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ASEAN Way: Challenges to ASEAN Capital Market Integration

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วิทยานิพนธ์ฉบับนี้วิเคราะห์ว่า “วิถีอาเซียน (ASEAN Way)” ซึ่งเคารพในหลักอธิปไตย หลักการไม่แทรกแทรงกิจการภายใน หลักฉันทามติ และหลักความยืดหยุ่นเป็นสาเหตุที่ทำให้การรวมตลาดทุนของภูมิภาคมีความสำเร็จเพียงบางส่วน แม้ว่าวิถีอาเซียนมีความสำคัญยิ่งต่อการดำรงอยู่ของอาเซียนและก่อให้เกิดวิวัฒนาการในการรวมกลุ่มของภูมิภาคจากเดิมที่มีลักษณะหลวม ๆ มาเป็นการรวมกลุ่มที่มีกฎเกณฑ์และมีนวัตกรรมใหม่ ๆ เช่น ความร่วมมือของภูมิภาคเกี่ยวกับตลาดตราสารหนี้ การเปิดเสรีด้านการบริการทางการเงิน และการให้ความคุ้มครองผู้ลงทุน อย่างไรก็ดีวิถีอาเซียนก็ส่งผลต่อความเข้มข้นของระดับการรวมกลุ่มในด้านการบวนการเชิงสถาบัน (institutionalisation) และกระบวนการเชิงกฎเกณฑ์ (legalisation) อันส่งผลให้เกิดความแตกต่างในด้านกฎเกณฑ์และการบังคับคับใช้ รวมทั้งการจัดการโครงสร้างเชิงสถาบันของทั้งอาเซียนและกลุ่มประเทศสมาชิก

วิถีอาเซียนถือเป็นจุดแข็งของอาเซียนซึ่งความยืดหยุ่นของวิถีอาเซียนเป็นกลไกสำคัญที่ช่วยป้องกันการรวมกลุ่มล้มเหลวลง อย่างไรก็ดีวิถีอาเซียนก็ส่งผลลบต่อโครงสร้างสถาบันและกฎเกณฑ์ ซึ่งในการวิเคราะห์ประเด็นดังกล่าววิทยานิพนธ์ฉบับนี้ใช้กระบวนการวิเคราะห์กฎหมายเปรียบเทียบโดยดำเนินการเปรียบเทียบระหว่างการรวมตลาดทุนของอาเซียนและความร่วมมือด้านตลาดทุนในภูมิภาคอื่น ๆ ทั่วโลก ตัวอย่างเช่นสหภาพยุโรป เพื่อบ่งชี้ความแตกต่างและผลกระทบของวิถีอาเซียนต่อการรวมตลาดทุนของภูมิภาค ในการนี้วิทยานิพนธ์ฉบับนี้ได้วิเคราะห์โดยเปรียบเทียบการบังคับใช้ในระดับรัฐภาคีอาเซียนเพื่อบ่งชี้ถึงความแตกต่างด้านการบังคับใช้ซึ่งส่งผลต่อการบรรลุเป้าหมายในการรวมตลาดทุนของภูมิภาค

สาขาวิชา นิติศาสตร์ ลายมือชื่อนิสิต .....

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TIR SRINOPNIKOM: ASEAN Way: Challenges to ASEAN Capital Market Integration. ADVISOR: PROF. SAKDA THANITCUL, Ph.D., 343 pp.

This research argues that the ASEAN Way of respecting sovereignty, non-interference, consensus and flexibility causes partial success of ASEAN capital market integration. Although the ASEAN Way is vital to the existence of ASEAN, and there are several innovations that were built on the basis of the ASEAN Way, such as regional cooperation concerning bond market development, financial services liberalisation and investor protection. However, the ASEAN Way has significantly influenced the intensity of institutionalisation and legalisation processes of ASEAN regionalisation. Critically, there remain significant disparities in the regulatory, normative, and cognitive institutions in the financial markets among the ASEAN countries.

This research argues that the ASEAN Way is the strong point of ASEAN, whose elasticity prevents the institution from falling apart; however, the ASEAN Way has critically influenced the institutionalisation and legalisation processes of ASEAN, and at the same time has caused implementation gaps across ASEAN member countries. This research uses a comparative analysis between ASEAN and the existing, global financial cooperation, for instance, the EU, in order to distinguish the distinctive characters and the influences of the ASEAN Way on regional capital market integration. It then compares the implementation efforts of ASEAN members to investigate how the ASEAN Way triggers discrepancies among ASEAN members that eventually impede the goal of integrating the regional capital markets.

Field of Study: Laws Student's Signature .....

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CONTENTS

Page

Page

Page

Page

Page

TABLES AND DIAGRAMS

TABLES

DIAGRAMS

GLOSSARY

ABF	Asian Bond Fund
ABMF	Asian Bond Market Forum
ABMI	Asian Bond Markets Initiative
ACIA	ASEAN Comprehensive Investment Agreement
ACMF	ASEAN Capital Markets Forum
ACMI Blueprint	ASEAN Capital Market Infrastructure Blueprint
ACRAA	Association of Credit Rating Agencies in Asia
Action Plan 2016	ACMF Action Plan 2016-2020
ADB	Asian Development Bank
AEC	ASEAN Economic Community
AEC Blueprint	ASEAN Economic Community Blueprint
AFAS	ASEAN Framework Agreement on Services
AFM	ASEAN Finance Ministers
AEM	ASEAN Economic Ministers
AIA	ASEAN Investment Area Agreement
AMBD	Autoriti Monetari Brunei Darussalam
AMMTC	ASEAN Ministerial Meeting on Transnational Crime
AMRO	ASEAN+3 Macroeconomic Research Office
APEC	Asia-Pacific Economic Cooperation
ATL	ASEAN Trading Link
ARF	ASEAN Regional Forum
ASA	Association of Southeast Asia

ASEAN	Association of Southeast Asian Nations
ASEAN CIS Framework	Memorandum of Understanding to Establish an ASEAN CIS Framework for Cross-border Offerings of CIS
ASEAN Charter	Charter of the Association of Southeast Asian Nations 2007
ASEAN Disclosure Standards	ASEAN Equity Securities Disclosure Standards and ASEAN Debt Securities Disclosure Standards ASEAN Disclosure Standards Scheme
Bangkok Declaration	ASEAN Declaration 1967
BMD Scorecard	Bond Market Development Scorecard
Bursa Malaysia	Malaysia Stock Exchange
CBM	Central Bank of Myanmar
CCP	Central Counterparties
CERT	Computer Emergency Response Team
CG Scorecard	ASEAN Corporate Governance Scorecard
CIS	Collective Investment Scheme
CMSA	Malaysia Capital Markets and Services Act 2007
CTP	Common Trading Platform
CSD	Central Securities Depository
CSX	Cambodia Stock Exchange
EAC	East African Community
EACJ	East African Court of Justice
EMEAP	Executives' Meeting of East Asia Pacific Central Banks

