adequacy of translation services for DSM proceedings and related documents should also be looked into.

(c) *The Secretariat's Legal Duties*

The High Level Task Force envisaged an expanded legal capacity in the Secretariat under the DSM system. As Article 19 of the Protocol requires the Secretariat to "have the responsibility of assisting the panels and the Appellate Body, especially on the legal, historical and the procedural aspects of the matters dealt with, and of providing secretariat and technical support" as well as to "assist the SEOM to monitor and maintain surveillance of the implementation" of panel and Appellate Body reports, it is imperative to ensure that funding is available to make this level of assistance and support available.

It is noteworthy too that Article 19 does not — unlike Article 22 of the DSU — expressly require the Secretariat to provide legal advice and assistance to developing country members or to provide training on dispute settlement under the DSM system. By contrast, the WTO Secretariat is expressly tasked to provide such support, which is invaluable, especially to those members which are new to using or considering use of the system. As most countries in ASEAN are either developing or least developed countries, it is important to provide

legal and technical support in intra-ASEAN disputes, where it is most needed. It appears, however, that in practice, non-binding legal advice may be obtained from the Secretariat's Agreements and Compliance Unit on potential economic disputes.³³

While Article 17 of the Protocol interestingly provides for a DSM Fund to "meet the expenses of panels and the Appellate Body and "any related administration costs of the ASEAN Secretariat", the CLMV countries, for instance, cannot expect to receive any legal assistance from the system. They may deserve further attention in this regard, for a start. However, it appears that the Agreements and Compliance Unit of the Secretariat can give non-binding legal advice.³⁴

Recommendation:

ASEAN members should be made aware of the existing legal assistance available in relation to the DSM process.

Apart from the Secretariat, it may be necessary to provide for a complementary and full-fledged legal support service, akin to the Advisory Centre on WTO Law (ACWL). The ACWL has been providing important advisory as well as representational services to developing members of the WTO. It is staffed by a team of highly qualified lawyers conversant with WTO law and practice and provides a valuable service to less developed states that require either legal advice on their laws or disputes or actual representation in WTO dispute settlement proceedings at highly discounted rates. In the ASEAN context however, there is no equivalent to this, and full legal costs have to be borne by ASEAN members in the event of a dispute under the DSM. This is confirmed under Art. 17.2 of the 2004 Protocol. (While Art. 17 also established a DSM Fund, this Fund is intended to cover the expenses of panels and, the Appellate Body and related ones of the ASEAN Secretariat.)

Recommendation:

ASEAN leaders should consider establishment and support of an advisory and legal service for less developed ASEAN members in the area of trade and investment disputes.

5.4.3 DSM — Information and Publicity

For officials of ASEAN grappling with the implications of WTO disputes and their legal implications — which has only in the last 10 years or so begun to provide a basis for understanding the substance

and interpretation of WTO rights and obligations, it is a significant requirement for these officials to also be familiar with the relatively new ASEAN DSM system. It is, therefore, imperative that, for the DSM to be useful, all critical information about it should be made easily available.

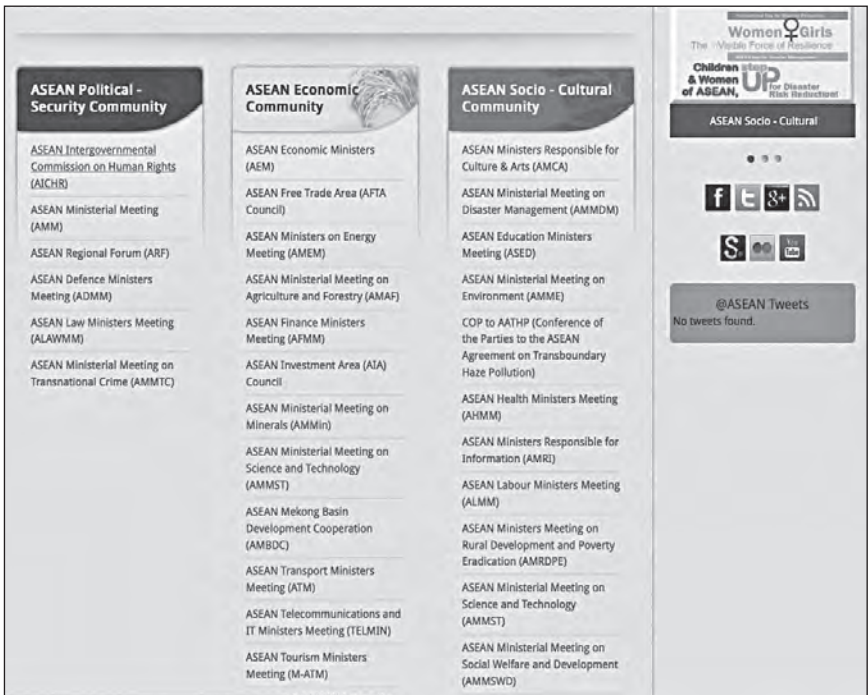
Recommendation:

The following are ways to achieve better and wider dissemination of information on the DSM.

(a) The ASEAN website can be a powerful tool for disseminating information about the dispute settlement process.

Currently the website is not known for its ease of navigation and searches. Improvements can be made in a variety of ways.

Figure 8.1
Screen Capture of ASEAN Home Page as at 16 May 2013



First, a clear link to a Dispute Settlement Web page that provides a one-stop source of DSM information should be created on the ASEAN home page. Currently, looking at the ASEAN home page, it is not immediately obvious where one might locate information on the DSM or its features, as can be seen in the screen capture of the list of ASEAN Community links in Figure 8.1.

Recommendation:

A clear link should be inserted in the main home page for a start. In addition, in the suggested (new) Dispute Settlement page, a number of important links needs to be included. Such links should include:

- All legal documents relating to the DSM, such as the Protocol and its predecessor;
- Background and overview information on the DSM, such as the HLTF report leading to the creation of the DSM;
- Information on all available avenues of dispute settlement, including the ACT, ACMB and DSM;
- User-friendly charts and time-lines of the DSM process;
- Information on assistance available from the Legal Unit and its contact particulars;
- Information on an indicative list of panel members, including their names, nationalities and relevant qualifications;
- Appellate Body members' names, nationalities, relevant qualifications and appointment dates and tenures of appointment;
- Up-to-date information on any complaints that have been formally initiated, and on any panels that may have been requested and established; and
- Updates as and when there are important Ministerial or other official statements pertaining to the DSM or its use.
- In the longer term, e-training modules could be developed and linked to this Web page as well, to facilitate learning about the DSM by members.

By way of comparison, the WTO has a "Dispute Settlement Gateway" page, which provides vital information and links to all aspects of the DSU system. While ASEAN's trade dispute settlement system is still in a state of relative infancy, the Gateway may serve as a useful model on the basic types of information and documentary links that are crucial to policy-makers, lawyers and researchers.

The lack of a clear and coherent web-based information system on the DSM can be a strong detraction from the usefulness and transparency of the DSM system.

(b) Information for Political Decision-Makers

Recommendation:

Apart from online information, face-to-face information sessions should be organized for decision-makers and officials in ASEAN, to further familiarize them with the DSM.

Recognizing the limit on the resources of the Secretariat, such sessions (as well as development e-training materials mentioned above) can be co-organized with neutral institutions and academics familiar with the DSM and its functions.

5.4.4 Policy Factors

As ASEAN seeks to introduce more rules-based characteristics to the integration mechanisms, a shift in the mindset of leaders — through better dissemination of information and strong DSM institutional features and support — must take place, to include, beyond the traditional “ASEAN Way” of full consensus, the possibility of a different approach in the specific area of trade disputes. This is certainly not to suggest an abrogation of the long-standing “ASEAN Way”, which has served ASEAN well in many respects through the years. Rather, it is a hope that it will evolve to accommodate the more active use of a rules-based, WTO-like system of dispute settlement that will yield results that are fair, certain and satisfactory to parties in the field of trade disputes covered by the DSM. Members have already put the infrastructure in place and the next shift in thinking must occur at the decision-making level when a trade dispute arises.

In addition, in the past, it might have been thought that the DSM was a purely politicized system, allowing ASEAN leaders or senior ASEAN officials to have ultimate decision-making powers in a trade dispute. To the extent that such a belief is an impediment to trust in or use of the DSM, it needs to be debunked forcefully.³⁵

Mirroring the spirit and in several provisions, the letter — of the WTO DSU system, the DSM establishes a rules-based system. In accepting a much more rules-based DSU, the WTO members intended that the situation prior to the establishment of WTO (in the era of

GATT 1947) of unilateral trade acts and political vetoes over dispute resolution should be changed. In like fashion, ASEAN has signalled with the DSM that economic disputes between members which remain unresolved would have to move beyond political decisions to a rules-based legal determination and remedies.

A good example of this is found in the WTO's reverse consensus method of decision making, which has been adopted by the 2004 Protocol, when it comes to adoption of panel or appellate rulings. Under the DSU and the DSM, this means that a panel and Appellate Body decision is to be adopted by the members acting as the DSB, unless *by consensus* it decides *not* to do so. When this mechanism was introduced in the WTO, it effectively eradicated the possibility that existed under the GATT era (i.e., pre-WTO) of non-adoption or unilateral blocking of panel decisions. Similarly under the 2004 Protocol, once a panel or the Appellate Body has made its decision, the SEOM is obliged to adopt it unless all members agree not to do so. The role of SEOM thereafter is one of surveillance of the *implementation* of the decision and is *not* a final appeal body. This resembles the role of the DSB. Another example is the mirroring by the Protocol of the DSU's use of clear deadlines for panel and appellate decisions, as well as the retaliation rules.

Given that the DSM is already present and is a rules-based, technical system, ASEAN must move beyond the image that it works only by consensus.

Recommendation 1:

ASEAN members and their legal professions and business communities should be made aware of **the rules-based features** of the 2004 Protocol and their advantages.

Recommendation 2:

Potential benefits of bringing a DSM dispute — rather than a WTO dispute — where a choice exists, should be impressed upon ASEAN members and their business communities. Examples could be the potentially lower local costs of holding hearings in Jakarta instead of Geneva, Switzerland; and the proximity of ASEAN capitals and officials to Jakarta than to Geneva and the time saved in travel by officials for hearings or meetings. Another example would be the improved, shorter deadlines under the DSM as compared with those of the DSU, for speedier resolution of trade disputes.

Recommendation 3:

ASEAN leaders are invited to consider encouraging the teaching of the ASEAN trade and investment settlement systems as part of ASEAN university courses on international economic law, or on trade and investment law, to raise the awareness and understanding among future lawyers in the region of these mechanisms and their relevance.

6. Conclusion

While the above specific suggestions should be looked into, it should be noted that non-use of the DSM is not in itself a total calamity, as it could mean that, for the most part, the integration agreements covered by the DSM are working quite smoothly, or that disputes are taken care of through non-adversarial means apart from the DSM.

As ASEAN seeks to introduce more rules-based characteristics to the integration mechanisms, a shift in the mindset of leaders and officials — through better dissemination of information and strong DSM institutional features and support — must take place, they have to move beyond the traditional “ASEAN Way” of full consensus in certain specific areas *where necessary*, such as where consultations are not successful. This is not to suggest the abrogation of the “ASEAN Way”, since consultations — which need not be adversarial and may be amicable — are still a key step and component of the DSM dispute settlement process. This ensures that disputes may still be settled without progressing to more formal and adversarial hearing processes.

Some doubt has been expressed as to whether the new, more rules-based DSM system is too “legalistic”, and unable to appreciate ASEAN’s history and mode of dealings.³⁶ This suggests a possible “disconnect” between ASEAN leaders’ aspirations for a more legal rules-based system,³⁷ and some officials’ continuing preference for a more informal, non-legalistic system. The recent dispute between Thailand and the Philippines³⁸ — where the parties were prepared not only to take the dispute to WTO dispute settlement but even to final appeal before the WTO’s Appellate Body — shows, however, that ASEAN members are in fact very much prepared to utilize a rules-based and “legalistic” system against each other.

With the WTO and other bilateral or regional agreements having their own dispute settlement systems, the DSM is but one possible option for ASEAN members who are party to all these, and find that

a particular problematic measure may form the subject-matter of more than one dispute settlement forum. Where the DSM is an applicable mechanism, its current deficiencies should not be allowed to form a barrier to members choosing to use it to resolve their trade disputes.

It should also be recognized that while trade dispute settlement is not a primary integration tool, it is *an important secondary tool* that supports integration and liberalization efforts. This is because it is a legal tool for ensuring that legal commitments carefully negotiated and agreed upon by ASEAN members for the purpose of integration are both complied with and implemented. To quote the DSU: the WTO members “recognize that [the WTO’s dispute settlement system] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rules of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”³⁹ Unfortunately, as pointed out earlier, these words (and indeed those in the Article it is found in) and their assurances are not found in the 2004 Protocol.

It is therefore imperative to ensure that the DSM system is a strong and reliable *supporting* mechanism in the integration process, so that ASEAN members may call upon it with confidence and trust should the need to use it arise. While the objective would not be to ensure *actual use* of the DSM by 2015, it should certainly be an objective to ensure that an operationally ready, structurally comprehensive and easily navigable system is in place by then or earlier, so that any dispute that arises may be referred to it with the confidence that the case will be handled efficiently, transparently and fairly.

NOTES

1. Articles 24–26, ASEAN Charter.
2. For the text, see: <<http://cil.nus.edu.sg/2010/2010-protocol-to-the-asean-charter-on-dispute-settlement-mechanisms/>>.
3. For statements related to the 2010 Protocol, see: <<http://www.aseansec.org/24506.htm>>; <<http://www.aseansec.org/24447.htm#Article-5>>; <<http://www.iseas.edu.sg/aseanstudiescentre/asco16-10.pdf>>; <<http://www.unpan.org/PublicAdministrationNews/tabid/115/mctl/ArticleView/ModuleID/1467/articleId/21548/default.aspx>>.

4. Article 2.2(d) and (h), ASEAN Charter.
5. Article 25 of the ASEAN Charter. This system is elaborated upon by the 2010 Protocol. For a discussion on the role of the Charter in relation to dispute settlement, see <<http://www.scribd.com/doc/29624617/Thayer-ASEAN-s-Dispute-Settlement->>.
6. Articles 24–26, ASEAN Charter.
7. Article 1 of the Charter provides as follows with regards the meaning of an “unresolved dispute”: “a dispute over the interpretation or application of the ASEAN Charter or other ASEAN instruments which has failed to be resolved by mutual agreement, and after the application and implementation of Article 9 of this Protocol”. Article 9 provides for a procedure in which the ASEAN Coordinating Council attempts to resolve the dispute.
8. For instance, the DSM contains its own surveillance mechanism.
9. On a related note, the International Center for the Settlement of Investment Disputes (ICSID) is a specialist arbitral body that handles investor-state disputes that may arise under bilateral investment treaties (BITs), and the case law from these disputes is both ample in number as well as rich in the variety of issues raised by foreign investors acting as complainants against host states.
10. (2003) 42 ILM 540. A second argument was also raised in the case, based on provisions in the 1998 Framework Agreement.
11. For information on NAFTA investor-state disputes, see the cases at <<http://www.state.gov/s/l/c3439.htm>>.
12. Article 40(2).
13. ASEAN Investment Report (AIR) 2010–11, launched at the ASEAN Summit, November 2011, p. 25 <<http://www.aseansec.org/20633.htm>>.
14. See Statement by the Chairman of ASEAN, “On the 45th Anniversary of ASEAN: The Way Forward”, ASEAN Leaders’ Summit, Phnom Penh, 4 April 2012, at para. 11 <http://www.asean.org/documents/20th%20summit/45th%20Anniversary_English_FINAL.pdf>.
15. For a flowchart of the mechanism, see <http://www.aseansec.org/hltf_flowchart.htm>. See also <<http://www.aseansec.org/Fact%20Sheet/AEC/2009-AEC-017.pdf>>.
16. For the text of the 1996 DSM, see <<http://cil.nus.edu.sg/1996/1996-protocol-on-dispute-settlement-mechanism-signed-on-20-november-1996-in-manila-philippines-by-the-economic-ministers/>> (accessed 13 April 2012).
17. See <<http://www.asean.org/16754.htm>> (accessed 13 April 2012).
18. ASEAN Secretariat, *ASEAN Fact Sheet*, February 2009 <<http://www.asean.org/Fact%20Sheet/AEC/2009-AEC-017.pdf>> (accessed 13 April 2012).