ESMA	European Securities and Markets Authority
EU	European Union
ETF	Exchange Traded Fund
Expedited Review	Memorandum of Understanding on Expedited Review
Framework	Framework for Secondary Listings 2012
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
ICSD	International Central Securities Depository
IGA	ASEAN Investment Guarantee Agreement
Implementation Plan 2009	Implementation Plan to Promote the Development of an Integrated Capital Market to Achieve the Objectives of the AEC Blueprint 2015
IOSCO MMoU	IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Co-operation and the Exchange of Information
Kuala Lumper Declaration	Kuala Lumper Declaration on the ASEAN Plus Three Summit 2005
LSX	Lao Stock Exchange
MAS	Monetary Authority of Singapore
MiFID	Markets in Financial Instruments Directive
MILA	Mercado Integrado Latinoamericano (Latin American Integrated Market)
MRA	ASEAN Framework on Mutual Recognition Arrangement

NAFTA	North American Free Trade Agreement
OJK	Otoritas Jasa Keuangan
PSEC	Philippines Securities and Exchange Commission
RIA-Fin	Roadmap for Monetary and Financial Integration of ASEAN
SEA	Securities and Exchange Act 1992 (Thailand)
SEC	Office of the Securities and Exchange Commission (Thailand)
SEP	Sufficiency Economy Principle.
SET	Stock Exchange of Thailand
SFA	Securities and Futures Act 2001 (Singapore)
SS	Suruhanjaya Sekuriti (Securities Commission Malaysia)
SSC	State Securities Commission (of Vietnam)
SGX	Singapore Stock Exchange
SOMTC	ASEAN Senior Officials Meeting on Transnational Crime
TAC	Treaty of Amity and Cooperation 1979
TEEAC	The Treaty for the Establishment of the East African Community 1999
TRIMs	Agreement on Trade-Related Investment Measures
UN Charter	Charter of the United Nations 1945
WC-CAL	Working Committee for Capital Account Liberalisation
WC-CMD	Working Committee on Capital Market Development

WC-FSL	Working Committee on Financial Services Liberalisation
WC-PSS	Working Committee for Payment & Settlement Systems
WFE	World Federation of Exchanges
WTO	World Trade Organisation
ZOPFAN	Zone of Peace, Neutrality, and Freedom Declaration 1971

CHAPTER I INTRODUCTION

1. Background

Since the Asian financial crisis in 1997, a number of Asian countries have put a great effort into restoring their financial sectors and strengthening the linkages of the financial sectors among the Asian countries. In this light, several domestic capital markets have considerably matured, and the domestic capacity for financial supervision has become more sophisticated.[1] Several intra-regional financial markets and policy coordination are constantly strengthened, as evidenced by several ongoing development cooperation efforts on macroeconomic monitoring and liquidity support.[2] A number of large developing Asian countries have changed the competition landscape within Asia. They have gained competitiveness, resulting in an increase of investment inflows into such countries.[3] This capitalisation has considerably decreased the size and importance of several ASEAN markets, which are still considered as small, within the global economies. In response, ASEAN's policy makers have tried to make a significant effort to identify the weaknesses within the regional financial markets and to address measures in order to ensure that ASEAN countries can still be capable of attracting investment flows. ASEAN leaders have recognised the importance and the urgency of economic integration and have initiated regional initiatives under several ASEAN forums.[4] The integration of separate markets into one larger market could lead

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1 Cyn-Young Park, "Asian Capital Market Integration: Theory and Evidence," in *Asian Development Bank Institute Working Paper* (2013), 1.

2 Such as the Chiang Mai Initiative Multilateralisation; See ibid.

3 For instance, China and India which are typically parts of "BRIC economies"

4 Datuk Ranjit Ajit Singh, "ASEAN: Perspectives on Economic Integration: ASEAN Capital Market Integration: Issues and Challenges," in *LSE IDEAS special report* (London School of Economics and Political Science, 2009), 28.

to efficiency gains through the economies of scale and, at the same time, reduce costs existing in financial market transactions.[5] This integration would eventually bring about a superior investment atmosphere and broaden the scope of risk diversification. Moreover, it could alleviate global imbalances since it provides a means of better matching of vast savings with investment opportunities within the region.[6]

By taking an historical perspective, ASEAN financial integration effort began in 1997, as envisaged under ASEAN Vision 2020, which focused on improving the regional co-operation and socio-economic development.[7] This vision has influenced the later ASEAN cooperation initiative. The dramatic movement of ASEAN financial integration[8] was seen in November 2007 when ASEAN leaders agreed on the AEC Blueprint by setting the ultimate goal of establishing a single market and production base in the ASEAN region before the end of 2015. One component under the AEC Blueprint is that ASEAN countries agreed to "transform ASEAN into a region with freer flow of capital and accelerate the free flow of professional and other services".[9] This transformation

5 See Lieven Baele and Elizaveta Krylova, "Measuring Financial Integration in the Euro Area," in *European Central Bank, Occasional Paper* (2004), 6-10; Ruben Lee, "Promoting Regional Capital Market Integration," in *Capital Markets Roundtable 2001* (Inter-American Development Bank, 2000), 4-8.

6 See Park, 1-5.

7 ASEAN, "ASEAN Vision," ed. ASEAN (1997), 2.

8 When discussing about financial integration, it is to be noted that this research would mean a broader concept of financial cooperation which consists of: (i) capital market integration and development to build capacity and lay the long-term infrastructure; (ii) financial service liberalisation to achieve free flow of financial services; (iii) capital account to achieve freer flow of capital; and (iv) banking and currency cooperation. The reference to capital market integration, under the context of this research, therefore specifically means a narrower scope of financial integration – only focusing the capital market not the financial market. However, there is interrelationship between the concept of financial integration and capital market integration that capital market integration would sit within the realm of financial market. This research, thus, may refer to the term of financial integration from time to time depending on the context of discussion.

9 ASEAN Secretariat, "ASEAN Economic Community Blueprint 2008," ed. ASEAN (2008), A.

aimed to: (i) promote greater harmonised rules in relation to capital markets; (ii) facilitate mutual recognition of market professionals; (iii) promote greater flexibility of securities issuance; (iv) enhance tax laws; and (v) facilitate market driven efforts.[10] In 2008, the implementation initiative of capital market integration was discussed during the ASEAN Financial Minister Meeting. There, the Implementation Plan 2009[11], as prepared by the ACMF[12], was proposed. Implementation Plan 2009 was then endorsed as an actual plan at the 13th Finance Minister Meeting, where there was put in place a significant milestone to create a development of an integrated capital market in order to fulfil the objectives under the AEC Blueprint.

The ASEAN integration initiative was innovative and, at the same time, ambiguous. The regional integration under the ASEAN context was not equal to the EU's integration.[13] ASEAN has explicitly developed its own approach of cooperation and a dispute resolution mechanism, which is embedded as the core principle of ASEAN cooperation.[14] This thesis names the ASEAN-specific balanced approach the "ASEAN Way: Challenges to Regional Capital Market Integration". It borrows the term "ASEAN Way" from ASEAN terminology, which usually refers to an ASEAN Way of cooperation, meaning respect of sovereignty and non-interference in domestic affairs among the member states. The term is widely referenced in ASEAN studies and in

10 See ibid., 14-17.

11 See ASEAN Capital Market Forum, "Implementation Plan to Promote the Development of an Integrated Capital Market to Achieve the Objectives of the Aec Blueprint 2015," ed. ASEAN Finance Ministers Meeting (ASEAN, 2009), 1-10.

12 ASEAN Capital Market Forum, About ACMF (ASEAN Capital Market Forum) < http://www.theacmf.org/ACMF/webcontent.php?content_id=0000> access 16 October 2014

13 Singh, 36.

14 See *Charter of the Association of Southeast Asian Nations*, Article II2(a).

international politics or social studies. Significantly, ASEAN Way still weighs heavily on the ASEAN integration process as well as on the regional capital market integration. As pointed out by ASEAN's own former secretary-general, Rodolfo Severino, the ASEAN Way "is not a doctrine that is adhered to and applied on dogmatic or ideological grounds. It springs from a practical need to prevent external pressure from being exerted against the perceived national interest – or the interest of the regime". [15] Critically, this research considers that the ASEAN Way allows ASEAN cooperation to develop amidst the regional political diversity and different economic conditions. Without the ASEAN Way, ASEAN would never have come this far.

However, an aspiration to create a deeper integration raise a question regarding the evolution of The ASEAN Way – to what extent, how should the ASEAN Way be applied in the context of economic and financial integration, especially building up the regional capital markets, which requires a high level of institutional readiness, sound regulatory frameworks, efficient enforcement mechanisms, and a smooth transition process.[16] Currently, ASEAN capital market integration can be defined as just a stage of creating the enabling conditions for cross-border access.[17] The differences of political economies, economic development and political systems nevertheless still cause a deeply divided perception of ASEAN's prospect of integration. Essentially, it can be seen as a confrontation between the members' view to facilitate further cooperation versus a firm adherence to the non-intervention concept.[18] It is obvious that the channels of regional ASEAN financial cooperation have become very diverse as Asian

15 Rodolfo C. Severino, Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-General (Singapore: ISEAS, 2006), 94.

16 See Asian Development Bank, *The Road to ASEAN Financial Integration – a Combined Study on Assessing Financial Landscape and Formulating Milestone for Monetary and Financial Integration in ASEAN* (Mandaluyoung: Asian Development Bank, 2013), 25-27.

17 See Forum.

18 Lee Leviter, "The ASEAN Charter: ASEAN Failure or Member Failure?," *New York University Journal of International Law & Politics* 43, no. 1 (2010).

financial cooperation has been conducted through a variety of forums that differ from one another in terms of their structures and the governance system. This variety leads to the overlapping works[19] among ASEAN bodies, which would consequently result in an absence of concrete regional governance structure and eventually slow down the integration effort. Furthermore, as observed by the international supervisory and market standards setting organisations, ASEAN illustrates the high level of regulatory disparities, capital controls and exchange restriction, different tax regimes/treatments, underdeveloped and high portfolio restrictions on institutional investors. These cause an illiquid market and lack of regionally focused products in ASEAN.[20] In order to allow the integration to progress further, a high level of a common aspiration of member countries towards regionalism is required. However, the reality is that ASEAN still encounters divergences of development levels, socio-economic and financial stability.[21] These differences call for the creation of ASEAN normative and institutional frameworks to overcome the differences of policy objectives and accommodate the economic diversity.

At the state level, implementation of the ASEAN initiative still faces several problems. Critically, the national domestic regulators and regulatory supervision are still focused on domestic activities which are not sufficient to cover overall risk exposures. Moreover, ASEAN members still have capital controls, exchange restrictions, low standards of corporate governance and investor protection, and certain restrictions for institutional investors which are potentially the result of the conflict between state sovereignty and the common interests of regionalism. The 'regional champions[22]' firms would see the opportunity to expand their markets and reap benefits from the

19 Bank of International Settlement, "Regional Financial Cooperation in Asia: Challenges and Path to Development," in *Bank of International Settlement Papers* (2008), 128.

20 See Singh, 36.

21 ibid.

22 Bank, 27.

integration, while domestic firms may fail to do so, leaving a question to the domestic policy maker as to whether and to what extent the policy maker will tolerate such domestic operators to lose in favour of foreign competitors.[23] Moreover, the convergence of legal prosecution frameworks related to cross-border capital market transactions is still doubtful. For example, the cross border litigation concerning criminal and commercial disputes raises a question regarding the role of domestic regulators in facilitating the development of the private sector for their criminal and commercial disputes arising from the capital market integration.[24]

Therefore, the ASEAN Way and problems embedded in ASEAN capital market integration led to this study and this research.

23 Thirachai Phuvanatnaranubala, "The Pan-ASEAN Vision: Driving the Integration of ASEAN Capital Markets," (ASEAN Capital Markets Forum, the Finance Thailand 2010 - Conference Bangkok, Thailand2010).<http://www.sec.or.th/TH/Documents/Information/speeches/speech220253.pdf> access 15 March 2015

24 ibid.

2. RESEARCH OBJECTIVES

The objectives of this research are to explore and identify the fundamental legal challenges of the ASEAN Way in an aspect of the implementation of ASEAN capital market integration, and to subsequently to make some suggestions in relation to the possible solutions in order to overcome such fundamental impediments and to foster the integration.

This research intends to answer the following research questions:

1) What is the unique character of ASEAN integration that influences the regional economic and financial integrations?
2) What are the legal impediments to the integration of ASEAN capital markets as a result of the ASEAN Way?
3) How can laws and institutions overcome the legal problems in order to create an efficient market integration process?
4) What is a mechanism to combine the strong points of the ASEAN Way with a cooperation and rules-based system of international cooperation in order to create effective regional capital market integration?

3. HYPOTHESIS

The ASEAN Way of respecting sovereignty, non-interference, consensus and flexibility is a cause of the partial success of ASEAN capital market integration.

4. SCOPE OF RESEARCH

This research will focus on a comparative analysis of international agreements with respect to ASEAN's capital markets and other related issues, including in particular (but not limited to): Charter of the Association of Southeast Asian Nations; ASEAN Declaration 1967; ASEAN Economic Community Blueprint ; Implementation Plan to Promote the Development of an Integrated Capital Market to Achieve the Objectives of the AEC Blueprint 2015; ACMF Action Plan 2016-2020; Memorandum of Understanding to Establish an ASEAN CIS Framework for Cross-border Offerings of CIS; and ASEAN Equity Securities Disclosure Standards and ASEAN Debt Securities Disclosure Standards ASEAN Disclosure Standards Scheme.

It will further compare national laws/regulations and related case law or court decisions, including in particular (but not limited to): the Malaysia Capital Markets and Services Act 2007; the Thai Securities and Exchange Act 1992; and the Singapore Securities and Futures Act 2001. It will also deal with legal literature concerning capital markets, as well as the extensive international reports issued by international organisations, for instance, the World Bank Groups and Asian Development Bank.

Critically, the key focus of this research is to identify the fundamental legal challenges of the ASEAN Way in an aspect of the implementation of ASEAN capital market integration; therefore, it will neither attempt to investigate the extent of ASEAN economic integration nor propose optimal institutional and regulatory arrangements since such issues would be a matter for another research.

5. RESEARCH METHODOLOGY

This research is a legal research. In essence, the approach of this doctoral study consists of three stages. The first stage encompasses an analysis of the fundamental conception of regional economic integration and the specialties of ASEAN economic integration from a viewpoint of the global paradigm. Then, this research will indicate normative and institutional characters of ASEAN where the ASEAN Way has been embedded as a core principle of regional integration. In this light of this, ASEAN capital market integration represents a philosophical tug of war between the ASEAN traditional way of cooperation and a movement towards a rules-based approach of international cooperation.