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28. Article 1 of the DSM has been criticized as allowing “forum-shopping”; see Paolo R. Vergano, “The ASEAN Dispute Settlement Mechanism and Its Role in a Rules-based Community: Overview and Critical Comparison”, paper presented at the inaugural conference of the Society of International Economic Law, June 2009, p. 7 <http://aieln1.web.fc2.com/Vergano_panel4.pdf> (accessed 13 April 2012).
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35. One reason advanced for arguing that the ASEAN system still provides for the possibility of political decision making in relation to dispute settlement is that the ASEAN Charter provides for reference of “unresolved disputes” or cases of non-compliance with rulings to political leaders at the ASEAN Summit. See, for example, Paolo R. Vergano, “The ASEAN Dispute Settlement Mechanism and Its Role in a Rules-based Community: Overview and Critical Comparison”, paper presented at the inaugural conference of the Society of International Economic Law, June 2009, p. 8, <http://aieln1.web.fc2.com/Vergano_panel4.pdf>.
36. See, for instance, the view expressed by David Chin, a former senior Singapore trade official (see note 24 above, at pp. 112–14) that ASEAN officials appear to prefer an informal, accommodating and cooperative

- means of dispute settlement, and that there may be a lack of trust in more legalistic means or in panels that may not fully appreciate the evolution of the ASEAN free trade process.
37. See e.g. paragraph 18 of the Joint Media Statement at the 35th ASEAN Economic Ministers Meeting in Cambodia in 2003: "... The Ministers also agreed to revise the existing ASEAN Dispute Settlement Mechanism (DSM) to ensure that binding decisions can be made expeditiously and based solely on legal considerations for intra-ASEAN trade disputes (adjudication mechanism)." (*Italics added.*) See <<http://www.aseansec.org/15070.htm>> (accessed 13 April 2012).
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9

Enhancing the Institutional Framework for AEC Implementation: Designing Institutions that are Effective and Politically Feasible

Helen E.S. Nesadurai

1. Introduction

The institutional structure supporting the ASEAN Economic Community (AEC) project remains limited. Despite the many suggestions proposed over the years for institutional strengthening, and despite ASEAN adopting a number of these proposals, ASEAN's institutional architecture for regional integration continues to emphasize political or discretionary approaches and little in the way of authority delegated to third parties or to the ASEAN Secretariat for enforcing compliance. ASEAN member states are well known for resisting any form of centralized authority to manage and complete the integration process.¹ It is also important to recognize that this penchant for weak institutions, in fact, reflects weak preferences for integration or, at least, for particular aspects of the regional integration agenda.² This

means that any proposal aimed at reworking regional institutions to support integration must consider institutional designs that are *politically feasible* so that these will more likely be adopted by ASEAN governments. Ideally, institutions should also be crafted so that they can help to *change* national preferences in favor of a deeper commitment to regional integration that will, in turn, ensure timely and effective implementation.

This chapter explores how best to design regional institutions to enhance AEC implementation. It begins with a political economy account of regional integration in Section 2 that helps us understand the factors that drive ASEAN countries' national commitment to regional integration as well as those that hold back these same governments from fully implementing these commitments. By doing so, we are better able to appreciate the ASEAN aversion to strong, centralized institutions and the preference for flexibility in the way regional integration is designed. Section 3 draws on the political science literature to consider how institutions might theoretically be designed to support cooperative projects like economic integration; this section also reviews the various institutional mechanisms adopted in ASEAN to support the AEC project. Based on the preceding discussion, Section 4 provides some suggestions on how institutions in ASEAN might be re-designed to support the AEC process in the light of national and regional political realities.

2. The Political Economy of ASEAN Integration: Understanding ASEAN's Preference for Flexibility

Three features characterize ASEAN's approach to regional economic liberalization and integration, seen in both the AFTA project initiated in 1992 and the current AEC project. First, ASEAN governments have generally been forthcoming in initiating ambitious plans and programs on economic cooperation and liberalization. Second, despite ambitious commitments, implementation of these commitments has faced problems, with member governments sometimes failing to meet set targets and/or ignoring them, asking for revisions to original targets and/or seeking exemptions from them. Third, ASEAN governments have always preferred relatively limited institutional structures that in the end are unable to impose stronger discipline on member governments to adhere to the commitments, action plans and timelines

to which they themselves earlier agreed. Although the AEC has seen a number of institutional innovations adopted to aid the integration process, it is clear that ASEAN members prefer non-intrusive, inter-governmental mechanisms for decision making, enforcement and adjudication that emphasize flexibility and consensus. The question is whether the flexibility inherent in ASEAN's approach to regional economic cooperation, integration and institutionalization is all that undesirable.

Despite the diversity of national political systems, polities and societies across the region, it is safe to say that Southeast Asian policy-makers in general share a broad commitment to maximizing national growth and employment as a means to secure and legitimize their rule domestically. However, they are also constrained by having to meet other politically salient priorities in their respective states ranging from domestic distributive and social equity agendas and nationalist/developmental goals, to strategic/security considerations. Although policy-makers appear to recognize the growth and employment benefits of liberalization and regional integration, they also embrace varying degrees of state intervention in the domestic economy in order to meet those domestic distributive and non-economic goals that they believe cannot be effectively achieved through economic liberalization and the market mechanism. A second, and related feature of the Southeast Asian political economy is the close relationship between ruling elites and the business sector, whether state-owned enterprises, government-linked corporations (GLCs), or private businesses.³ However, the effects of government-business relations on national policy choices with regard to liberalization and integration are mixed, depending on whether outward-looking or inward-focused business interests have the ear of ruling elites. Although civil society and labor groups have grown more vocal in articulating their concerns over economic liberalization and regional integration in the slowly expanding democratic space in the region,⁴ regional integration processes continue to be shaped and managed by ruling elites whose responses to integration will be filtered both by external competitive forces and dominant domestic interests and priorities. The precise configuration of domestic interests either favoring or resisting regional liberalization and integration will also vary across Southeast Asia, given the region's inherent diversity in terms of state-society relations, level of development and even political system. This means that ASEAN

country “preferences vary with respect to a range of economic policies”, which include trade and investment liberalization and “behind-the-border” regulatory policies.⁵

The interplay between external competitive pressures and domestic factors in shaping the evolution of AFTA and the AEC provides valuable lessons for this chapter. For instance, both AFTA and the AEC were initiated by ASEAN governments, which saw in these two projects the chance to secure national economic growth by enhancing the competitiveness of the ASEAN region as a whole, particularly as a site for investment. However, these same governments were also constrained in how far and how fast they could commit to regional integration, because they had to take into account domestic socio-economic and sociopolitical priorities, including domestic business demands for exemptions from regional liberalization schedules.⁶ Although governments do not always concede to such demands, they have tended to acquiesce when politically influential firms or politically important sectors are involved, particularly those with close ties to ruling elites.⁷ Even though there is now a greater degree of business interest in regional integration, government commitment to integration hinges on how integration impacts on politically important domestic interests and priorities. Such considerations can make governments more cautious about the speed and extent of regional liberalization and integration to which they are prepared to commit and/or implement. Consequently, regional integration in Southeast Asia is deliberately designed for flexibility to allow national governments sufficient autonomy in deciding which sectors to liberalize, deregulate or reform and at what speed. The institutional design of AFTA, and later the AEC, reflects the vertical and horizontal compromises that member states have had to forge between states and various domestic interest groups on the one hand and between the member states involved in these two projects on the other hand.

However, far from undermining regional cooperation, flexibility may have saved the AFTA project by allowing affected member governments the chance to renegotiate their original commitments. The quid pro quo was for ASEAN to develop clearer, legally binding rules to govern regional liberalization in future.⁸ Although flexibility became institutionalized through new procedural rules that allowed exemptions, modifications of concessions, and notifications of intent to delay or

withdraw commitments, these rules nonetheless introduced greater order into the regional liberalization exercise, thereby also signalling to business investors that regional economic liberalization remained on the cards.⁹ The relevant question to ask is how to reap the positive benefits of flexibility whilst tempering its negative consequences. The next section draws on the theoretical literature on institutions to address this question.

3. Institutions for Integration: Theoretical Insights and the ASEAN Experience

Institutions can very simply be defined as governance arrangements comprising sets of norms, rules, procedures, and organizational structures that aid collective action. Depending on their design, institutions can aid implementation of integration commitments. This can occur through ensuring that clearly defined commitments are agreed upon and effectively monitored, so that instances of non-compliance can be addressed while the propensity for non-compliance reduced either through reputational effects or material costs. If a state cares about its reputation as a reliable cooperation partner in the eyes of other states or in the eyes of a key audience — investors, for instance — it is less likely to renege on its commitments without good, defensible reasons. Material costs may be incurred if institutional rules require compensation to be paid for non-compliance. In this way, institutions help to shape the behavior of both members and even non-members. For instance, business actors (non-members of the institution) are more likely to tailor corporate investment, production and marketing decisions toward the regional market if they are convinced that regional integration will be completed. An institutional framework that enhances the credibility of the integration project can catalyse such actions. On the other hand, if business actors do not expect regional integration to be delivered as promised, they are less likely to factor the regional market into corporate plans.

The report of ADB's flagship study on *Institutions for Regional Integration* identifies decision-making rules and a set of various "commitment devices" to be especially helpful aid to implementation.¹⁰ In addition to these two institutional categories, "facilitating institutions" are equally vital in bolstering integration.¹¹ See Table 9.1. The rest of

TABLE 9.1
Institutional Design for Enhancing Implementation

Institutional Category	Variations
Decision Rules	<ul style="list-style-type: none"> • Unanimity • Consensus • Majority Voting • Weighted Voting • Qualified Majority Voting • Supermajority Voting
Commitment Devices	<ul style="list-style-type: none"> • Mobilization of political leaders • Legalization, including delegation of monitoring and sanctioning to third parties such as secretariats • Enfranchisement of non-government actors • Side payments
Facilitating Organizations and Structures	<ul style="list-style-type: none"> • Coordination organizations • Technical and policy advice providers • Financial support • Other parallel agreements supporting (or detracting from) AEC commitments

Source: Table constructed from information in ADB, *Institutions for Regional Integration*, pp. 103–11, 118.

this section discusses how these institutional forms are theoretically expected to support regional integration and how well (or not) they work in ASEAN and the AEC.

3.1 Decision Rules

Decision making, which is fundamental to the effectiveness of any institution or organization, can occur through a variety of rules (see Table 9.1). Although some form of voting is seen as an efficient way of making decisions in situations where there are divergent preferences, majority voting can undermine or even fracture the institution when “persistent minorities” unhappy with the [majority] decisions adopted choose to exit the institution as decisions cannot be changed unless through another majority vote.¹² Although less efficient than majority voting systems, consensus-decision rules work against the collapse of the

project by preventing the emergence of such “discontented minorities” as even one “nay” means the proposed action cannot be adopted.¹³ But, consensus decision making is not always the long drawn-out process it is often made out to be. In ASEAN, consensus rarely means all ten members have to agree on the joint action; consensus is not synonymous with unanimity. However, cooperation can be blocked if even one member state opposes the project.¹⁴ Only if this happens will the process of getting agreement on some proposal be protracted. Consensus decision making will remain a key feature of ASEAN decision making although, the ASEAN Charter accords ASEAN leaders the right to use voting on issues that cannot be resolved through consensus.¹⁵ However, as the discussion to follow suggests, the ASEAN leaders are unlikely to opt for voting on unresolved issues, given the entrenched ASEAN organizational culture of consensus and the utilitarian value of the consensus system in generating peaceful relations in ASEAN.

3.2 Commitment Devices

Commitment devices are useful in facilitating agreement on, and implementation of, integration commitments, especially amongst a heterogeneous group. ADB flagship study identifies a number of these devices. One such device, the mobilization of political leaders, is said to help ensure cooperation by entrenching the commitment to the collective project deep within the political executive.¹⁶ US President Clinton’s initiation of the APEC Leaders’ Meeting in 1993 had the effect of galvanizing political commitment to the cause of Pacific-wide economic liberalization. However, as the APEC and the ASEAN experiences reveal, the initial public commitment by top political leaders to cooperative projects has not been sufficient to ensure compliance with commitments thus made. In fact, the involvement of high-level political leadership can detract from project implementation if political calculations external to the project are injected into decision-making. In ASEAN, maintaining a unified position and good relations with other leaders can be more important than censuring a non-cooperative member.

A second commitment device is legalization, which comprises three components: the precision of commitments, whether these are legally binding and whether the authority to interpret, monitor and enforce commitments has been delegated to a third party such as a

standing secretariat.¹⁷ Having precise and binding commitments may be sufficient to ensure compliance, especially through reputational effects, even if organization members, as in ASEAN, are averse to delegating interpreting, monitoring or sanctioning authority to third parties. However, if members are averse to adopting precise and/or binding targets, then even the reputational constraint is unable to work. As Haggard puts it, “how can I tell if you have violated your commitments if they are non-binding or I cannot even be sure what they are?”¹⁸ Although many AEC commitments are legally binding, there is only a limited degree of precision in terms of targets and timelines outlined in the AEC Blueprint, which has identified 17 policy aims and 176 priority actions to be completed within four implementation periods beginning in 2008 and ending in 2015.¹⁹ There are still areas where more detailed national action plans need to be worked out. Moreover, the Blueprint supports flexible implementation through “pre-arranged flexibility”.²⁰ However, what this means and how it will be decided have not been clarified.

While the ASEAN Secretariat has been accorded the task of monitoring members’ compliance with their AEC commitments, the Secretariat has no delegated authority to punish non-compliance.²¹ It is unlikely that ASEAN members will agree to transfer any degree of authority to *enforce* implementation to the Secretariat in the foreseeable future.²² In fact, the ASEAN Charter “does not provide for sanctions, suspension or expulsion in the event of non-compliance”.²³ There are only protocols that allow for negotiated compensation when original commitments are modified or withdrawn or if aggrieved parties invoke the enhanced dispute settlement mechanism.²⁴ However, the enhanced DSM remains a limited mechanism for a number of reasons. For instance, the ASEAN Senior Economic Officials Meeting (SEOM) has the right to decide, by consensus, not to establish a panel to hear a dispute (Article 5).²⁵ Although compensation for non-compliance is available under Article 16 of the Enhanced DSM, the payment of compensation is voluntary. Articles 26 and 27 require unresolved disputes or non-compliance with DSM rulings to be referred to the ASEAN Summit for a final decision. Although leaders can choose whether to make their decision on the basis of consensus or some form of voting (see Article 20 of the Charter), they are unlikely to opt for voting or formal censure. Thus, even having clearer rules and an enhanced DSM does not preclude AEC implementation problems

from being addressed through *political* negotiations rather than clear rules or legal principles.²⁶ This can make the AEC process somewhat unpredictable.

The third commitment device identified by ADB is “the enfranchisement of non-government actors”.²⁷ One way to enfranchise such actors is to accord them *locus standi* in dispute settlement.²⁸ This move, however, has not even been adopted in the WTO and is unlikely to be politically feasible in ASEAN.²⁹ A more informal enfranchisement mechanism is to accord “voice” to non-state actors. This can aid the cause of integration when pro-integration private-sector actors publicly (or privately) press national governments to comply with their integration commitments whenever the latter is tempted to delay or renege on integration commitments.³⁰ Although business actors do not have standing to invoke the ASEAN DSM, there are other avenues through which ASEAN officials and member governments engage with and hear from the private sector. These include ASEAN’s dialogue sessions with the ASEAN Business Advisory Council (ABAC) and the ASEAN Chambers of Commerce and Industry (ASEAN-CCI). Another way to use the private sector to bolster integration is in monitoring. However, this has yet to be done to its fullest potential.