The second stage will involve an analysis of the implementation of ASEAN capital market integration at the ASEAN level in order to identify the features of the regional capital market integration, and to prove that the reliance on the ASEAN Way approach causes ASEAN capital market integration to be only a partial success. In doing so, it will evaluate and analyse ASEAN integration initiatives in the context of global capital markets in order to compare achievements and impediments/disparities existing in ASEAN integration.

The implementation of international cooperation requires an adoption at member stage levels; and the ASEAN region represents diversity of political, economic and social developments. The third stage of this research, therefore, will involve an evaluation of ASEAN members' implementation efforts to achieve the objectives of ASEAN integration. The ASEAN Way yields negative consequences on an accomplishment of market integration efforts. In doing this, this research will be based

on a comparative analysis among ASEAN members to indicate successes and problems arising from domestic implementation and adjustment programmes.

Apart from a conclusion at the end, this research, will further provide an analysis of institutional and normative building efforts, shedding light on an approach to combine the strong points of the ASEAN Way and rules-based structures in order to construct an ASEAN capital market. It will also provide recommendations for ASEAN to overcome the legal impediments and disparities arising from the integration.

This research is based on a document research. Doctrinal methodology is employed to analyse the rights and obligations of ASEAN members under the capital market integration initiatives. It helps clarify the application and interpretation of the essential regulatory principles, and the implications of particular ASEAN approaches and terms. Apart from that, this research will be based on literature reviews and comparative study of legal documents/commentaries sources. The legal comparative approach will be utilised as a tool for broadening the perspective of legal research. On the other hand, this research will take into account the positive and negative experiences in connection with selected ASEAN domestic markets and some developed markets. Conducting a comparative approach would provide a good analysis regarding the aspects of capital market integration. In doing so, the author will focus on an analysis of international agreements with respect to ASEAN's capital markets, national laws/regulations and related case law or court decisions (as the case may be). It will also deal with legal literature concerning the capital market, as well as the extensive international reports issued by international organisations such as OECD and IOSCO.

The resources of this research will involve library documents, including institutional documents, working papers, and speeches regarding financial integration and regional cooperation in ASEAN countries.

6. CONTRIBUTION TO THE FIELD

The work on the doctoral research will produce exemplary academic contributions to the study of ASEAN financial services. ASEAN integration is still at an early stage, so there are only a few studies that fully focus on legal aspects and impediments arising from legal implementation. This research would make an original contribution to scholarship in this area. Through an exploration of ASEAN issues and identification of unique factors and challenges, it is also strongly believed that this research will provide useful insights for future reform for ASEAN and members countries. The final product will provide a legal analysis of impediments existing in the process of regional capital market integration, which will enable the creation of a legal roadmap for ASEAN and member countries in order to achieve the objectives of an integrated capital market.

7. THESIS STRUCTURE

The structure of this research is divided into five chapters, as follows:

Chapter I Providing research background, hypothesis of the study, research methodology, and scope of the research.

Chapter II Providing a conceptual discussion on financial integrations and the fundamental key elements of ASEAN's integration system, in particular the ASEAN Way, as well as proposing legal justification to the concept.

Chapter III Analysing ASEAN capital market integration at the institutional level, evaluating ASEAN initiatives under the context of global capital market in order to specify position and disparities existing in the process of regional integration.

Chapter IV Reconsidering the impact of the ASEAN Way on the regional capital market integration through an assessment of implementation at member state levels in order to identify impediments and implementation gaps.

Chapter V Making a conclusion and forming recommendation to combine the strong points of the ASEAN Way and rules-based structures in order to construct an ASEAN capital market.

CHAPTER II ECONOMIC INTEGRATION IN THE CONTEXT OF ASEAN

The main objectives of this Chapter are to examine the role of law and institution in economic cooperation by using ASEAN as a case in point, and to analyse the unique feature of ASEAN's cooperation; namely, the ASEAN Way.

The first part of this Chapter will discuss the conceptual element of economic integration in the legal perspective and subsequently apply it to the context of ASEAN. The second part of this Chapter will analyse the concept of the ASEAN Way, which is known as the keystone of ASEAN's cooperation, in the light of theoretical and legal aspects.

1. ECONOMIC INTEGRATION AND ASEAN

This section discusses the issue of economic integration in a legal perspective by arguing that the consideration of economic integration would be made through the aspects of institutionalisation and legalisation processes. Following an investigation of the extent of ASEAN's institutionalisation and legalisation, the result as such will be used as the foundation for consideration regarding a regional capital market integration in Chapter III and IV later on.

1.1 Economic Integration in a Legal Perspective

Institutionalisation and legalisation processes are the fundamental elements for a consideration of economic integration in a legal perspective, as economic integration requires a construction of institutions and legal system. According to Bela Balassa, economic integration comprises both a "process" and a "state of affairs".[25]

25 Bella Balassa, *The Theory of Economic Integration* (Greenwood Press, 1961), 174.

As a process, economic integration envisages "measures designed to abolish discrimination between economic units belonging to different national states" while the state of affairs of economic integration is represented by "the absence of various forms of discrimination between national economies".[26] Based on such observation, it is obvious that Balassa has identified an relationship between economic integration and a construction of both institutions and legal frameworks. A construction of both institutions and legal frameworks, as the tools, would be necessary to achieve the process and the state of affairs of integrating the economy. If the desired level of economic integration is lower, such as in a free trade area, the likelihood would be that the institutional structure and legal arrangement will be limited to the facilitation to enable a market access, along with a regional dispute settlement mechanism. In the case where the desired level of economic integration has moved beyond the free trade area, the institutions are more likely to be productive and possess supranational characteristics with strong legal binding effects on member states. To such extent, a regional legal system, with both legislative and judicial mechanisms, will be created; for example, the European Parliament has legislative power for the EU while the Court of Justice of the EU has its main mandate to interpret EU law and ensures its equal application across all EU member states.

26 ibid.

In the light of the above, a reciprocal relationship between institutionalisation and economic integration[27] is observable. Critically, economic integration would lead to regional institution building in several channels. In this regard, Bernard Mennis made a supporting observation that as a result of economic integration, "boundaries between nation-states become less discontinuous, thus leading to the formation of a more comprehensive system. Economic integration consists in the linking up and merging of the industrial apparatus, administration and economic policies of participating countries".[28] Essentially, it is clear from such observation that an increase of trade and investment across the borders results in private sectors demanding the elimination of the barriers and the provision of security of contract and investment. This demand accordingly results in the government's creating the regional arrangements and institutions that underpin liberalisation of tariff and non-tariff barriers as well as the harmonisation of regulations.[29] Moreover, by narrowing down to the financial integration, it is more apparent that the process of achieving the integration directly relies on the institutionalisation and legalisation processes. This is because there is a necessity of creating and enabling conditions for cross-border access to reach the stage where[30]: (i) capital is allowed to move freely within the region; (ii) issuers are free to raise capital anywhere within the region; and (iii) investors can invest

27 See Randall Henning, "Regional Economic Integration and Institution Building," in *Regional Economic Integration in a Global Framework*, ed. Julie Mckay, Maria Olivia Armengol, and Georges Pineau (Germany: European Central Bank, 2005), 79.

28 Bernard Mennis and Karl P. Sauvant, *Emerging Forms of Transnational Community* (Lexington Books, 1976), 75.

29 Henning, 1-20.

30 Jaseem Ahmed and V. Sundararajan, "Regional Integration of Capital Markets in ASEAN: Recent Developments, Issues, and Strategies," *Global Journal of Emerging Market Economies* 1:87 (2009): 92.

everywhere within the region.[31] Therefore, the achievement of creating cross-border access would indeed require the establishment of institutional and regulatory tools in order to facilitate the flow of capital within the region.

The institutionalisation can be seen as a sequential process: beginning with the lowest form of integration and subsequently developing to the top level (See Diagram 1). In a free-trade area, tariffs and quantitative restrictions (quotas) have been removed internally between state members while each member retains its own tariffs against non-members.[32] An example of a free-trade area is the free-trade area agreement between Australia and Thailand, whose preamble sets out that:

"The objectives of the Parties in concluding this Agreement are:

(a) to liberalise trade in goods and services and to create favourable conditions for the stimulation of trade and investment flows;"[33]

In the case of a customs union, in addition to the suppression of discrimination in commodity movements within the union, the state members will together adopt a common external tariff policy.[34] In this connection, the character of a common tariff policy can be considered by examining the preamble of the Southern African Custom Union Agreement, the ambition of which is that the members are "desirous of

31 ibid.

32 Balassa, 174; Patrick M. Crowley, "Is There a Logical Integration Sequence after EMU?," *Journal of Economic Integration* 21(1), no. 2006 (2006): 3.

33 *Thailand-Australia Free Trade Agreement*, Article 102.

34 Balassa, 174.and Crowley, 3.

determining and applying the same customs tariffs and trade regulations to goods imported from outside the Common Customs Area".[35]

A common market is a higher form of economic integration to enable free movements of factors of production, goods and services.[36] An example of a common market is the European Single Market. In 1986, the builders of the common market completed the work to further their integration on the basis of the Single European Act, which was the first major revision of the Treaty of Rome 1957. The Single European Act set the objective to achieve the completion of the common market by 1 January 1993.[37]

An economic union, as distinct from a common market, involves the harmonisation or coordination of some national policies in order to remove discrimination and a transfer of some policies to the supranational level.[38] An example can be found under the Treaty establishing the European Community (or the Treaty of Lisbon), which formed the constitutional basis of the EU, the creation of which completed the stage of economic and monetary union.[39]

Nevertheless, the ultimate level of integration is the political union that contains an effective and democratic body at the supranational level.[40] Currently, none of the regional integration efforts has reached such stage.

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35 *Southern African Custom Union Agreement* Preamble.

36 Balassa, 174-75.

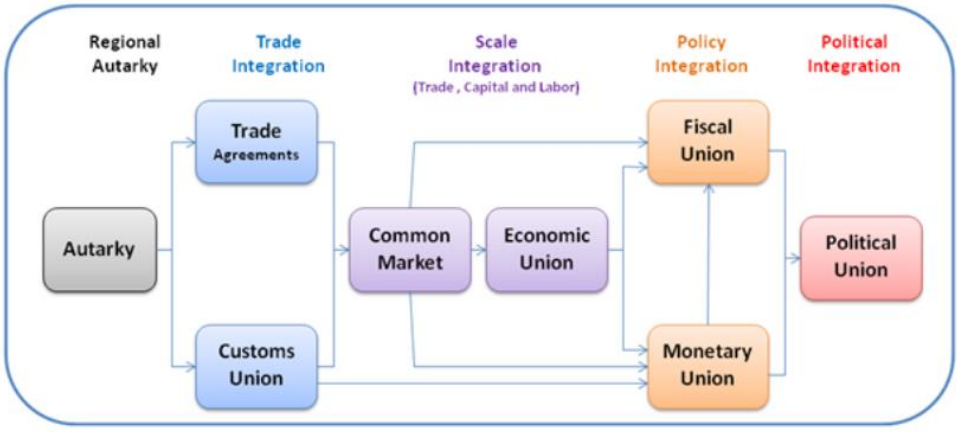
37 See generally *The Single European Act*.

38 Crowley, 3.

39 See generally *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*.

40 See Crowley, 3.

Diagram 1 **– Sequence of Integration**



Source: the Bank of Thailand

With regard to legalisation of economic integration, a general international trend to develop a more rules-based system to regulate international economic activity. is apparent; especially in the development of the WTO with its rules for regulating international trade and its unified dispute settlement mechanism.[41] In this connection, the significance of a legalisation process to economic integration lies in the fact that rules are the most tangible and easily enforceable core of international regimes.[42] The international regimes would require principles, norms, rules, and decision-making, where rules would specify prescriptions or prescriptions for action.[43] To put into practice, scholars, activists and policymakers in the post-Cold War period have foreshowed a “new world order” that would be governed by laws and institutions. At this point, typical international governance regimes would rely primarily

41 Paul J. Davidson, "The ASEAN Way and the Role of Law in ASEAN Economic Cooperation," *Singapore Year Book of International Law and Contributors* 8, no. 165 (2004): 165-66.

42 See Qin Yaqing, "Rule, Rules, and Relations: Towards a Synthetic Approach to Governance," *The Chinese Journal of International Politics* 4 (2011): 120.

43 Stephen D. Krasner, *International Regime* (Cornell University Press, 1983), 2.

on rules; explicitly designed and lay down with specific terms to which the actors concerned would adhere.[44]

The institutionalisation of regional integration has a close relationship with the legalisation process. Legalisation is a key mechanism to justify the legality of institutionalisation. Essentially, legalisation refers to a particular set of characteristics that institutions may (or may not) possess.[45] These characteristics are defined along three dimensions: obligation, precision, and delegation. The "obligation means that states or other actors are bound by a rule or commitment or by a set of rules or commitments. Specifically, it means that they are legally bound by a rule or commitment in the sense that their behaviour thereunder is subject to scrutiny under the general rules, procedures, and discourse of international law, and often of domestic law as well. Precision means that rules unambiguously define the conduct they require, authorise, or prescribe. Delegation means that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules."[46]

Each of these three dimensions is a matter of degree and gradation, and each can vary independently so that the place of an international norm, agreement, or regime in each dimension is an indicator of the degree of legalisation.[47] As a multidimensional consortium, the concept encompasses broad spectrums ranging from the ideal type of legalisation in which all three dimensions are maximised to a

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44 Yaqing, 119.

45 Kenneth Abbott et al., "The Concept of Legalisation," *International Organisation* 54, no. 3 (2000): 401.

46 ibid.