The two monitoring devices in ASEAN — the AEC Scorecard and the NTB Database — are limited instruments because of ASEAN’s reluctance to allow private sector inputs. The ASEAN database on NTBs has been built on *official* notifications of NTBs and does not include notifications by firms that have experienced impediments in the course of their business operations.³¹ Although the Scorecard is a valuable attempt by the Secretariat at enhancing the monitoring of integration commitments, the first AEC Scorecard was not very effective as a monitoring device. Two versions of this Scorecard have been developed: a confidential version that was revealed only to Leaders, Ministers and officials in October 2009 and a “business-focused public version” that was made public in April 2010.³² When the public version records that 73.6% of set targets of the AEC have been achieved, it is, in fact, only referring to the proportion of AEC-related legal instruments that have been domestically ratified rather than the attainment of actual liberalization targets.³³ These developments are not unimportant if we judge AEC compliance not as a binary (of compliance with set targets *versus* non-compliance with set

targets) but as a continuum.³⁴ Domestic ratification then indicates that member states are edging closer to full implementation. However, this does not alter the fact that the public version of the Scorecard resembles more a public-relations exercise rather than an effort to harness publicity to indirectly pressure national governments to comply with their AEC commitments. Governments may be more forthcoming on implementing their AEC commitments if they believe private investors are watching and judging, their actions (or non-actions). Encouragingly, the second Scorecard released at the ASEAN Summit in April 2012 tracked both domestic ratification *and* implementation of commitments. It also solicited the private sector for its views on the various barriers, including non-tariff barriers, that firms have encountered in ASEAN. The Secretariat's dialogues conducted with firms from three priority sectors — the automotive, electronics and textiles industries — will also be used to update the NTB Database.³⁵

Although business actors can be valuable allies in driving implementation of integration initiatives, the converse is also possible if domestic businesses demand protection or delays in regional liberalization as both the AFTA and AEC experiences outlined in Section 2 show. Even if governments are not directly lobbied by inward-focused business interests, governments often have to take into account the impact of liberalization on industries deemed to be of strategic or developmental value to the country or on politically important domestic groups. NGOs and parliamentarians have expressed concern at the adverse consequences of regional integration on domestic employment and the survival of local businesses. In this regard, the EU example is instructive with respect to the role that side payments, such as redistributive transfers, have played in securing *national* integration commitments.

Thus, a fourth commitment device suggested by ADB is the use of side-payments or redistributive transfers to those groups disadvantaged by regional integration. Such transfers are recognized by economic theory — in the form of Coase's theorem — as an efficient means to cooperation in collective action situations where there are gainers and losers.³⁶ It is important, though, not to regard such transfers as "bribes" to forestall opposition to cooperative projects but to recognize that some forms of transfers, development

assistance or even differentiated deadlines for instance, can help bring disadvantaged member states, groups or regions to the level where they can more easily participate in integration.

The Initiative for ASEAN Integration (IAI) is significant as a form of development assistance, although its potential has not been fully realized. The IAI usefully provides technical and financial resources for a variety of development projects that are meant to support regional integration — development of infrastructure, human capital and information technology in particular. However, such transfers have not been made conditional on recipients meeting integration commitments.³⁷ Side payments that take the form of differentiated deadlines for completing regional integration are especially useful in heterogeneous settings where one or more members need additional time to comply with set targets because of various domestic constraints. In ASEAN, the differentiated AFTA/AEC completion timetable, both aimed at securing the commitment to integration of the new/poorer members of ASEAN — the CLMV countries of Cambodia, Lao People's Democratic Republic, Myanmar and Viet Nam — should be regarded as a useful commitment device. The 5-year transition period allowed these states before they are expected to complete integration, effectively a “variable-speed geometry” model of integration, enhances the overall commitment of members holding differing preferences on integration and varying capacities to complete the process.³⁸ Variable-speed geometry has helped sustain the collective commitment to AFTA when varying timelines for completing the regional liberalization of politically sensitive products and sectors — automobiles, rice, sugar, petrochemicals — were permitted.³⁹ It has also been institutionalized in Article 21 of the ASEAN Charter as the “ASEAN minus X formula” toward “flexible participation” in the AEC.⁴⁰ Unfortunately, this formula could worsen regional market fragmentation in the interim before integration is finally completed. If timelines as to when the “X” members are to comply with AEC targets are unclear or left vague, then the predictability that businesses require if they are to take the AEC seriously is undermined.

3.3 Facilitating Organizations and Structures

Aside from decision-making procedures and commitment devices, “facilitating institutions” provide “advisory, technical, administrative

and financial support” for regional integration.⁴¹ The most important of these institutions is, of course, the ASEAN Secretariat, which directly coordinates all of ASEAN’s many functions and activities in addition to taking on a greater role in monitoring regional integration. The Secretariat is primarily responsible for ensuring that the more than 700 meetings held in ASEAN each year are effectively coordinated.⁴² Under the AEC pillar alone, there were at least 138 meetings between June 2009 and May 2010 involving 13 ministerial councils or committees through which the integration process is managed.⁴³ Termsak Chalermpananupap, Director of the Political Security Directorate at the ASEAN Secretariat, names “lack of coordination” as a serious weakness in ASEAN, a problem that extends also to ASEAN coordination of economic integration.⁴⁴ Although ASEAN established three Community Councils for each of the three community pillars (political-security, economic and socio-cultural) as a way to enhance coordination within ASEAN, there is some doubt within ASEAN as to whether these can work to improve coordination, information sharing and decision making on ASEAN’s community building process.⁴⁵ For the AEC, this sort of coordination involves about 12 functional ministries; however, inter-ministerial coordination must be complemented by effective coordination within ministries amongst officials, between officials of different ministries within each community, and ultimately between the three community pillars.⁴⁶ This overarching coordinating task has been awarded to the ASEAN Coordinating Council made up of the ASEAN Foreign Ministers, who retain, therefore, their *primus-inter-pares* status within the Association.

While ASEAN has recognized the importance of enhancing coordination amongst its many different programs by establishing various coordination councils, the Secretariat’s Termsak argues that these “organizational extensions” are “events, not agencies, and periodic occasions, not permanent offices”.⁴⁷ Moreover, he points out that ASEAN’s limited financial resources restrict the actions it can take in order to further integration. Recent available figures reveal ASEAN’s limited resources in 2009 — about US\$9 million for the Secretariat’s operating expenses (from identical contributions from members) and US\$11 million for the Development Fund, also from member contributions, to fund special projects. However,

this is reportedly insufficient, given the territorial scale of the region, its huge development needs, and the number of programs it is committed to achieving through its three community pillars.⁴⁸ Other sources of funds include the ASEAN Foundation and the ASEAN Infrastructure Fund. Although ASEAN has been adept at winning funds from its Dialogue Partners, these depend on the generosity of these donors and their financial positions, and, thus, are not always secure or sustainable sources of funding. Termsek argues that, without organizational structures that are more permanent with long-term staff members and sufficient budgetary resources for both operational and project-based needs, it will be difficult for the ASEAN Secretariat to provide effective support for regional integration and for ASEAN itself to meet its publicly stated commitments.⁴⁹

More “permanent offices” to support regional integration are, however, unlikely to be created given ASEAN members’ aversion to centralized bureaucracies; thus, the Association will have to work within the present coordinative framework notwithstanding its limitations. However, ASEAN can streamline some of its structures to address redundancies and minimize task duplication, which in turn could free up resources to support regional integration. For example, with the ASEAN Plus Three Macroeconomic Research Office (AMRO) now established to undertake financial and macroeconomic surveillance to support the multilateralized Chiang Mai Initiative, the ASEAN surveillance infrastructure can be reoriented toward supporting the AEC process. Although the ASEAN Integration Monitoring Office (AIMO), previously known as the Macroeconomic and Finance Surveillance Office, was established in 2011 to support AEC completion,⁵⁰ it appears that AIMO will continue to undertake regional financial surveillance as well as monitoring ASEAN regional integration.⁵¹ While the two tasks may be linked in that regional integration requires financial stability, AIMO should focus on monitoring regional economic integration and leave surveillance support for the Chiang Mai Initiative to AMRO. In this way, AMRO, too, may be regarded as an external facilitating institution that contributes to the AEC project, albeit only indirectly.

Other facilitating institutions external to ASEAN that can support the AEC process include ADB, UN-ESCAP, the Economic Research

Institute for ASEAN and East Asia (ERIA), the ASEAN-ISIS network of regional think-tanks, and the ASEAN dialogue partner network of countries. Support comes in the form of policy and technical advice, while funding support usually comes from ADB and the ASEAN Dialogue Partners through official assistance as well as assistance from private foundations.

One category of external institutional structure with ambiguous effects on ASEAN's capacity to complete regional integration comprises the bilateral and plurilateral free trade agreements (FTAs) and similar economic partnership agreements that ASEAN governments have negotiated individually and collectively with non-ASEAN members. Despite the lack of convincing evidence that such FTAs generate substantial net economic gains for participating countries, governments continue to pursue them for their perceived economic (especially market access) as well as political benefits.⁵² By 2010, the ten ASEAN states together had concluded a total of 91 FTAs (excluding AFTA/AEC) with 60 either under negotiation or proposed.⁵³ This, for many observers, has created a "noodle bowl" effect in the region, with losses coming from trade diversion effects and higher business costs as firms negotiate the inconsistencies between the many agreements in place.⁵⁴ Notwithstanding these losses, it is possible for these bilateral and plurilateral arrangements to be supportive of ASEAN regional integration if these agreements lead to domestic regulatory reform that in turn facilitates AEC implementation. However, these FTAs could as well divert the attention and resources of ASEAN members away from AEC matters.⁵⁵ Under these circumstances, FTAs such as these could be regarded as hindering rather than facilitative structures.

4. Enhancing Regional Institutions for ASEAN Economic Integration

Table 10.2 summarizes how AEC institutions fare in terms of the three institutional categories of decision making, commitment devices and organizational structures. The table also highlights the strengths and limitations of these institutions as well as suggests where reform can be more productively concentrated.

TABLE 9.2
The ASEAN and AEC Framework: Implications for AEC Implementation

Institutional Category and Variations	ASEAN Experience	Evaluation
Decision Rules	Consensus decision making institutionalized in ASEAN	Consensus decision making unlikely to change, and remains valuable to ensure ASEAN unity and the overall commitment of its members to the AEC.
	ASEAN Charter allows voting at leaders' summits to resolve unresolved conflicts or dispute settlement.	Voting likely to be unacceptable and could fracture ASEAN.
		Voting by leaders at summits unlikely to be adopted as voting is likely to be viewed as a move that could undermine intra-ASEAN unity.
Commitment Devices		
Mobilization of political leaders	Bi-annual leaders' summits ensure involvement by political leaders in ASEAN matters.	Leaders' summits will at most apply peer encouragement rather than voting to censure or sanction AEC non-compliance; leaders are likely to be vigilant about maintaining intra-ASEAN unity, which is the basis of ASEAN's capacity to act on a range of internal issues beyond the AEC as well as externally as a driver of wider East Asian regionalism.

TABLE 9.2 (Cont'd)

Institutional Category and Variations	ASEAN Experience	Evaluation
Legalization, including delegation of monitoring and sanctioning to third parties such as secretariats	Most agreements now legally binding but commitments still imprecisely stated although actions ongoing to make these more precise and time-bound.	Flexibility will remain the watchword of ASEAN integration and, as with consensus decision making, remains valuable in maintaining ASEAN unity, given present political realities.
	Use of flexible arrangements such as "negotiated flexibility" and "ASEAN-X" undermines predictability and credibility of regional integration.	Flexible arrangements such as "negotiated flexibility" and "ASEAN-X" should be converted into deferred implementation though this must be clearly time-bound.
	Some degree of delegation of monitoring to ASEAN Secretariat but without enforcement authority.	Even if greater monitoring responsibility is accorded to ASEAN Secretariat, the principals in this principal-agent relationship (i.e., the ASEAN national governments) are unlikely to allow the agent (i.e., ASEAN Secretariat) much autonomy in deciding on how monitoring will be conducted, thus limiting the effectiveness of monitoring.

<p>Two specific instruments available for monitoring — AEC Scorecard and NTB Database</p> <p>Dispute settlement mechanism present but is limited, as it emphasizes political solutions to disputes and non-compliance, there is no sanctioning provided for while compensation is voluntary; thus enforcement mechanism is weak.</p>	<p>Secretariat has recognized need to enhance potential of two monitoring instruments — AEC Scorecard and NTB Database.</p>
<p>Enfranchisement of non-government actors</p> <p>Side payments (to enable those who are disadvantaged by integration to participate in the integration project)</p>	<p>Limited informal enfranchisement mechanism present in the form of ASEAN dialogues with private sector and, to a far lesser extent, civil society and NGOs.</p> <p>Untapped potential of non-government actors as providers of independent information and as feedback mechanisms that can act to shift national commitments toward AEC implementation.</p> <p>Potential of side payments to enhance AEC implementation not fully realized:</p> <ul style="list-style-type: none"> • IAI assistance not linked to or made conditional on AEC compliance; however, such conditionalities are unlikely to be adopted as they contradict the ASEAN institutional culture.

TABLE 9.2 (Cont'd)

Institutional Category and Variations	ASEAN Experience	Evaluation
	<ul style="list-style-type: none">• Differentiated timelines for AEC implementation (variable-speed geometry) can act as a form of indirect side payment;• ASEAN-X formula for flexible participation or negotiated flexibility can also be counted as a form of indirect side payment; however, notion of “negotiated flexibility” not clarified.	<ul style="list-style-type: none">• Differentiated timelines and flexible participation create unpredictability for businesses; although the importance of flexibility in ensuring all members remain committed to the AEC should be recognized, flexibility can be more effectively governed as suggested above.
Facilitating Organizations and Structures		
Coordination organizations	<p>The ASEAN Secretariat is the principal coordination organization supporting ASEAN and the AEC; however, coordination burden is heavy but limited resources and authority provided; coordination remains decentralized and dominated by inter-governmental (ministerial or official) committees and meetings.</p>	<p>ASEAN Secretariat will have to work within present inter-governmental coordinative framework as member governments averse to centralizing more tasks within the Secretariat.</p> <p>Potential exists for Secretariat to streamline internal structures and minimize task duplication, thereby transferring resources and expertise to supporting the AEC.</p>

<p>ASEAN Integration Monitoring Office (AIMO) should focus on monitoring regional integration and leave regional financial surveillance to AMRO.</p>	<p>These should continue to be tapped.</p>	<p>Financial contributions from members need to be reviewed to enable more internal sources of funds.</p>	<p>Comprehensive analysis of the range of economic, political, social, foreign policy and administrative impacts of these FTAs on member states and on the AEC needed; existing studies are partial, focusing mostly on the economic effects of these FTAs; since governments rationalize pursuit of FTA strategy as partly political to attain foreign policy benefits, the full effects of these FTAs must be more rigorously assessed for informed decision making.</p>
<p>Technical and policy advice</p>	<p>Extensively provided by supportive external organizations such as ADB, ERIA, ASEAN-ISIS and foundations such as GIZ.</p>	<p>Limited financial resources from within ASEAN; however, external sources helpful, such as from ADB, ASEAN Dialogue Partners, and external foundations.</p>	<p>Effects of bilateral and plurilateral FTAs on AEC remain unclear.</p>
<p>Financial support</p>			
<p>Other parallel agreements supporting (or detracting from) AEC commitments</p>			

Source: Author's analysis using template provided in Table 9.1.