47 Davidson, 168.

"hard legalisation" that all three (or at least obligation and delegation) are high. On the contrary, a form of "partial" or "soft legalisation" engages with different combinations of attributes and finally reaches the stage of a complete absence of legalisation.[48] In highly developed national legal systems, statutes and regulations are regularly taken as prototypical of hard legalisation. The domestic enactments can vary widely in the degree of legalisation. The level of obligation, precision and delegation in a formal institution can be obscured in practice by political pressure, informal norms, and other factors. Legalisation of international communities exhibits similar variations; however, international institutions are less highly legalised than institutions in democratic rule-of-law states.[49]

1.2. ASEAN Economic Integration

The establishment of ASEAN was predominantly due to security and political concerns[50] with the goal to make ASEAN a regional peace foundation to manage the regional balance of power with the global superpowers;[51] namely a zone of "fighting-for-influence" between the United States and Soviet Union[52] (or the realpolitik of the Cold War[53]). Its establishment also responded to the necessity of having strong

48 Abbott et al., 401.

49 ibid.

50 Michael Ewing-Chow and Tan Hsien-Li, "The Role of the Rule of Law in ASEAN Integration," in *EUI Working Paper* (European University Institute, 2013), 1.

51 See Shaun Narine, *Explaining ASEAN: Regionalism in Southeast Asia* (Lynne Rienner Publishers, 2002), 15; Lee Leviter, "The ASEAN Charter: ASEAN Failure or Member Failure?," *New York University Journal of International Law & Politics* 43, no. 1 (2010): 170.

52 Mohamad Faisol Keling and et al, "The Development of ASEAN from Historical Approach," *Asian Social Science* 7, no. 7 (2010): 1.

53 Ewing-Chow and Hsien-Li, 6.

cooperation to subdue any suspicious attitudes, which might lead to armed conflicts[54]; especially, there was concern about Indonesia, which had the largest military in Southeast Asia and tried to hold itself out as a regional power.[55] Consequently, ASEAN's five original members agreed to establish a regional forum to promote peaceful relations among other members[56] while respecting each other.[57]

This research has found that ASEAN's processes of institutionalisation and legalisation have evolved through numerous contextual changes. The matters of ASEAN's institutionalisation and legalisation could be considered through the lens of ASEAN's cooperation history, as follows.

1.2.1. ASEAN's Institutionalisation

At the beginning, ASEAN's institutionalisation process was limited in terms of its objectives and form. The early establishment of the organisation could be seen as a dialogue of a "group of friends[58]" or a "cooperation forums"; consisting of the Annual Meeting of Foreign Ministers, Standing and Ah-Hoc Committees, and National Secretariat. Accordingly, the Bangkok Declaration set out the principles that:

"to carry out these aims and purposes, the following machinery shall be established:

54 Penelitian dan Pelatihan Ekonomika dan Bisnis, "SWOT Analysis on the Capital Market Infrastructures in the ASEAN+3," in *ASEAN+3 Research Group Final Report and Summary* (ASEAN, 2014), 8.

55 See Leviter, 170; Narine, 15.

56 Ewing-Chow and Hsien-Li, 4.

57 Leviter, 170.

58 Simon Chesterman, "Does ASEAN Exist? The Association of Southeast Asian Nations as an International Legal Person," *Singapore Year Book of International Law and Contributors* 199, no. 211 (2010): 200.

(a) Annual Meeting of Foreign Ministers, which shall be by rotation and referred to as ASEAN Ministerial Meeting. Special Meetings of Foreign Ministers may be convened as required.

(b) A Standing committee, under the chairmanship of the Foreign Minister of the host country or his representative and having as its members the accredited Ambassadors of the other member countries, to carry on the work of the Association in between Meetings of Foreign Ministers.

(c) Ad-Hoc Committees and Permanent Committees of specialists and officials on specific subjects.

(d) A National Secretariat in each member country to carry out the work of the Association on behalf of that country and to service the Annual or Special Meetings of Foreign Ministers, the Standing Committee and such other committees as may hereafter be established.[59]"

By using the word "association", it was obvious that ASEAN ought to differentiate itself as not being an "international organisation".[60] ASEAN, at the beginning, did not have any legal status under international law. It was neither to integrate member economies nor to build a supranational institution.[61] ASEAN cooperation, at the beginning, conveyed a sense of looseness and informality[62] as

59 ASEAN Secretariat, "The ASEAN Declaration (Bangkok Declaration) Bangkok, 8 August 1967," ed. ASEAN Secretariat (ASEAN Secretariat, 1967), Item 3.

60 See Mohamad Ghazali Shafie, "Reflections on ASEAN: 30 Years and Vision of the Future," in *ASEAN Roundtable 1997, 'ASEAN in the New Millennium'* (Singapore: ASEAN Secretariat, 1997), 1-2.

61 Benny Teh Cheng Guan, "ASEAN's Regional Integration Challenge: The ASEAN Process," *The Copenhagen Journal of Asian Studies* 20 (2004): 71.

62 See Shafie, 1-2.

there was a necessity to conciliate the diversity of views and positions held by the ASEAN members. This was because ASEAN's regional orientation, at the origin, profoundly emphasised military and political issues rather than the commercial and economic aspects.[63] In particular, prior to the establishment of ASEAN, the Vietnam War was escalating, and many countries in the region feared that communism in the region would spread as predicted by the "domino theory".[64] At the same time, there was an undeclared military conflict between Indonesia and Malaysia (including Singapore, Malaya, Sarawak, Brunei and North Borneo (Sabah)), or so called the "Konfrontasi"[65], which was a clear indication of Indonesia's powerful military. The conflict resulted in a transgression of the diplomatic relations between Malaysia and Indonesia and strained diplomatic ties among the parties and other Southeast Asian nations[66] that might eventually destabilise the region.[67] Therefore, ASEAN was born as a means to combat such communist movement and to act as a direct response to the intra-regional stimulus of Konfrontasi.

The Bangkok Declaration was created differently than the Treaty of Rome, which it established a common market and conferred legal status upon the European Economic Community.[68] Consequently, while the European Economic Community developed more rapidly towards an economic integration, ASEAN still emphasised

63 See generally Bisnis, 1-20.

64 Ewing-Chow and Hsien-Li, 4.

65 HistorySG, "Konfrontasi," http://eresources.nlb.gov.sg/history/events/126b6b07-f796-4b4c-b658-938001e3213e.

66 ibid.

67 Guan, 71.

68 See *Treaty Establishing the European Economic Community*, Article 2 and 210.

security cooperation, as obvious in the signing of ZOPFAN, which was created for the purpose of neutralisation of any form of interference by outside powers.

The development of ASEAN's institutionalisation process was realised according to the signing of TAC, which was adopted at the Bali Conference 1976. TAC established the settlement of dispute mechanism among the members so that dispute resolution could be carried out through a formally institutionalised process. Article 14 of TAC provided that "to settle disputes through regional processes, the High Contracting Parties shall constitute, as a continuing body, a High Council comprising a Representative at ministerial level from each of the High Contracting Parties to take cognizance of the existence of disputes or situations likely to disturb regional peace and harmony". Article 16 further provided that "the foregoing provision of this Chapter shall not apply to a dispute unless all the parties to the dispute agree to their application to that dispute". 46 It can be observed, however, that the drawbacks of the TAC's dispute resolution system would be that it did not carry out through a permanent dispute settlement body and it was limited by being subject to members' consent to an application.