The discussion thus far (summarized also in Table 10.2) suggests that three key problems or weaknesses limit the role that ASEAN/AEC institutions can play in advancing regional integration and the attainment of the AEC's goals. First, AEC institutions are designed to maximize flexibility for ASEAN member states, in effect institutionalizing a relatively high degree of national autonomy even while putting in place various organizational structures and mechanisms to aid the integration process. This study recognizes, however, the value of flexibility in politically sustaining cooperative projects like the AEC, but flexibility has to be properly governed so as not to exacerbate regional market fragmentation or add to the uncertainties faced by states, businesses and others over how regional integration unfolds. Second, there is limited use made of feedback mechanisms to drive integration forward. Thus, even when potentially valuable monitoring mechanisms are adopted such as the AEC Scorecard or the NTB database, the positive effects of delegated monitoring — including the reputational constraint and feedback loops — are not fully realized because member governments limit the extent of monitoring as well as public release of surveillance findings. Although recent evidence suggests that ASEAN members are beginning to use these instruments more effectively as indicators of progress on regional integration, such progress must be maintained so that private sector views on, and experiences of, the full range of barriers to ASEAN integration are recognized and remedies considered. Effective feedback mechanisms could overcome some of the limitations created by the ASEAN commitment to flexibility and national policy autonomy. In addition, monitoring should also cover the social and socio-economic costs of integration so that groups facing dislocations as a result of integration can be more effectively supported; in time, such groups can become better integrated into the regional market. Third, the ASEAN institutional structure is overloaded with a good deal of coordinative activities as well as more substantive tasks involving research, analysis, technical support and monitoring, made worse by limited resources at the disposal of the Secretariat. In addition, it remains unclear what effects members' parallel commitments to bilateral/plurilateral FTAs have on the AEC. In view of these features and realities, the following four reform areas are suggested.

4.1 Maintaining Flexibility but Minimizing Ambiguities

ASEAN's core institutional structures and processes are unlikely to be altered, as these support national policy autonomy for each member. Consequently, consensus decision making, flexibility in AEC commitments and implementation, and the intergovernmental, coordinative framework will remain key features (see Table 10.2 for details). However, ambiguities emerging out of flexible approaches to AEC implementation should at least be minimized, for instance, by providing more precise implementation action plans that are also time-bound with clear end-dates. While gaps in the AEC Blueprint are already being addressed in ASEAN, recourse to mechanisms, such as "negotiated flexibility", "in-built flexibilities" or even "ASEAN-X", should be minimized; instead, these are better converted into deferred implementation that is also time-bound with clearly stated time-lines or pre-specified dates by which particular stages of the implementation process should occur. At the least, such detailed information will provide a basis against which member governments can be assessed. The positive impact of such information on AEC implementation will depend also on the effectiveness of monitoring and feedback.

4.2 Maximizing Monitoring and Feedback through Effective Use of Independent Information

The ASEAN preoccupation with securing a substantial degree of national policy autonomy (or sovereignty) within cooperative projects like the AEC suggests that other ways must be found to press member governments to make good on AEC implementation. This means that it is more likely for integration commitments to be implemented if individual ASEAN governments themselves choose to do so rather than for AEC implementation to rely on top-down pressure through voting, sanctions/censure or even dispute settlement.⁵⁶ The political economy analysis in Section 2 reveals two competing imperatives that shape ASEAN government responses on regional cooperation and integration — external competitive pressures that drive integration forward and domestic sociopolitical, distributional and nationalist imperatives that hamper integration. From this, it becomes clear that if ASEAN members can be shown that hesitant or lack of compliance with AEC targets is undermining the attractiveness of their respective states as investment

locations, member governments may then make the choice to hasten AEC implementation. Thus, one focus of any move to enhance AEC institutions should be to consider how institutions can be designed in order that they might change these underlying national preferences in favor of regional integration. In short, this chapter advocates institutional mechanisms that can catalyse individual country decisions to hasten and/or implement their respective integration commitments.⁵⁷

One such means to enhance individual country commitment to implementing the AEC is by improving existing monitoring and feedback devices so that decision-makers have access to more and different kinds of information, and especially independent information, in order to make decisions on AEC compliance. In ASEAN, while there is considerable research and policy advice provided by think-tanks and research institutes, there is limited consultation with the private business sector and even less with NGOs and local groups that may be affected by regional integration. Although there is interaction with regional businesses through the ASEAN Business Advisory Council (ABAC), this mechanism does not sufficiently use private sector experiences with doing business in the regional market and private sector sentiment about the AEC to refine the depth and pace of integration. Such information could be employed to reinforce the external impulses that drove the initial national commitment to regional integration.

Since business pressure has been important in driving the ASEAN commitment to the AEC integration agenda, and since the goal of virtually all ASEAN states is to remain attractive to business investment, institutions can be designed to harness and channel business pressure more effectively toward this end. There are a number of ways this may be accomplished. One, businesses can be invited to contribute to regular reviews of ASEAN achievements on integration conducted by the ASEAN Secretariat or by academic institutions. Businesses could even be encouraged to do this independently, for instance, through a private sector body such as the CIMB ASEAN Research Institute (CARI).⁵⁸ Regular surveys to track the views of businesses on regional integration, including all specific instances of impediments, can provide the independent source of information — and pressure — on governments to make good on their integration commitments. Ensuring businesses are integrated in official review mechanisms or allowed to contribute to the AEC Scorecard and the NTB Database

is important because the information collected can help convey to member governments the urgency of implementation as well as the costs of not doing so in terms of lost business opportunities and, ultimately, of the prospects for growth.

If ASEAN members are not keen to allow independent information to be fully used in monitoring regional integration, it may be best to allow for parallel tracks with a surveillance/monitoring report for internal use as well as one for public release. While this could limit the extent to which external scrutiny can help drive AEC implementation, what is ultimately important is for each member government to interpret the surveillance information and make an informed choice as to whether delaying on the AEC will be good for that country's growth prospects. In this regard, if mechanisms such as the AEC Scorecard and the NTB Database also involve a process whereby individual governments have to explain country performances, including the range of reasons for non-compliance (such as with IMF Article IV consultations), this consultative process might, through encouraging internal reflection by each government or peer encouragement, help increase positive state attitudes to AEC implementation.⁵⁹

4.3 More Effective Use of Redistributive Transfers and Information from Non-Business Stakeholders

The ASEAN experience also reveals that poor implementation of integration initiatives reflects the unwillingness of member governments to accept some of the "losses" associated with liberalization and integration, even short-term ones. While this should not mean supporting protectionist interests or "buying off" opposing voices, the very real and legitimate concerns of other stakeholders such as labor and environmental groups need to be addressed if regional integration is to be politically sustainable amongst broad sections of domestic society across ASEAN. ASEAN states have usually disregarded information on the adverse consequences of liberalization and integration, believing that to even acknowledge these would be to invite all manner of protectionist demands. However, a more positive reading of what may be collectively termed "anti-integration" sentiments would see these as raising much-needed awareness amongst policy-makers of the adverse socio-economic consequences of

economic liberalization and integration on domestic groups. Assessment and incorporation of these adverse effects by the Secretariat could enable more focused redistributive transfers in the form of regional development assistance to these affected groups, so that the fruits of regional integration are ultimately more equitably distributed. However, such transfers should not be regarded as “bribes” to forestall criticism of the integration project, but rather should be seen as mechanisms to alleviate the short-to mid-term plight of those disadvantaged by integration and to enhance the long-run gains for such groups. An ideal approach is for local communities to directly bid for regional development funds through the IAI mechanism or through external funding sources such as foundations, Dialogue Partners and international organizations.

4.4 Streamlining the Organizational Structure to Support Regional Integration

The ASEAN Secretariat will have to work within the present inter-governmental coordinative framework as member governments are reluctant to turn the Secretariat into a centralized office with enforcement authority. However, the Secretariat needs to continue to streamline internal structures to minimize task duplication, thereby transferring resources and expertise to supporting the AEC. In this regard, the conversion of the previous surveillance office to the ASEAN Integration Monitoring Office (AIMO) is encouraging, but AIMO should concentrate on monitoring regional integration and leave regional financial surveillance to the ASEAN Plus Three Macroeconomic Research Office (AMRO).

Two urgent tasks remain. One is to review and enhance ASEAN members’ financial contributions to the Association, especially to support the enormous coordinative and other substantive tasks the Secretariat undertakes. Relying on external donors to support tasks that ASEAN needs to get done is not sustainable over the long run and if ASEAN wants to be taken seriously as an independent actor in regional politics. External reliance can reduce the incentive of member governments to take more seriously the projects they themselves have adopted, like the AEC. A second urgent task is to conduct a comprehensive analysis of the economic, political, social, foreign-policy and administrative impacts of the range of bilateral and plurilateral FTAs

on member states and on the AEC. Existing studies on this topic focus on the economic effects of FTAs on the countries involved and on businesses. Since governments usually rationalize pursuit of their FTA strategy on partly political grounds, usually to attain foreign-policy benefits, these claimed foreign-policy benefits must be more rigorously assessed, including the question of whether the FTA strategy distracts government attention from the AEC. As the preceding discussion has suggested, these FTAs could be supportive of the AEC or they could hinder AEC progress. A comprehensive assessment of the full range of costs and benefits of countries' FTA strategy will provide the basis on which recommendations can be made as to whether ASEAN governments should continue with or cut back on FTAs. ADB is perhaps the organization that is best placed to undertake such a large and comprehensive study.

5. Conclusion

This chapter draws lessons from a political economy analysis of ASEAN economic integration to offer a number of practical and politically feasible suggestions on how institutions in ASEAN could be fashioned to enhance AEC implementation. With individual ASEAN member governments mindful of retaining as much domestic policy autonomy as possible, institutional design cannot rely on enhancing external or top-down mechanisms to impose discipline on member governments; such mechanisms will probably not even be accepted by member states as they are likely to be regarded as devices that will prevent or constrain governments from meeting what they consider to be legitimate domestic needs and priorities. In view of this key political reality, the chapter suggests that AEC institutions should be crafted in ways that help individual governments decide that it is indeed in their national interest to complete the AEC.

The chapter uses the three institutional categories of decision-making, commitment devices and organizational structures to identify the strengths and limitations of AEC institutions in the light of present-day ASEAN political realities. The chapter also suggests four areas where reform could be more productively concentrated: (a) maintaining flexibility but minimizing ambiguities; (b) maximizing monitoring and feedback through the more effective use of

independent information, especially from businesses; (c) making more effective use of redistributive transfers and information from non-business stakeholders; and (d) streamlining the ASEAN organizational structure as well as external institutional structures to more effectively support regional integration. A key theme of these suggestions is the use of effective monitoring and feedback instruments to motivate member governments to make policy choices that support AEC implementation. While this does not necessarily guarantee that governments will always make choices that will enhance AEC completion, as this depends on the kind of information and feedback obtained and the political incentives facing governments, nevertheless, a “bottom-up” or unilateral approach is more realistic, given the ASEAN emphasis on national policy autonomy. Unilateral decisions favoring AEC implementation, when they do happen, are likely to be more sustainable.

NOTES

1. Termsak Chalermpananupap, “Institutional Reform: One Charter, Three Communities, Many Challenges”, in *Hard Choices: Security, Democracy and Regionalism in Southeast Asia*, edited by Donald K. Emmerson (Singapore: Institute of Southeast Asian Studies, 2009).
2. Stephan Haggard, “The Organizational Architecture of the Asia-Pacific: Insights from the New Institutionalism”, *ADB Working Paper Series on Regional Economic Integration*, no. 71 (January 2011).
3. See Helen E.S. Nesadurai, “Trade Policy in Southeast Asia: Politics, Domestic Interests and the Forging of New Accommodations in the Regional and Global Economy”, in *Routledge Handbook of Southeast Asian Politics*, edited by Richard Robison (London and New York: Routledge, 2012), pp. 318–22.
4. Andrew MacIntyre, T.J. Pempel and John Ravenhill, “The Political Economy of East Asia: Directions for the Next Decade”, in *Crisis as Catalyst: Asia’s Dynamic Political Economy*, edited by Andrew MacIntyre, T. J. Pempel and John Ravenhill (Ithaca and London: Cornell University Press, 2008), pp. 273–75.
5. Haggard, “Organizational Architecture”, p. 4.
6. Hal Hill and Jayant Menon, “ASEAN Economic Integration: Features, Fulfillments, Failures and the Future”, *ADB Working Paper Series on Regional Economic Integration*, no. 69 (December 2010).

7. Helen E.S. Nesadurai, *Globalisation, Domestic Politics and Regionalism: The ASEAN Free Trade Area* (London and New York: Routledge, 2003); John Ravenhill, "East Asian Regionalism: Much Ado About Nothing?", *Review of International Studies* 35 (2009): 215–35.
8. For details, see Nesadurai, *Globalisation, Domestic Politics and Regionalism*, pp. 168–70.
9. See the views of the US-ASEAN Business Council, reported in PricewaterhouseCoopers, *Special Report Update on AFTA and Regional Economic Integration*, 2000 <<http://www.us-asean.org/pwcreport1.htm>>.
10. See ADB, *Institutions for Regional Integration: Towards an Asian Economic Community* (Manila: Asian Development Bank, 2010), pp. 103–8.
11. ADB, *Institutions for Regional Integration*, p. 118.
12. ADB, *Institutions for Regional Integration*, p. 103.
13. Ibid.
14. Severino Jr., quoted in Haggard, "Organizational Architecture", p. 16.
15. Chalermpananupap, "Institutional Reform", p. 104.
16. ADB, *Institutions for Regional Integration*, p. 105.
17. Kenneth W. Abbot and Duncan Snidal, "Hard and Soft Law in International Governance", *International Organization* 54, no. 3 (2000): 421–56.
18. Haggard, "Organizational Architecture", p. 12.
19. ASEAN Studies Centre, *The ASEAN Community: Unblocking the Roadblocks* (Report No. 1) (Singapore: Institute of Southeast Asian Studies, 2008); Hadi Soesastro, "Implementing the ASEAN Economic Community Blueprint", in *The ASEAN Community: Unblocking the Roadblocks* (ASEAN Studies Centre Report No. 1) (Singapore: Institute of Southeast Asian Studies, 2008), pp. 34–35.
20. ASEAN, *ASEAN Economic Community Blueprint* (Jakarta: ASEAN Secretariat, 2007), p. 36, <<http://www.aseansec.org/21083.pdf>>.
21. ADB, *Institutions for Regional Integration*, p. 107.
22. See Chalermpananupap, "Institutional Reform", p. 112.
23. Chalermpananupap, "Institutional Reform", p. 128.
24. ASEAN Secretariat, *ASEAN Dispute Settlement System* (Jakarta: The ASEAN Secretariat, 2009). Other institutional innovations are discussed in Yoshimatsu, "Collective Action Problems".
25. ASEAN, *Protocol on Enhanced Dispute Settlement Mechanism*, Vientiane, 29 November 2004 <<http://www.aseansec.org/16755.htm>>.
26. Locknie Hsu, "The ASEAN Charter and a Legal Identity for ASEAN", in *The ASEAN Community: Unblocking the Roadblocks* (ASEAN Studies Centre Report No. 1) (Singapore: Institute of Southeast Asian Studies, 2008), pp. 75–78.
27. ADB, *Institutions for Integration*, p. 107.

28. Haggard, "Organizational Architecture", p. 27.
29. See the chapter by Locknie Hsu in this volume.
30. ADB, *Institutions for Integration*, p. 108.
31. Christopher Findlay, David Parsons and Herb Plunkett, "An Assessment of ASEAN's Priority Sectors for Fast-track Integration", in *Brick by Brick: the Building of an ASEAN Economic Community*, edited by Denis Hew (Singapore: Institute of Southeast Asian Studies, 2007), p. 123.
32. ASEAN Secretariat, *ASEAN Annual Report 2009–2010* (Jakarta: The ASEAN Secretariat, 2010), p. 23.
33. ASEAN Secretariat, *ASEAN Economic Community Scorecard* (Jakarta: The ASEAN Secretariat, 2010), p. 14.
34. On evaluating compliance as a continuum, see Ronald B. Mitchell, "Institutional Aspects of Implementation, Compliance and Effectiveness", in *International Institutions and Global Climate Change*, edited by Urs Luterbacher and Detlef Sprinz (Cambridge, MA: MIT Press, 2001), p. 224.
35. See ASEAN Secretariat, *ASEAN Economic Community Scorecard: Charting Progress Towards Regional Economic Integration (Phase 1: 2008–09 and Phase 2: 2010–11)* (Jakarta: The ASEAN Secretariat, 2012), p. 3.
36. Ronald Coase, "The Problem of the Social Cost", *Journal of Law and Economics* 3 (1960): 1–44.
37. Haggard, "Organizational Architecture", p. 28.
38. Haggard, "Organizational Architecture", p. 13.
39. Nesadurai, *Globalisation, Domestic Politics and Regionalism*.
40. ASEAN, *The ASEAN Charter*, ASEAN Secretariat, Jakarta, 20 November 2007 <<http://www.aseansec.org/ASEAN-Charter.pdf>>.
41. ADB, *Institutions for Integration*, p. 118.
42. Chalermphanupap, "Institutional Reform", p. 117. For 2009–10 data, see ASEAN Secretariat, *ASEAN Annual Report*, pp. 48–61.
43. ASEAN Secretariat, *ASEAN Annual Report*, pp. 21–34 and 50–53.
44. Chalermphanupap, "Institutional Reform", p. 117.
45. *Ibid.*, pp. 117–19.
46. *Ibid.*
47. *Ibid.*, p. 121.
48. *Ibid.*, p. 122.
49. *Ibid.*
50. Details of the ASEAN organizational structure, which includes the Integration Monitoring Office is found at <http://www.aseansec.org/contact_us.htm>.
51. See the list of tasks expected of an Assistant Director of AIMO, a post advertised by the ASEAN Secretariat in 2012 <<http://www.aseansec.org/jobs/ADR-AIMO310312.pdf>>.

52. John Ravenhill, "East Asian Regionalism: Much Ado About Nothing?" *Review of International Studies* 35 (2009): 215–35.
53. ADB, *Institutions for Regional Integration*, p. 64.
54. Ibid.
55. Chalermplanupap, "Institutional Reform", p. 114.
56. Mitchell points out that sanctions intended to shift a country's policy on some issue often leads that country to commit even more to the censured policy. See Mitchell, *Institutional Aspects of Implementation*, p. 233.
57. This central theme is also in line with the sentiments of Razeen Sally in his chapter on external FTAs in this volume. Sally advocates a return to unilateral rather than preferential liberalization of trade and FDI.
58. CIMB is a Malaysian-based regional banking group that is fully supportive of ASEAN integration. In April 2011, CARI signed a collaborative agreement with *Universitas Indonesia* to undertake collaborative research to promote ASEAN integration. See CIMB Group, "Press Release: CARI inks symbolic cooperation agreement with Universitas Indonesia", 18 April 2011 <http://www.cimb.com/index.php?ch=g2_mc&pg=g2_mc_news&ac=369&tp=cimb_group> (accessed 25 April 2012).
59. On how consultative processes can catalyze positive behavioral change, see Mitchell, *Institutional Aspects of Implementation*, p. 233.

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10

ASEAN Economic Community Business Survey

Albert G. Hu¹

Executive Summary

There is concern that the slow progress in implementing AEC 2015 may have to be with the ASEAN business community showing little or no interest in ASEAN developments. We conducted a survey to find out whether this concern has empirical support. Our survey was designed to relate ASEAN business firms' awareness of or interest in AEC 2015 to various firm characteristics, their operating environments, and in particular the extent to which they were engaged in ASEAN economic integration.

The survey was conducted in nine ASEAN member states, with a total sample size of 381 firms. They came from over 47 two-digit ISIC (Rev 3) industries, with the majority representing manufacturing and services industries. Most of the questionnaires were filled out by members of senior management at the respondent firms.

A key finding of the survey is that there is a general lack of awareness of AEC 2015 in the ASEAN business community. For

example, it is more likely for the respondent firms to be aware of the ASEAN-PRC Free Trade Agreement than of AEC 2015. By relating the likelihood of the firms' awareness of AEC 2015 to their exposure to ASEAN economic integration, we find that the awareness of AEC 2015 increases to the extent to that firms were affected by the regional, cross-border economic activities. In other words, what drives the business community's interest in AEC 2015 is the actual process of economic integration. We can infer from this that the lack of awareness of AEC 2015 in the business community can be attributed to the lack of actual economic integration.

We also examine how ASEAN businesses obtain information regarding the various initiatives of ASEAN economic integration. The most popular source of such information is the internet. But the internet has turned out to be the least effective way of disseminating information regarding ASEAN economic integration by being associated with the lowest level of awareness of AEC 2015. Instead, those that received such information from the government were most likely to be aware of AEC 2015. This clearly suggests that ASEAN governments can do more to communicate the vision of AEC to the ASEAN business community.

Finally, we investigate the impediments to ASEAN economic integration. Non-tariff barriers, including different regulatory standards, excessive regulation and lack of information about foreign business environments dominated the respondent firms' concerns. We also find that the main reason why the respondent firms did not use the existing ASEAN economic integration measures is the lack of information about these measures.

1. Background

At their Summit in Kuala Lumpur in December 1997, ASEAN leaders articulated their vision for a stable, prosperous, and highly competitive region with equitable economic development and reduced poverty and socio-economic disparities by 2020. Six years later, at their Bali Summit, the leaders mapped out this vision by proposing the three pillars of an ASEAN Community: the ASEAN Economic Community (AEC), the ASEAN Security Community and the ASEAN Socio-Cultural Community. To facilitate the implementation of the AEC, the ASEAN

Economic Ministers agreed in Kuala Lumpur in 2006 to develop “a single and coherent blueprint for advancing the AEC by identifying the characteristics and elements of the AEC by 2015 ... with clear targets and timelines for implementation of various measures as well as pre-agreed flexibilities to accommodate the interests of all ASEAN Member Countries”(AEC Blueprint). The timetable of establishing the AEC by 2015 was then affirmed by ASEAN leaders at their Summit in 2007 in the Cebu Declaration, which calls for ASEAN to be transformed into a region with free movement of goods, services, investment, skilled labor, and freer flow of capital. To monitor and motivate the timely enforcement of the AEC 2015 initiatives, an AEC Scorecard was proposed. Member states’ implementation of AEC 2015 was evaluated against the agreed timeline and benchmark and quantified with the Scorecard.

With 3 years left to the proposed deadline of 2015, progress toward an ASEAN Economic Community has been slow. There is concern that part of the reason for the slow progress has to do with the ASEAN business community showing little or no interest in ASEAN developments. If substantiated, this would pose a great threat to realizing AEC by 2015. It was against this background that the Institute of Southeast Asian Studies (ISEAS) commissioned this survey in order to assess the business sector’s views on the prospect of achieving an AEC by 2015.

2. Survey Design and Implementation

ISEAS approached and engaged this author as the coordinator for this survey in December 2011. For each of the ten ASEAN countries where the survey was to be carried out, ISEAS or the survey coordinator identified and engaged a national consultant to assist with the survey. The survey coordinator developed a 13-question questionnaire in consultation with ISEAS. With the time and resource constraints, we had to be selective in the scope of the survey. The survey questionnaire was included as an appendix at the end of this chapter. The questionnaire was then sent to the national consultants, who were given two months to complete the survey and return the response data.

The national consultants were requested to achieve a target sample size of 40 respondent firms. They were also asked to make the sample as representative as possible of the underlying population of firms in

their respective countries in terms of firm size, industry affiliation, geographical location, ownership and export orientation. Given the small sample size, no quantitative guidelines were given for these dimensions of stratification.

The national consultants were also instructed to solicit responses from members of the senior management of the respondent firms, as the issues the survey deals with are of macro and strategic nature.

In the end, due to unforeseen circumstances, the survey for Malaysia was not conducted. We have received satisfactory survey response data from the other nine countries. The questionnaire was sent to the national consultants around mid-December 2011; the last survey data were returned 9 March 2012.

3. Basic Dimensions of the Survey

3.1 *Distribution by Industry*

Table 10.2 shows the distribution of the respondent firms by country and sector. The sample size ranges from 29 for Singapore to 53 for Cambodia, with a total of 381 firms for the nine countries. Manufacturing and services, with 142 and 224 firms respectively, are where most of the respondent firms come from. Agriculture, forestry and mining together are represented by 12 firms. Given the importance of agriculture for many ASEAN countries, agricultural firms are under-represented in our sample. We thus need to interpret the results of the survey with this limitation in mind. We have tabulated the distribution of the respondent firms by broad sectors. In the appendix we list the respondent firms by two-digit ISIC Rev industries. The respondent firms are distributed across 47 such industries. There are also three firms whose business spans a range of industries. We thus label these conglomerates.

3.2 *Distribution by Firm Size*

In Table 10.3, we tabulate the firm size distribution of the sample. In the survey questionnaire, we asked the respondents to place their firms into one of four size categories based on employment: 0 to 100 workers, 100 to 200 workers, 200 to 1,000 workers and over 1,000 workers. Overall, small firms, those employing less than 100 workers, account for 53% of the sample. Very large firms, hiring over 1,000 workers, represent 11% of the sample. Examining size distribution

TABLE 10.2
Country and Sector Distribution

	Agriculture	Conglomerate	Forestry	Manufacturing	Mining	Service	Total
Brunei Darussalam	0	1	0	8	1	36	46
Cambodia	0	0	0	13	0	40	53
Indonesia	1	0	0	5	3	35	44
Lao PDR	1	0	1	24	1	13	40
Myanmar	2	1	0	6	1	32	42
Philippines	0	1	0	13	0	21	35
Singapore	0	0	0	12	0	17	29
Thailand	0	0	0	24	1	18	43
Viet Nam	0	0	0	37	0	12	49
Total	4	3	1	142	7	224	381

TABLE 10.3
Size Distribution of Firms

(%)	No Response	0~100	100~200	200~1,000	>1,000
Brunei Darussalam	2	70	15	9	4
Cambodia	0	55	23	11	11
Indonesia	0	55	16	16	14
Lao PDR	0	75	10	13	3
Myanmar	0	60	17	24	0
Philippines	3	31	9	20	37
Singapore	0	52	14	10	24
Thailand	0	37	30	26	7
Viet Nam	0	39	31	20	10
All	1	53	19	17	11

by country, we observe that small countries tend to have more representation from small firms. For Brunei Darussalam, 70% of the firms fall into the smallest size category. This proportion is 60 and 75% for Myanmar and Lao People's Democratic Republic, respectively. For larger economies, such as the Philippines, Thailand and Viet Nam, the smallest firms represent less than 40% of their samples. At the largest size end, the Philippines and Singapore stand out, with 37 and 24% of their sample represented by this size class.

3.3 Distribution by Foreign Ownership

We also asked each respondent where the firm's headquarters is. This information is then used to determine whether the firm is a foreign-invested firm. If the firm reported a foreign location for the firm's headquarters, we then classify the firm as a foreign-invested firm. As Table 10.4 shows, 80% of the firms in the sample are domestic firms. For those firms that listed foreign location for their headquarters, the vast majority of the foreign locations are outside ASEAN. In the case of Viet Nam, foreign ownership is inferred from research using the company name and information available on the internet. The distribution varies by country. Singapore, not surprisingly, has the largest

TABLE 10.4
Sample Distribution by Foreign Ownership

(%)	Foreign-invested	Domestic
Brunei Darussalam	17	83
Cambodia	26	74
Indonesia	11	89
Lao PDR	13	88
Myanmar	5	95
Philippines	23	77
Singapore	48	52
Thailand	16	84
Viet Nam	24	76
All	20	80

representation of foreign-invested firms, nearly half of the sample. On the other hand, Myanmar, perhaps due to its political isolation, only has 5% of its sample represented by foreign-invested firms. Other countries with large foreign-invested firms' representation include Cambodia, the Philippines and Viet Nam, all above 20%.

3.4 Distribution by Export Orientation

We assess the respondent firms' export orientation by asking them what proportion of their sales are derived from overseas markets. The respondent had four choices, 0, 0 to 50, 50 to 100, and 100%. Distribution by country and export orientation thus defined is tabulated in Table 10.5. Around 40% of the firms are completely domestic-oriented, while 9% did not respond to this question, possibly due to confidentiality considerations. This leaves us with at least half of the firms reporting some export sales. There is great diversity among the countries. Again when it comes to integration with the world economy, Singapore stands out with two-thirds of its firms reporting over half of their sales destined for foreign markets. The share is lowest for Myanmar, with only 7% of firms reporting more than half of sales accounted for by exports. The export orientation distribution for Cambodia is polarized at the two extremes, 68% of firms focusing exclusively on the domestic market, and 9% of the firms serving overseas markets only.

TABLE 10.5
Export Orientation

(%)	No Response	0%	0~50%	50~100%	100%
Brunei Darussalam	0	67	11	22	0
Cambodia	0	68	11	11	9
Indonesia	7	55	30	7	2
Lao PDR	0	30	43	13	15
Myanmar	31	43	19	7	0
Philippines	9	26	37	23	6
Singapore	10	7	17	66	0
Thailand	0	9	60	26	5
Viet Nam	24	41	16	18	0
All	9	41	27	19	4

3.5 Job Descriptions of Survey Respondents

The kind of information that the survey is designed to solicit is related to the strategic and macro aspects of a company's operation. Therefore company personnel who are involved in setting the strategic direction of the company are best able to answer the questions of the survey. We requested the national consultants to try as much as possible to engage a member of the senior management of a company to fill out the questionnaire. Given the time and resource constraints, this was not always possible. As the national consultants described in their qualitative assessments of the survey, sometimes the senior management authorized a middle or junior member of the firm to fill out the questionnaire. In Table 10.6, we report the job descriptions of the survey respondents. Based on the job titles provided by the respondents, we classify the respondents' responsibilities in their companies into four categories: Head, Senior, Middle and Junior. In the appendix, we provide a table detailing what job titles each category contains. In short, personnel at the Chief Executive Officer (CEO), Managing Director or General Manager level are considered heads of their firms; Chief Financial Officer, Chief Operating Officer, Deputy General Manager, and Chief Accountant are considered Senior; the middle category includes managers and accountants; and the junior category includes associate and executive in various capacities.

TABLE 10.6
Job Descriptions of Survey Respondents

	Head	Senior	Middle	Junior	Total
Brunei Darussalam	7	4	24	9	44
Cambodia	9	9	17	12	47
Indonesia	21	19	2	0	42
Lao PDR	9	20	9	0	38
Myanmar	24	13	5	0	42
Philippines	17	12	5	1	35
Singapore	3	11	13	2	29
Thailand	2	3	16	5	26
Viet Nam	17	21	11	0	49
Total	109	112	102	29	352

We are able to clearly identify 352 job titles; i.e., 29 respondents did not disclose their job titles. Heads and senior management account for 221, or 63% of the total. Junior staff account for 8% of the total, with middle management responsible for the remaining 29%. Thus we have a reasonably good share of respondents in senior positions in their firms. At the country level, Myanmar, Indonesia, and Viet Nam are disproportionately represented by senior management respondents. Brunei Darussalam and Cambodia have a good number of questionnaire filled out by junior staff.

4. General Perception of AEC 2015

4.1 Lack of Awareness of AEC 2015

We ascertain the respondents' awareness of AEC by asking them a yes or no question: are you aware of AEC 2015? The results are tabulated in Table 10.7. Overall, 55% of the respondents said they were not aware of AEC 2015. The proportion is much larger in large and more developed ASEAN countries than in small and less developed ones with the exception of Thailand and Brunei Darussalam: 77%, 80%, 86% and 76% of the respondents from Indonesia, the Philippines, Singapore and Viet Nam, respectively, were not aware of AEC 2015; in sharp

Table 10.7
Are You Aware of AEC 2015?