Critically, the provision of TAC did not confer the status of a free-trade area upon ASEAN. In fact, TAC only dealt with a small aspect of economic cooperation, while Article 6 simply employed broad language that the member states shall "collaborate for the acceleration of the economic growth in the region in order to strengthen the foundation for a prosperous and peaceful community of nations in Southeast Asia".[69] Thus ASEAN members' economic attainments in the early period

69 Ibid., Article 6.

were the makings of individual policies and dealing with the broader internally economy that had very little to do with ASEAN as an institution.[70]

From 1992 onwards, there was a dramatic development in the ASEAN's institutionalisation process. The sequential form of free-trade area was established in ASEAN in 1992 according to the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, whose preamble sought to ensure that ASEAN members committed "to further cooperate in the economic growth of the region by accelerating the liberalisation of intra-ASEAN trade and investment with the objective of creating the ASEAN Free Trade Area using the Common Effective Preferential Tariff (CEPT) Scheme"[71] ASEAN seemed to adopt a more institutional and legalistic approach to the regional cooperation whereby a series of economic agreements were introduced, including the ASEAN Free Trade Area in 1992, Framework Agreement on Services and Agreement on Intellectual Property in 1995, Protocol on Dispute Settlement Mechanism in 1996, ASEAN Investment Area Agreement and the Framework Agreement on the Facilitation of Goods in Transit in 1998, and ASEAN Tourism agreement in 2002. Many of these are legally binding documents that represented a dynamic movement towards the creation of binding foundations to create a fully integrated community rather than just a loose integration. Such development reflects the reality that the process of integrating trade was done first through tariff reduction and then followed by services and investment liberalisation. Nonetheless, the key obstacle was that ASEAN, at that time, did not become an international organisation.

70 Guan, 71.

71 *Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area*, Preamble.

As a result, it did not draw a distinction, in terms of legal powers and purposes, between the organisation and its member states, and did not have legal powers exercisable on the international plan.[72]

The ASEAN institutionalisation process has been accelerated since 2003. At the 9th ASEAN Summit in 2003, the ASEAN Leaders resolved that an ASEAN Community would be established.[73] At the 12th ASEAN Summit in January 2007, the Leaders affirmed their strong commitment to accelerate the establishment of an ASEAN Community by 2015 and signed the Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015.[74]

From 2008 onwards, the institutionalisation of ASEAN was apparent as the ASEAN Charter was signed and became effective on 15 December 2008. It serves as a well-founded substance in achieving the ASEAN Community by providing legal status and an institutional framework for ASEAN. It also codified ASEAN norms, rules and values; set clear targets for ASEAN; and presented accountability and compliance.[75] Significantly, the ASEAN Charter provided that "ASEAN, as an inter-governmental organisation, is hereby conferred legal personality[76]". The Charter came into effect thirty days after the tenth instrument of ratification was deposited with the ASEAN Secretary-General.[77] The Charter established a tri-pillared community consisting of: (i) political-security community; (ii) economic community; and (iii) socio-cultural

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72 See Chesterman, 205.

73 See above the ASEAN Secretariat, "Overview," ASEAN Secretariat.

74 ibid.

75 ibid.

76 *Charter of the Association of Southeast Asian Nations*, Article 3.

77 ibid., Article 47(4).

community.[78] In connection with the economic community, steps towards economic integration were put into place. There was the seminal document mapping out the steps for the economic integration of ASEAN,[79] the so-called AEC Blueprint 2008-2015. The Blueprint 2008-2015 set out an ultimate goal to establish a single market and production base in the ASEAN region before the end of 2015. According to the Blueprint, the regional economic community envisaged the following key characteristics: (a) a single market and production base, (b) a highly competitive economic region, (c) a region of equitable economic development, and (d) a region fully integrated into the global economy.[80] In this regard, an ASEAN single market and production base would comprise five core elements: (i) free flow of goods; (ii) free flow of services; (iii) free flow of investment; (iv) freer flow of capital; and (v) free flow of skilled labour".[81] As the successor to the AEC Blueprint 2008-2015, the AEC Blueprint 2025, adopted by the ASEAN Leaders at the 27th ASEAN Summit on 22 November 2015 in Kuala Lumpur, Malaysia, provided broad directions through strategic measures for the AEC from 2016 to 2025. It was aimed at achieving the vision of having an AEC by 2025 as highly integrated and cohesive; competitive, innovative and dynamic region; with enhanced connectivity and sectoral cooperation; and a more resilient, inclusive, and people-oriented, people-centred community, integrated with the global economy.[82]

78 ibid., Article 9(1).

79 Ewing-Chow and Hsien-Li, 1-2.

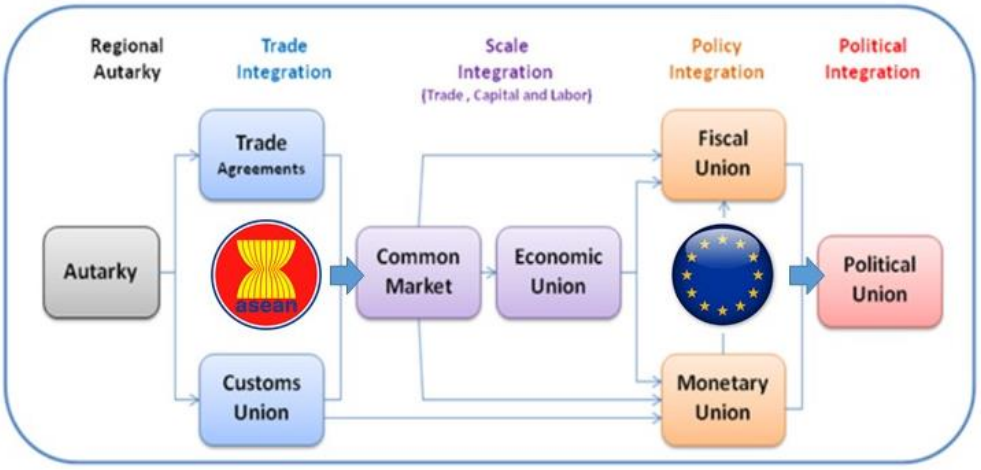
80 See ASEAN Secretariat, "ASEAN Economic Community Blueprint 2008," ed. ASEAN (2008), 6; *Charter of the Association of Southeast Asian Nations*, Article 1(5).

81 "ASEAN Economic Community Blueprint 2008," 6.

82 See "ASEAN Economic Community Blueprint 2015," (2015), 6-7.

There is continuing debate on the expectation and direction of ASEAN's institutionalisation. This is because all the ASEAN member countries ratified the ASEAN Charter that subsequently created a greater level of expectations. It is clear that the language of the AEC Blueprint 2008 aimed for the AEC to reach the phrase of scale integration (see diagram 2). The reality of an establishment of AEC through the ASEAN Charter implies that ASEAN is now transcending the trade integration phase and moving toward the scale integration phrase. ACE is thus now an intermediate form of integration between trade agreements and a common market. [83]

Diagram 2 **– Stages of ASEAN and EU's Integration**



Source: Adopted from the Bank of Thailand

83 Pariwat Kanithasen, Vacharakoon Jivakanont, and Charnon Boonnuch, "AEC 2015: Ambitions, Expectations and Challenges ASEAN's Path Towards Greater Economic and Financial Integration," in *Bank of Thailand Discussion Paper* (Bangkok, Thailand: Bank of Thailand, 2011), 13.