(%)	No Response	No	Yes
Brunei Darussalam	11	70	19
Cambodia	0	26	74
Indonesia	0	77	23
Lao PDR	0	28	73
Myanmar	0	36	64
Philippines	0	80	20
Singapore	0	86	14
Thailand	0	30	70
Viet Nam	0	76	24
All	1	55	44

contrast, only 26%, 28% and 36% of respondents from Cambodia, Lao People's Democratic Republic and Myanmar, respectively, reported that they were not aware of AEC 2015.

The AEC Scorecard is a mechanism that ASEAN has devised to monitor and discipline ASEAN countries in implementing AEC-related economic integration measures. The awareness of AEC Scorecard is not surprisingly much lower than that of AEC 2015, as can be seen in Table 10.8. Overall only 14% of the firms had heard of the mechanism. And the cross-country variation follows a similar pattern as that for the awareness of AEC 2015.

To put it in perspective, we compare the awareness of AEC 2015 with the respondents' awareness of ASEAN's free-trade agreements (FTA) with countries from outside the region. These include ASEAN's FTAs with Australia and New Zealand (ANZ), the PRC, India and Republic of Korea. The results are reported in Table 10.9. Each cell of Table 10.9 contains the proportion of the respective ASEAN country's respondents who said they were aware of the ASEAN FTAs or AEC 2015. In the bottom row, we compare the awareness for all countries.

Surprisingly, the awareness of AEC 2015 is lower than that of any of the FTA's. About two thirds of the respondents said they knew about ASEAN's FTA with the PRC, compared with 44% for AEC 2015. This

TABLE 10.8
Are You Aware of AEC Scorecard?

(%)	No response	No	Yes
Brunei Darussalam	15	74	11
Cambodia	0	66	34
Indonesia	0	95	5
Lao PDR	0	95	5
Myanmar	12	74	14
Philippines	0	91	9
Singapore	0	97	3
Thailand	0	72	28
Viet Nam	0	94	6
All	3	83	14

TABLE 10.9
Awareness Comparison: AEC 2015 vs ASEAN FTA's

(%)	AEC 2015	ANZ	PRC	India	Korea, Rep. of
Brunei Darussalam	20	35	50	15	41
Cambodia	74	43	81	58	71
Indonesia	23	30	57	25	30
Lao PDR	73	40	50	35	38
Myanmar	64	31	62	40	48
Philippines	20	63	80	60	54
Singapore	14	52	72	69	45
Thailand	70	67	83	67	51
Viet Nam	24	57	71	51	61
All	44	46	67**	45	49***

Note: **, *** T-test statistic significant at 5% and 10% level respectively.

difference is statistically significant at the 5% level. Also significant — at the 10% level — is the disparity in awareness of AEC 2015 and ASEAN's FTA with Republic of Korea, which nearly half of the respondents reported they were aware of.

Turning to cross-country differences, Brunei Darussalam and Indonesia were less aware of these economic integration initiatives than the rest of the ASEAN countries, but still the ASEAN-PRC FTA garnered more attention than the others in these two countries. In fact, Lao People's Democratic Republic and Myanmar are the only countries where the ASEAN-PRC FTA did not generate the greatest awareness, and instead AEC 2015 was most widely known. Thai respondents tended to be familiar with all these regional economic integration initiatives. In the Philippines, Singapore and Viet Nam, firms seemed to be particularly less likely to be aware of AEC 2015 than the FTAs.

4.2 What is Behind the Lack of Awareness of AEC 2015?

To understand whether the lack of awareness of AEC 2015 is driven by lack of exposure to international trade and investment in ASEAN, we asked the respondents to assess how ASEAN economic integration in general had affected their businesses. The question has eight choices and the respondents were allowed to select multiple choices. The first choice is no or minimal impact, and if there was impact, the other seven choices delineated specific impact. In Table 10.10, we first tabulate the results on the basis of whether or not the respondents selected the first choice, no or minimal impact. Overall, at least 58% of the respondents felt that ASEAN economic

TABLE 10.10
How is Your Business Affected by ASEAN Economic Integration?

(%)	No Response	Impact	No or Minimal Impact
Brunei Darussalam	7	57	37
Cambodia	2	60	38
Indonesia	0	48	52
Lao PDR	0	65	35
Myanmar	2	64	33
Philippines	3	51	46
Singapore	0	59	41
Thailand	0	84	16
Viet Nam	0	37	63
All	2	58	40

integration had had some impact on their businesses, whereas 40% said there had been no or minimal impact.

At the country level, Viet Nam had the largest share, 63%, of firms reporting no or minimal impact of ASEAN economic integration on their businesses. On the other hand, 84% of Thai respondents said their businesses had been affected by ASEAN economic integration.

We then take a further step in relating the awareness of AEC 2015 to the impact of ASEAN economic integration by cross-tabulating the responses to the two questions in Table 10.11. The rows indicate the number of responses to the question of whether the respondents were aware of AEC 2015, while the columns represent responses to whether they said they had been affected by ASEAN economic integration. Concentrating on the columns first, we can see the numbers indicating that those who reported no or minimal impact of ASEAN economic integration on their business were less likely to be aware of AEC 2015 by a ratio of two to one, 103 vs. 49; the disparity in the awareness of AEC 2015 is minimal for those who reported some impact of ASEAN economic integration.

Similarly, if we focus on the rows, those respondents who said they were aware of AEC 2015 were more likely to feel the impact of ASEAN economic integration by a ratio greater than two to one, 117 vs. 49. But those who were not aware of AEC 2015, they were equally likely to report that they were affected or not affected by ASEAN economic integration. These then suggest that there is a strong positive correlation

TABLE 10.11
Awareness of AEC 2015 and ASEAN Economic Integration

		Impact of ASEAN Economic Integration		
		Impact	No/Minimal Impact	Total
Awareness of AEC 2015	No	103	103	206
	Yes	117	49	166
Total		220	152	372

Note: corr (AEC 2015 awareness, impact of economic integration) = 0.21*.

* Significant at 1% level.

between the respondents' awareness of AEC 2015 and whether they were exposed to ASEAN economic integration. The correlation coefficient of 0.21 between the two reported in the note of Table 10.11 is statistically significant at the 1% level.

In Table 10.12, we examine how the specific impact of ASEAN economic integration on their business that the respondents reported was correlated with their awareness of AEC 2015. The first column of Table 10.12 lists the seven specific types of impact we identify. One third of those respondents who were aware of AEC 2015 listed "more export to ASEAN" as a consequence of ASEAN economic integration for their business, but only 17% of those who were unaware of AEC 2015 did this. The difference is statistically significant at the 1% level. That those who were aware of AEC 2015 were also more likely to report that they were affected by ASEAN economic integration also applies to the other specific impacts of ASEAN economic integration listed in Table 10.12, including more investment from ASEAN, cheaper imports from ASEAN, more competition from ASEAN MNCs, and higher profits. However, the difference is not statistically meaningful for the cases of "more competition from imports from ASEAN" and "lower profits".

We also asked the respondents to assess how important various markets will be for their business over the next 3 years. These markets are

TABLE 10.12
Awareness of AEC 2015 and ASEAN Economic Integration

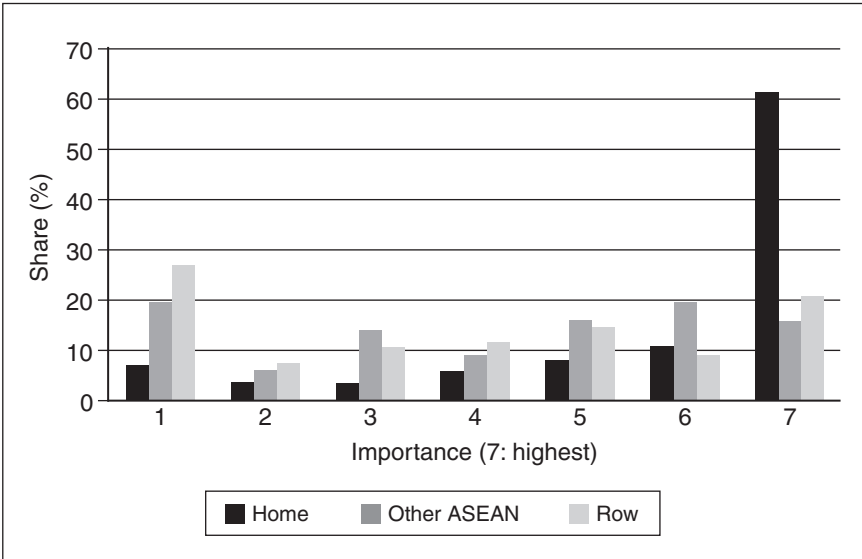
	AEC 2015 Awareness	
	Yes	No
More export to ASEAN	33*	17
More investment in ASEAN	25**	17
Cheaper imports from ASEAN	37*	23
More competition from imports from ASEAN	36	29
More competition from ASEAN MNCs	40*	27
Higher profits	19***	12
Lower profits	19	17

Note: *, **, *** significant at 1%, 5% and 10% level respectively.

home, other ASEAN, and the rest of the world (ROW). The assessment was made on a seven-point scale, one being least important and seven being most important. We tabulate the distribution of the assessment marks for each market in Figure 10.1. The vertical axis represents the share, in percentage, of respondents assigning a particular mark to a certain market. The horizontal axis is the scale of assessment. Thus, the bars of the same colour, representing one of the three markets, add up to 100%.

Over 60% of the respondents regarded their home market as the most important market, with a score of 7, to their business in the next 3 years. In sharp contrast, only 16% of the respondents gave other ASEAN markets a score of 7. This is lower than the share of respondents who assigned a score of 7 to ROW markets, which is about 21%. At the least important end of the distribution, 27% of the respondents assigned a score of 1 to ROW markets; 20% of the respondents did that for other ASEAN markets; and only 7% regarded their home market as least important. Overall, the distribution of scores is highly skewed toward the most important end of the

FIGURE 10.1
Future Importance of Markets



spectrum for home market, but more evenly spread out for ROW and other ASEAN markets. The average scores received by the three markets are, respectively, 5.8, 4.2, and 3.9 for home, other ASEAN and ROW markets. While the differences between the scores for home and the other two markets are highly statistically significant, the difference between the importance of other ASEAN and ROW markets is not.

We now relate the respondents' assessment of the importance of the ASEAN market to their awareness of AEC 2015 by basing our estimates on a simple Probit model. The model uses the scores assigned by the respondents to various markets to predict whether or not they were aware of AEC 2015. Thus the three independent variables listed in Table 10.13 are the scores assigned to the three markets respectively, ranging from 1 to 7; the dependent variable is 1 if the respondent was aware of AEC 2015 and zero otherwise. Not surprisingly, the results indicate that the greater the importance the respondent assigned to other ASEAN markets for future business, the more likely they would report that they were aware of AEC 2015. In fact, if the score goes by one point, the likelihood of AEC awareness will go up by 17% and the result is statistically significant at the 1% level. The importance of home and ROW markets does not explain whether the respondent was aware of AEC 2015 or not.

In sum, what we have shown in this section is that a firm's awareness of AEC 2015 increases in its exposure to ASEAN economic integration. A firm whose business is closely integrated with the rest of ASEAN economies and thus more likely to feel the impact of ASEAN economic integration is much more likely to be aware of

TABLE 10.13
Importance of Markets and AEC 2015 Awareness

	Coefficient	Standard Error
Home country	-0.01	0.05
Other ASEAN countries	0.17*	0.04
Rest of the world	-0.01	0.04

Note: * significant at 1% level. Dependent variable is AEC awareness.

AEC 2015 than a firm that is relatively isolated from the process of ASEAN economic integration. In other words, what drives the business community's interest in AEC 2015 is the actual process of economic integration. A corollary of this result is that the lack of awareness of AEC 2015 in the business community can be attributed to the lack of actual economic integration.

4.3 AEC 2015 Awareness and Other Firm Characteristics

We now examine how AEC 2015 awareness is related to other firm characteristics. In Table 10.14, we first cross-tabulate firm size against AEC 2015 awareness. The first column of Table 10.13 lists the firm size categories; the second column indicates the share of firms in each size category that were aware of AEC 2015; the last two columns report results from a Probit regression that uses firm size to predict the awareness of AEC 2015.

Firms with employment between 100 and 200 workers were more likely to know of AEC 2015 than those in the other size categories, with 57% of them saying yes to the question of are you aware of AEC 2105. Somewhat surprisingly, the very large firms, those employing more than 1,000 workers, reported the lowest awareness of AEC 2015, with only 28% of them being aware. This size pattern of AEC awareness is confirmed by the results from the Probit regression. Being a firm that hires between 100 and 200 workers versus the other firms increases the likelihood of AEC 2015 awareness by 41%. This is statistically significant at the 5% level.

TABLE 10.14
Export Orientation and AEC 2015 Awareness

Export Orientation	AEC 2015 Awareness	Probit Regression	
	Yes	Coefficient	Standard Error
0	39%		
0~50%	55%	0.41*	0.16
50~100%	43%	0.11	0.18
100%	38%	-0.04	0.34

Note: **significant at 1% level. Dependent variable is AEC awareness.

TABLE 10.15
Foreign Ownership and AEC 2015 Awareness

Firm Size	AEC 2015 Awareness	Probit Regression	
	Yes	Coefficient	Standard Error
Foreign-invested	35%		
Domestic	46%	0.30***	0.17

Note: *** significant at 10% level. Dependent variable is AEC awareness.

In Table 10.15, we examine the relationship between foreign ownership and the awareness of AEC 2015. Thirty five per cent of the foreign-invested respondents reported that they were aware of AEC 2015, whereas 46% of domestic respondents were aware of it. We tested the significance of the difference by running a Probit regression using domestic ownership as a predictor for the likelihood that a firm was aware of AEC 2015. The results reported in the right columns of Table 10.15 indicate that being domestic-owned increases the likelihood of being aware of AEC 2015 by 30%. But this effect is only marginally significant in a statistical sense.

Foreign-invested firms, mostly MNCs, are most likely to be part of a global value chain and are concerned with the global business and economic environment. This may explain their relative unfamiliarity with AEC 2015.

We then relate AEC 2015 awareness to the firms' export orientation. The results are reported in Table 10.16. The relationship seems to

TABLE 10.16
Export Orientation and AEC 2015 Awareness

Export Orientation	AEC 2015 Awareness	Probit Regression	
	Yes	Coefficient	Standard Error
0	39%		
0~50%	55%	0.41*	0.16
50~100%	43%	0.11	0.18
100%	38%	-0.04	0.34

Note: **significant at 1% level. Dependent variable is AEC awareness.

follow an inverted U-shaped pattern: 39% of the respondents that did not export at all were aware of AEC 2015; this share then goes up to 55% for those that exported less than 50% of their sales; it then falls to 43% the group that exported between 50% and 100% of their sales; finally, for those that produced exclusively for export, the share falls further to 38%. The significant jump from 0% to less than 50% is most likely due to exposure to economic integration. But when it gets close to 100% of export sales, the responding firms are likely to be producing for MNCs as part of their global value chain, which means that they are less likely to be affected by regional economic integration measures.

To investigate whether the awareness of AEC 2015 varies by sector of business, we report the share of respondents who were aware of AEC 2015 by industry in Table 10.17. Since our sample size is relatively small and the respondents are not evenly distributed across the 47 two-digit ISIC Rev3 industries, we have to consolidate the industry groups. For manufacturing, we list food and beverage (ISIC 15), textiles and apparel (ISIC 17 and 18), and electrical and electronics (ISIC 30, 31 and 32) separately and consolidate all the other manufacturing industries into the other manufacturing group. Likewise for services, we list business services (ISIC 72 and 74), and wholesale and retail (ISIC 50, 51, and 52) separately and individually, but consolidate all others into other services. Among these seven sectors of business, only

TABLE 10.17
AEC 2015 Awareness by Sector of Business

Sector	AEC 2015 Awareness	Sector	AEC 2015 Awareness
Food & Beverage	67%**	Manufacturing	42%
Textiles & Apparel	25%		
Electrical & Electronics	32%		
Other manufacturing	43%		
Business services	39%	Services	44%
Wholesale and retail	53%		
Other services	38%		

Note: ** significant at 5% level, based on a Probit regression of AEC 2015 awareness on the sector fixed effects.

respondents from the food and beverage showed a distinctly greater awareness of AEC 2015, with over two thirds of them saying they knew of AEC 2015. For broader groups of manufacturing and services, the latter showed a slightly greater awareness of AEC 2015, but it is not statistically significant.

4.4 Awareness of AEC 2015 and the Role of Government in Information Dissemination

Besides economic integration, the awareness of AEC 2015 may also depend on how the regional economic integration vision was communicated to the general public. We asked the respondents to identify channels through which they normally receive information about regional economic integration initiatives. They were given five choices: search on the internet, relevant government organization, trade association, business contacts and the media. They could make multiple choices. Their answers are summarized in Table 10.18. About 42% of the respondents selected internet search as their channel of obtaining information about regional economic integration (21% selected the internet as their only source of information); this number is significantly higher than that for any of the other four channels.

We examine whether the way information is disseminated affects the respondents' awareness of AEC 2015 by basing our estimates on a Probit model in which the relative importance of the channels of information dissemination was used to predict the likelihood that

TABLE 10.18
How Respondents Obtain Information about
Regional Economic Integration

Channels of Information Dissemination	Share
Search on the internet	42%*
Relevant government organization in my country	28%
Trade association information sharing	23%
Business contacts	30%
Media	28%

Note: * significant at 1% level.

a respondent was aware of AEC 2015. To implement the model, we first recorded the respondents' response into mutually exclusive choices. The survey allowed the respondent to select multiple channels of information dissemination. Thus, we have reclassified the respondents into three groups: those that cited internet search as the only way information about regional economic integration was disseminated; those that cited relevant government organization as a source of information among others; and the rest of the respondents. We used the group of the rest of the respondents as the reference group for the Probit estimation. The results are tabulated in Table 10.19.

The estimate for the coefficient of the internet-only group is -0.38 and statistically significant at the 5% level. It suggests that the respondents that could only access information regarding ASEAN regional economic integration are 38% less likely than the respondents in the reference group to be aware of AEC 2015. On the other hand, the respondents that had the assistance of government in accessing information about ASEAN economic integration are 52% more likely than those in the reference group to have heard about AEC 2015. Thus, among the three groups, the group with access to government-mediated information is most likely to be aware of AEC 2015; the group relying on internet search is least likely to be aware of AEC 2015; the difference in likelihood between the two groups is around 90%.

These results suggest two things: (1) ASEAN business's awareness of AEC 2015 in part depends on how such information has been communicated to them; (2) the government has a role to play in raising ASEAN business's awareness of AEC 2015.

TABLE 10.19
AEC 2015 Awareness and Information Dissemination

Channels of Information Dissemination	Coefficient	Standard Error
Relevant government organization in my country	0.52*	0.16
Internet only	-0.38^{**}	0.18

Note: *, ** significant at 1%, 5% level respectively. Dependent variable is AEC 2015 awareness.

5. Implementation of AEC 2015 Blueprint

In the blueprint for AEC 2015, ASEAN identified specific targets for realizing the vision of AEC 2015. ASEAN member states were requested to focus on the following eight areas: free flow of goods, free flow of services, free flow of investment and capital, free flow of skilled labor, competitive economic region, infrastructure development, equitable economic development, and integration into the global economy.

In the survey we asked the respondents to assess the implementation of AEC 2015 along these eight dimensions individually, both in their own countries and in another ASEAN country where they had the most significant business interests. They were asked to rate their satisfaction with the progress on a 7-point scale, 1 being least effective implementation, and 7 being most effective. The results are tabulated in Table 10.20.

TABLE 10.20
Implementation of AEC 2015

Initiative	Home Country	Another ASEAN Country	Number of Responses
Free flow of goods	4.57***	4.78	119
Free flow of services	4.55*	4.90	116
Free flow of investment and capital	4.49*	5.03	119
Free flow of skilled labor	4.63	4.83	120
Competitive economic region	4.30*	4.80	118
Infrastructure development	4.15*	4.65	121
Equitable economic development	4.05*	4.73	115
Integration into the global economy	4.01*	4.64	107

Note: assessment on a scale of 1 to 7, 7 being most effective implementation.

* significant at 1% level; *** significant at 10% level based on two-sided t-test of home and other ASEAN country sample means.

The number of respondents who were able or willing to assess the implementation performance in both countries was less than one third of the total sample size. Mostly these respondents rated the implementation with scores between 4 and 5, or, to use an academic grade system, between C and B. This clearly leaves something to be desired. What is even more interesting is that the respondents gave their home country lower scores than they did the ASEAN country where they had the most significant overseas business interest. In other words, they were saying “the neighbour’s pastures are greener!” This is true for all eight areas of AEC initiatives, statistically significant in all but the area of free flow of skilled labor.

To understand whether the observed pattern of greener pastures abroad is universal across countries, we evaluate the difference between the home and other ASEAN country scores by country and report the results in Table 10.21. For each of the eight areas of AEC 2015 initiatives, we report both the countries for which the score received by home country is less than that of another ASEAN country and countries for which the home score is higher than another ASEAN country’s score. We only list countries for which the score differences are statistically significant.

In all eight areas, firms from Myanmar considered the implementation of AEC 2015 to be more effective in the other ASEAN country than in their home country. This is also the case with Cambodia except for free flow of services. Other countries where firms reported better implementation of AEC abroad than at home include the Philippines (free flow of services and infrastructure development), Indonesia (free flow of skilled labor), and Thailand (equitable development). On the other hand, the Thai firms gave their home country higher scores in free flow of goods and free flow of skilled labor. Somewhat surprisingly Singapore firms only ranked their home country higher in the area of competitive economic region. For all other country-initiative combinations, there is no material difference between home and other ASEAN country scores. Therefore, it seems that the “neighbour’s pastures are greener” phenomenon is largely driven by Cambodia and Myanmar and for some select initiatives also by the Philippines, Indonesia and Thailand.

TABLE 10.21
Implementation of AEC 2015

Initiative	Home < Other ASEAN	Home > Other ASEAN
Free flow of goods	Cambodia***, Myanmar*	Thailand*
Free flow of services	Myanmar*, Philippines***	None
Free flow of investment and capital	Cambodia*, Myanmar*	None
Free flow of skilled labor	Cambodia**, Indonesia**, Myanmar*	Thailand**
Competitive economic region	Cambodia*, Myanmar*	Singapore**
Infrastructure development	Cambodia*, Myanmar***, Philippines*	None
Equitable economic development	Cambodia*, Myanmar*, Thailand**	None
Integration into the global economy	Cambodia*, Myanmar*	None

Note: *, **, *** significant at 1%, 5%, and 10% level respectively based on regressing the difference between home and foreign score on country fixed effects.

6. ASEAN Economic Integration: Impediments

Since the awareness of AEC 2015 is directly related to the respondents' exposure to ASEAN economic integration, we naturally wanted to find out what was impeding ASEAN economic integration. In the survey, we identified ten potential barriers to conducting business in ASEAN countries and asked the respondents to select up to three of these barriers that were most relevant to their experience.

The ten barriers were: tariff barriers, different regulatory standards, discrimination against foreign investors, excessive government regulations and bureaucracy, language barriers, lack of information about the business environment in other ASEAN states, inadequate infrastructure, double taxation, lack of competition policy, and weak intellectual property rights (IPR) protection. The share of the respondents selecting each barrier is tabulated in Table 10.22.

TABLE 10.22
Barriers to Conducting Business in Other ASEAN Countries

Barriers	Share
Tariff barriers	33%*
Different regulatory standards	41%*
Discrimination against foreign investors	9%
Excessive government regulations and bureaucracy	38%*
Language barriers	24%
Lack of information about the business environment in other ASEAN states	35%*
Inadequate infrastructure	22%
Double taxation	23%
Lack of competition policy	16%
Weak IPR	19%

Note: Top barriers significantly different from the rest at 1% significance level.

Three non-tariff barriers received the largest votes: different regulatory standards, excessive regulation and lack of information about foreign business environment were selected by 41%, 38% and 35% of the respondents, respectively. Surprisingly, one third of the respondents also selected tariff barriers as a factor impeding their business venture in other ASEAN countries. Given tariffs have mostly been eliminated among ASEAN countries, we suspect this result reflects the respondents' mistaking the difficulty with using preferential tariffs for tariff barriers.

To understand whether or not and why ASEAN firms have failed to be fully engaged in ASEAN economic integration, we asked them two questions on whether they had taken advantage of the existing trade and investment liberalization measures.

In the first question, the respondents were asked whether they had used the lower tariffs of the ASEAN Free Trade Agreement (AFTA), and if not, why not. In Table 10.23, we list the potential reasons the respondents were asked to choose from. We also let the respondents add other reasons if they did not think any of the reasons we proposed applied in their cases. In the end, only one firm chose to add its own

reason, which was that it had not used the lower tariffs but planned to do so in the future.

Twenty-three per cent of the respondents said they had taken advantage of the tariff reductions. Of the 77% of the respondents who had not used the lower tariffs, nearly 40% of the respondents said they were not aware of the lower tariffs that came with AFTA, a surprisingly large figure. This may explain why in Table 10.22, tariff barriers were listed as one of the main impediments to ASEAN economic integration. Twenty per cent said they did not export or import, and thus had no use for the lower tariffs. What should be worrisome to ASEAN policy-makers is that 8% of the firms said they had not used the lower tariffs because they had not been able to find information about how to make use of the new tariffs. This may also have contributed to the finding that the respondents considered high tariffs a barrier to ASEAN economic integration. The concern of the tariff savings being too small or involving too much paper-work did not garner much support, each receiving only 2% of the respondents' choices.

TABLE 10.23
Have You Used the Lower Tariffs of the AFTA
(ASEAN Free Trade Agreement)?

Choices	Number	Share
(a) No. We weren't aware of them.	143	39%
(b) No. We don't export or import.	74	20%
(c) No. We haven't been able to find information on how to make use of the new tariffs.	31	8%
(d) No. It requires too much paperwork and the tariff savings are minimal.	9	2%
(e) No. The tariff savings are too small compared to the non-tariff barriers.	7	2%
(f) Yes. We have used the lower tariffs.	86	23%
a & b	6	2%
a & c	5	1%
Subtotal	361	97%
Total	371	100%

A small number of the respondents made multiple choices. We list in Table 10.23 the combinations that received most votes: a & b and a & c. Altogether the respondents making the choices listed in Table 10.23 account for 97% of the whole sample.

We constructed a similar question with respect to the existing ASEAN investment liberalization measures and tabulate the results in Table 10.24. The proportion of the respondents who had availed themselves of these measures, 13%, is even lower than that for the tariff reductions. This is not surprising, as investing abroad is likely to be a much bigger commitment and involves higher costs than engaging in international trade. Of the remaining 87% of the respondents who had not used the investment liberalization measures, 46% said they were aware of them, 21% said they had no plan to invest abroad, and 9% reported that they had not been able to find information on how to use these measures.

TABLE 10.24
Have You Taken Advantage of the Existing ASEAN Investment Liberalization Measures?

Choices	Number	Share
(a) No. We weren't aware of them.	171	46%
(b) No. We don't invest abroad and have no plan to do so in the near future.	77	21%
(c) No. We haven't been able to find information on how to use these measures.	32	9%
(d) No. It requires too much paperwork.	2	1%
(e) No. The investment liberalization measures are insignificant in reducing the costs of doing business in the ASEAN countries where we have invested or plan to invest.	13	3%
(f) Yes. We have used the investment liberalization measures.	50	13%
a & b	7	2%
a, b & c	5	1%
Subtotal	357	95%
Total	374	100%

The respondents making the choices listed in Table 10.24 account for 95% of the sample.

In sum, the survey results indicate that an important impediment to ASEAN economic integration is lack of information about the policies and initiatives that have been put in place. It clearly remains a challenge for the ASEAN policy-makers to effectively communicate ASEAN economic integration measures and how the business community can take advantage of such measures.

7. Qualitative Comments of the National Consultants

After the survey was completed, we asked the national consultants to write a one-page summary of their observations about the survey that the questionnaire may not have captured. The original submissions by the national consultants are included in the appendix.

A few common themes run through the national consultants' qualitative comments. Nearly everybody discussed the difficulty of securing interviews with companies they wanted to talk to. These companies usually turned down such requests out of concern for the confidentiality of the information that they needed to reveal. The national consultant for the Philippines worried that this might taint the representativeness of the sample of firms he assembled. In the case of Brunei Darussalam, there were cases where the senior management delegated to subordinates the task of responding to the questionnaire.

All national consultants echoed the finding that there was a general lack of awareness of the AEC. Most of them felt lack of information accessible to the general public was a main reason. Another major reason points to a misalignment between the AEC and actual economic integration. The national consultants for Indonesia, Lao People's Democratic Republic, and Viet Nam all reported that the firms they talked to mostly focused on their domestic markets, and when they were engaged in international trade, non-ASEAN overseas markets were more important than ASEAN markets.

Some national consultants pointed out that some firms had been or would be negatively affected by the AEC. The national consultant for Lao People's Democratic Republic remarked that local Lao PDR firms had been negatively affected by the AEC.

The national consultant for Singapore explained that not all individuals interviewed were familiar with every aspect of international trade

and investment; this might explain why some of the questions were left unanswered. He also mentioned that some respondents were not comfortable with yes or no questions and chose not to answer instead. Singapore respondents' main critical comments focused on non-tariff barriers in the other ASEAN countries. For example, project review, approval and implementation were too slow in some ASEAN countries; there was lack of clarity and transparency in laws and regulation in some ASEAN countries.

The national consultant for Thailand remarked that some of the large firms ignored the impact of trade liberalization, "because of their past experience on the FTA that usually requires many paperwork and the benefits are insignificance [sic]". He also mentioned that some of the Thai firms were not able to comment on AEC implementation in other ASEAN countries because of the lack of information.

The national consultant for Viet Nam cautioned against generalizing from the results from the small sample. She also commented that there was no specific question about import activities, "when many enterprises import intermediate inputs from ASEAN and other countries". Finally, she thought given the fast diffusion of information technology, firms could access information on government policy through the internet.

8. Summary

There is concern that part of the reason for the slow progress of implementing AEC 2015 may have to do with ASEAN business community showing little or no interest in ASEAN developments. We conducted a survey to find out whether this concern had empirical support. Our survey was designed to relate ASEAN business firms' awareness of or interest in AEC 2015 to various firm characteristics, their operating environment, and in particular the extent to which they were engaged in ASEAN economic integration.

The survey was conducted in nine ASEAN member states, with a total sample size of 381 firms. They came from over 47 two-digit ISIC (Rev 3) industries, with the majority representing manufacturing and services industries. Most of the questionnaires were filled out by members of senior management in the respondent firms.

A key finding of the survey is that there is a general lack of awareness of AEC 2015 in the ASEAN business community. For example, it is more likely for the respondent firms to be aware of the

ASEAN-PRC Free Trade Agreement than of AEC 2015. By relating the likelihood of the firms' awareness of AEC 2015 to their exposure to ASEAN economic integration, we find that the awareness of AEC 2015 increases to the extent that the firms are affected by regional, cross-border economic activities.

In other words, what drives the business community's interest in AEC 2015 is the actual process of economic integration. We can infer from this that the lack of awareness of AEC 2015 in the business community can be attributed to the lack of actual economic integration.

These results lend support to the argument that the top-down approach to ASEAN economic integration has its limitations, particularly when the ASEAN business community's actual engagement in cross-border economic activities lags behind the vision of ASEAN politicians.

We were aware that how information regarding ASEAN economic integration is communicated to the business community could affect ASEAN firms' awareness of AEC 2015. We, therefore, investigated how ASEAN businesses obtained information regarding the various initiatives of ASEAN economic integration and whether that affected their awareness of AEC 2015. The most popular source of such information was the internet. But the internet turned out to be the least effective way of disseminating information regarding ASEAN economic integration; it was associated with the lowest level of awareness of AEC 2015. Instead, those that had received such information from the government were most likely to be aware of AEC 2015.

Finally, we investigated the impediments to ASEAN economic integration. Non-tariff barriers, including different regulatory standards, excessive regulation and lack of information about foreign business environments, dominated the respondent firms' concerns. When we prodded the respondent firms to elaborate on their current usage of the existing ASEAN trade and investment liberalization measures, we found a low rate of usage of such measures. The respondent firms complained that lack of information about these liberalization measures was a main reason why they had not used them.

More effort is needed to examine the issues we have studied with this survey. The sample size of our survey is relatively small, particularly for the large ASEAN countries. We would like to include all ten ASEAN member states in the survey.

NOTE

1. Messrs. Rodolfo Severino and Omkar Shrestha provided critical guidance and advice throughout the survey. Helpful suggestions and assistance from Sanchita Basu Das, Aekapol Chongvilaivan and participants in the ISEAS-ADB Final Workshop on "Assessment of Impediments and Actions Required for Achieving an AEC by 2015", 21 March 2012, are gratefully acknowledged. The survey would not have been possible had it not been for the hard work of the dedicated national consultants listed below:

National Consultants of the Various Countries involved in the Survey

Country	Name	
Brunei Darussalam	Mr Adna Shatriemie Bin Hj A. Abd Rahman	Lecturer, Faculty of Business, Economics and Policy Studies, University of Brunei Darussalam
Cambodia	Ms Neth Chantha	Deputy Executive Director, Cambodian Institute for Cooperation and Peace, Phnom Penh
Indonesia	Mr Erlan Hidayat	Independent Consultant, Jakarta
Lao People's Democratic Republic	Ms K. Souphaphone	Lao National Chamber of Commerce and Industry, Vientiane
Myanmar	Ms Hnin Wint Nyunt Hman	Research Assistant, ASEAN Studies Centre, Institute of Southeast Asian Studies, Singapore
Philippines	Mr Thanut Tritasavit	Research Associate, Regional Economic Studies Programme, Institute of Southeast Asian Studies, Singapore
Singapore	Mr Hock Lin Tai	Manager, NUS Entrepreneurship Centre, NUS Enterprise, National University of Singapore, Singapore
Thailand	Dr Bundit Chaivichayachat	Assistant Professor, Faculty of Economics, Kasetsart University, Bangkok
Viet Nam	Mrs Dinh Hien Minh	Senior Research Fellow, Central Institute for Economic Management, Ministry of Planning and Investment, Ha Noi

APPENDIX 10.1

Job Descriptions of Survey Respondents

Job Description	Reported Job Title
Head	Vice director/CEO, Director/CEO, General Director, General manager, Secretary General and Executive Director, Managing Director, Co-founder/Managing Director, owner, President Director, Executive Director, Managing partner, CEO, Group Head, President, Director General, Secretary General, CEO/Director, President and Chief Executive Officer, Chief Executive Officer, President and Managing Director
Senior	Chief Accountant, Head of Accounting Division, Deputy General Director, Head of Sales Division, Head of Administrative Division, Head of General Issue Division, Head of Export-import Division, Vice Head of Division on Sales, Export and Import, Head of Export and Import Division, Director, Human Resource Manager, Vice President Corporate Communication, Senior Development Business Manager, Senior Sales Manager, Commissioner, VP Business Development, Senior Auditor, Deputy Director, Chief of Branch, Chief of Division, Chief of Factory, Deputy Managing Director, Deputy General Manager, Chief Financial Officer, SVP Trading and Marketing, Executive Vice President and Chief Operating Officer, Chief Operating Officer, Executive Vice President, Vice President and Deputy General Manager, Senior Advisor, Sales Director, Senior Sales Manager
Middle	Accountant, Assistant for Chief Accountant, Assistant for Director/CEO, Accountant in import-export, Admin Supervisor, Marketing Executive & Finance Manager, Sales Marketing Manager, Manager, Sales Supervisor, Project Coordinator, Executive, Service Delivery Manager, Project Manager, Sales Manager, Sales and Customer Supervisor, Q&A Manager, Senior Accountant, Financial Consultant, Financial Officer, Key Account Executive, HR Manager, HR/Admin. Manager, Manager — Communication, Procurement Manager, Export-import Manager, System Engineer, IT Manager, Account Manager, Team Leader, Engineer Manager, AVP and Section Manager
Junior	Admin Executive Officer, Sales Consultant, Associate, Marketing Executive, Sales Executive, Communications Officer, Sales representative, Business Development Officer, Account Officer, Receptionist, Assistant Product Manager, Assistant Manager, Marketing Associate

APPENDIX 10.2
Distribution by Two-digit ISIC Rev 3 Industries

Industry	ISIC Code (Rev 3)	Freq.	Per Cent
Agriculture, hunting and related service activities	1	4	1.05
Forestry, logging and related service activities	2	1	0.26
Mining of coal and lignite; extraction of peat	10	3	0.79
Extraction of crude petroleum and natural gas; service activities incidental to oil and gas extraction, excluding surveying	11	6	1.57
Mining of metal ores	13	1	0.26
Manufacture of food products and beverages	15	23	6.04
Manufacture of tobacco products	16	1	0.26
Manufacture of textiles	17	4	1.05
Manufacture of wearing apparel; dressing and dyeing of fur	18	20	5.25
Manufacture of paper and paper products	21	8	2.1
Publishing, printing and reproduction of recorded media	22	4	1.05
Manufacture of coke, refined petroleum products and nuclear fuel	23	1	0.26
Manufacture of chemicals and chemical products	24	10	2.62
Manufacture of rubber and plastics products	25	3	0.79
Manufacture of other non-metallic mineral products	26	3	0.79
Manufacture of basic metals	27	3	0.79
Manufacture of fabricated metal products, except machinery and equipment	28	4	1.05
Manufacture of machinery and equipment n.e.c.	29	6	1.57

Industry	ISIC Code (Rev 3)	Freq.	Per Cent
Manufacture of office, accounting and computing machinery	30	2	0.52
Manufacture of electrical machinery and apparatus n.e.c.	31	11	2.89
Manufacture of radio, television and communication equipment and apparatus	32	12	3.15
Manufacture of medical, precision and optical instruments, watches and clocks	33	1	0.26
Manufacture of motor vehicles, trailers and semi-trailers	34	5	1.31
Manufacture of other transport equipment	35	1	0.26
Manufacture of furniture; manufacturing n.e.c.	36	17	4.46
Electricity, gas, steam and hot water supply	40	6	1.57
Collection, purification and distribution of water	41	2	0.52
Construction	45	10	2.62
Sale, maintenance and repair of motor vehicles and motorcycles; retail sale of automotive fuel	50	16	4.2
Wholesale trade and commission trade, except of motor vehicles and motorcycles	51	67	17.59
Retail trade, except of motor vehicles and motorcycles; repair of personal and household goods	52	6	1.57
Hotels and restaurants	55	7	1.84
Land transport; transport via pipelines	60	1	0.26
Water transport	61	8	2.1
Air transport	62	1	0.26

APPENDIX 10.2 *(Cont'd)*

Industry	ISIC Code (Rev 3)	Freq.	Per Cent
Supporting and auxiliary transport activities; activities of travel agencies	63	16	4.2
Post and telecommunications	64	7	1.84
Financial intermediation, except insurance and pension funding	65	10	2.62
Insurance and pension funding, except compulsory social security	66	2	0.52
Activities auxiliary to financial intermediation	67	8	2.1
Real estate activities	70	1	0.26
Computer and related activities	72	23	6.04
Other business activities	74	26	6.82
Public administration and defence; compulsory social security	75	1	0.26
Education	80	4	1.05
Sewage and refuse disposal, sanitation and similar activities	90	1	0.26
Other service activities	93	1	0.26
Conglomerates	n.a.	3	0.79
	Total	381	100

APPENDIX 10.3

The Survey Questionnaire

ASEAN ECONOMIC INTEGRATION SURVEY

CONFIDENTIALITY STATEMENT

This survey is commissioned by and conducted for the Institute of Southeast Asian Studies (ISEAS), 30 Heng Mui Keng Terrace, Pasir Panjang, Singapore 119614. ISEAS is a non-governmental policy research institution. The information collected here will only be used for ISEAS's internal research purposes and will be treated with the strictest confidence.

I. Background information

1. Information on the respondent

- (a) Name of the person: _____
- (b) Position in company: _____
- (c) Email address: _____
- (d) Phone number: _____

2. Information on the company

- (a) Name of company: _____
- (b) Location of global headquarters (*City, Country*): _____
- (c) Which industry does your company operate in? _____
- (d) In what year was your company established? _____
- (e) How many employees does your company have? Please choose one from the following ranges:

Less than 100	
Between 100 and 200	
Between 200 and 1,000	
Over 1,000	

II. The company's business involvement in ASEAN

3. Please report the share of the sales of your company generated from the following locations. When you serve a foreign market, do you serve it by foreign direct investment (FDI), i.e., setting up a foreign subsidiary, by export or by both means?

Country	1. Share of Total Sales (%)	2. Mode of Service (1 – FDI; 2 – Export; 3 – Both)
(a) Home country		
(b) Other ASEAN countries		
(c) Rest of the world		

4. On a scale of 1 to 7, please evaluate the importance of the following markets to your business in the next 3 years (1 – least important, 7 – most important)

Country	Importance
(a) Home country	
(b) Other ASEAN countries	
(c) Rest of the world	

III. ASEAN economic integration and the company

5. What are the most significant barriers to conducting business in other ASEAN member states? *Choose up to 3.*
- (a) Tariff barriers to international trade
 - (b) Different regulatory standards (e.g., technology, safety, health, etc.)
 - (c) Discrimination against foreign investors
 - (d) Excessive government regulations and bureaucracy
 - (e) Language barriers
 - (f) Lack of information about the business environment of the other ASEAN member states
 - (g) Inadequate infrastructure
 - (h) Double taxation
 - (i) Lack of competition policy
 - (j) Weak legal enforcement (e.g., contract enforcement, protection of property rights including IPR, etc.)
 - (k) Others (Please specify):
6. How has ASEAN economic integration affected your business?

Choose all that applies.

- (a) Minimal or no impact
 - (b) More export to other ASEAN countries
 - (c) More investment in other ASEAN countries
 - (d) Cheaper import of intermediate inputs from other ASEAN countries
 - (e) More competition from imports from other ASEAN countries
 - (f) More competition from other ASEAN country invested companies in my country
 - (g) Higher profitability
 - (h) Lower profitability
 - (i) Others:
7. Has your company used the lower tariffs of the AFTA (ASEAN Free Trade Agreement)?
- (a) No. We weren't aware of them.
 - (b) No. We don't export or import.
 - (c) No. We haven't been able to find information on how to make use of the new tariffs.
 - (d) No. It requires too much paperwork and the tariff savings are minimal.
 - (e) No. The tariff savings are too small compared to the non-tariff barriers.
 - (f) Yes. We have used the lower tariffs.
8. Has your company taken advantage of the existing ASEAN investment liberalization measures?
- (a) No. We weren't aware of them.
 - (b) No. We don't invest abroad and have no plan to do so in the near future.
 - (c) No. We haven't been able to find information on how to use these measures.
 - (d) No. It requires too much paperwork.
 - (e) No. The investment liberalization measures are insignificant in reducing the costs of doing business in the ASEAN countries where we have invested or plan to invest.
 - (f) Yes. We have used the investment liberalization measures.
9. Where did/would you obtain information about ASEAN trade and investment liberalization measures?
- (a) Search on the internet
 - (b) Relevant government organization in my country
 - (c) Trade association information sharing
 - (d) Business contacts
 - (e) Media
10. ASEAN has the following free trade agreements (FTA) with other countries.

Please answer three questions for each FTA: whether you were aware of it, whether you have used it and whether you think it is effective in reducing trade barriers.

FTA	Aware (Yes/No)	Use (Yes/No)	Effective (Yes/No)
ASEAN + Australia and New Zealand			
ASEAN + PRC			
ASEAN + India			
ASEAN + Republic of Korea			

IV. ASEAN Economic Community (AEC) 2015

11. Have you heard of the following?

Initiative	Yes/No
(a) AEC 2015	
(b) AEC Scorecard	

12. If you are aware of AEC 2015, on a scale of 1 to 7 (1 — not implemented; 7 — expeditious and effective implementation), please rate the implementation of the following AEC initiatives in your country and the ASEAN country that is your most significant overseas ASEAN market, whether by export or FDI. If you are unfamiliar with an initiative, please give a value of 0.

Initiative	Home Country	Other ASEAN Country
(a) Free flow of goods (e.g., elimination of tariff and non-tariff barriers, customs integration, harmonization of technical standards and regulations, etc.)		
(b) Free flow of services (e.g., mutual recognition arrangements, liberalizing foreign equity participation restrictions, etc.)		
(c) Free flow of investment and capital (e.g., national treatment, investment protection, streamline and simplify investment applications and approvals, promote capital mobility, etc.)		
(d) Free flow of skilled labor (e.g., issuance of visas and employment passes, ASEAN University Network, etc.)		

(e) Competitive economic region (e.g., competition policy, consumer protection, IPR protection, avoidance of double taxation, e-ASEAN Framework Agreement, etc.)		
(f) Infrastructure development (e.g., liberalization of air services, ASEAN Highway Network, Trans-ASEAN Gas Pipeline, ASEAN Power Grid, etc.)		
(g) Equitable economic development (e.g., SME development, technical assistance and capacity building, etc.)		
(h) Integration into the global economy (e.g., coordination among member countries in dealing with external economic relations, enhance participation in global supply networks, etc.)		

13. If you are aware of the AEC Scorecard mechanism, on a scale of 1 to 7 (1 — ineffective; 7 — highly effective), please rate the effectiveness of the mechanism as a way to help enforce the implementation of the AEC 2015 initiatives in your country and the ASEAN country that is your most significant overseas ASEAN market, whether by export or FDI.

Country	Assessment (1–7)
(a) Home country	
(b) Other ASEAN country	

End of Survey

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This is an important and timely volume: important because ASEAN is an increasingly significant and influential regional and global actor; and timely because, as the 2015 ASEAN Economic Community target approaches, what is needed is a sympathetic yet arms-length survey of the issues and challenges. ASEAN will miss some of the targets laid out in its AEC Blueprint, but the reader is left in no doubt that the ASEAN spirit is alive and well. The editors include a distinguished former Secretary General of ASEAN and the leading academic analyst of ASEAN economic cooperation. They and their co-editors are to be congratulated for soliciting contributions from an outstanding and diverse group of authors, and then adding their highly authoritative commentary and analysis. A must read for anybody seriously interested in ASEAN.

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*H.W. Arndt Professor of Southeast Asian Economies,
Australian National University*



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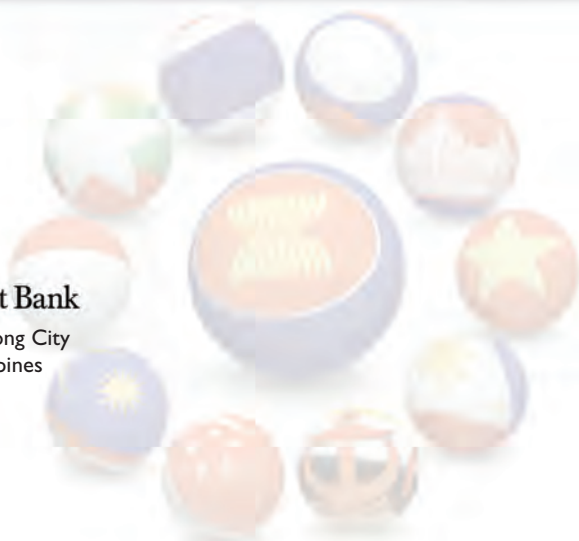
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