The reality is that the AEC is the latest chapter in the evolution of ASEAN economic integration that began with the Preferential Trading Arrangement to promote intra-regional trade. It has been conceived in anticipation of the full completion of the AFTA that the average tariff rate among the original signatories of the scheme would be brought down to 2.3 per cent (from 12.7 per cent when AFTA began 10 years ago), and the efforts to reduce this rate to zero are on track.[84] The reduction reflects the fact that ASEAN currently engages the form of a trade agreement which only involves trade in goods and services, which may be used as a basis for a more advanced integration to a common market.[85] Nevertheless, ASEAN also deploys some features of a common market. ASEAN's trade agreements are driven by trade integration and, at the same time, facilitated by increased labour mobility and regional financial integration, thereby creating some mechanisms to create free or freer movements of factors of production, goods, capitals and services. Critically, ASEAN, at this stage, is not becoming a genuine common market since ASEAN cannot reach the stage where there are no barriers to the flow of goods and services, a harmonisation of standards, an implementation of Mutual Recognition Agreement, and no visa entry and exit. The crucial fact is that ASEAN Charter creates ASEAN as an inter-governmental international organisation[86] where the enforcement of economic commitment is based on flexible participation[87]. This provision eventually precludes ASEAN from developing deeper into

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84 See Ong Keng Yong, "ASEAN Moves Forward to Build a Single Market* Commentary by Ong Keng Yong for the Asian Wall Street Journal," http://ASEAN.org/?static_post=ASEAN-moves-forward-to-build-a-single-market-commentary-by-ong-keng-yong-for-the-asian-wall-street-journal.

85 See generally Crowley, 1-20.

86 *Charter of the Association of Southeast Asian Nations*, Article 3.

87 See ibid., Article 21.

the real stage of a common market (more details are to be discussed in Chapter III and IV).[88]

By way of comparison, the EU denotes a distinct approach. The multinational integration process began in 1951 as a customs union on the basis of the Treaty establishing the European Coal and Steel Community.[89] In 1957, the same member states expanded the cooperation and by entering into the Treaty of Rome established the European Economic Community.[90] In 1986, the builders of the common market completed the work to further their integration on the basis of the Single European Act, which was the first major revision of the Treaty of Rome 1957, setting the objective to achieve the completion of the common market by 1 January 1993.[91]

It must be highlighted that AEC is only one of three pillars of the ASEAN Community. The other two are the ASEAN Security Community and the ASEAN Socio-Cultural Community.[92] Nevertheless, these communities also comprise inter-governmental and cooperative mechanisms. By contrast, the EU has undertaken a clearer route. In 1997, the fifteen members decided to perfect their area of freedom, security, and justice, by signing the Treaty of Amsterdam, amending the Treaty of the European Union, the Treaties establishing the European Communities and certain related acts. According to the Treaty of Amsterdam, the member states agreed to

88 Taku Tamaki, "Making Sense of 'ASEAN Way': A Constructivist Approach" (paper presented at the Annual Conference of the International Political Science Association, Fukuoka, Japan, 2006), 6.

89 See generally *Treaty Establishing the European Coal and Steel Community*.

90 See generally *Treaty Establishing the European Economic Community*.

91 See *The Single European Act*.

92 The former aims to bring ASEAN's political and security cooperation to a higher plane while the latter aims to promote human development and establish a community of caring societies.

devolve certain powers from national governments to the European Parliament across diverse areas, including legislating on immigration, adopting civil and criminal laws, and enacting foreign and security policy, as well as implementing institutional changes for expansion as new member nations join the EU.[93] In 2009, Treaty of Lisbon amending the Treaty on European Union and the Treaty Establishing the European Community was the constitutional basis of the EU to complete the stage of economic and monetary union and to progress toward the political union.[94]

1.2.2. ASEAN's Legalisation

Unlike the paradigm of the EU, ASEAN took forty years to progress from being a loose international cooperation to a more legalistic form of cooperation. Within ASEAN, the framework regulating economic relations in the region is evolving. Just as there has been a move to more of a rules-based system to regulate international economic relations at the broader international level, so too have there been developments within ASEAN towards greater legalism in regulating the economic relations of the members. Initially, ASEAN had a very loose framework for cooperation and the members were reluctant to be too legalistic in their relations with each other.[95] An explicit piece of evidence is the language of Bangkok Declaration , which stated that ASEAN "represents the collective will of the nations of South-East Asia to bind themselves together in friendship and cooperation".[96]

93 See generally *Treaty of Amsterdam Amending the Treaty of the European Union, the Treaties Establishing the European Communities and Certain Related Acts*.

94 See *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*.

95 Davidson.168

96 Secretariat, "The ASEAN Declaration (Bangkok Declaration) Bangkok, 8 August 1967," Fifth.

There was a dynamic development with regard to an approach of creating international obligation; to the extent that the ASEAN state members were legally bound by a rule or commitment. On the surface, the momentum towards a rules-based system of international economic relations[97] has increasingly influenced developments of ASEAN integration since 1992.[98] ASEAN has put in place the cooperation frameworks, according to the Singapore Declaration of 1992, which stated that "ASEAN shall adopt appropriate new economic measures as contained in the Framework Agreement or Enhancing ASEAN Economic Cooperation directed towards sustaining ASEAN economic growth and development which are essential to the stability and prosperity of the region[99]". In this regard, "ASEAN shall establish the ASEAN Free Trade Area using the Common Effective Preferential Tariff (CEPT) Scheme as the main mechanism within a time frame of 15 years beginning 1 January 1993 with the ultimate effective tariffs ranging from 0% to 5%. ASEAN member states have identified the following fifteen groups of products to be included in the CEPT Scheme for accelerated tariff reductions[100]". Moreover, the rationalisation of the framework for economic cooperation, and the development of rules to set the guidelines was also apparent within the context of the Framework Agreement for Enhancing ASEAN Economic Cooperation. Although it is a framework agreement and does not set out any details for implementing and supervising economic cooperation in the region, it is important as it sets out a commitment to cooperate in a number of areas and envisages a number of agreements arising from this Framework Agreement. The

97 For instance, as exemplified by developments within the WTO. See Davidson, 168.

98 ibid.

99 See Secretariat, "Singapore Declaration of 1992.

100 ibid.

Framework Agreement outlines potential cooperation in a variety of fields, such as industrial investment, finance, agriculture and forestry, transportation, communications, technology transfer, tourism, and human resources.[101] In addition, agreements in more precise and specific terms have been enacted by the ASEAN states in a number of areas to implement the mandate of the Framework Agreement, and agreements in other areas are being considered. Before the entry into force of the ASEAN Charter, ASEAN States had already concluded at least 313 main treaties in various cooperation areas.[102] For example, ASEAN members agreed to open up trade in services with one another. In order to provide a framework for the protection of intellectual property rights within ASEAN, the ASEAN countries agreed to the ASEAN Framework Agreement on Intellectual Property Cooperation in December 1995. Apart from that, ASEAN members had already built up a copious body of separately negotiated treaties, agreements and other instruments that applied to specific regulatory areas.[103]

Crucially, ASEAN further developed its legalisation process through the establishment of the ASEAN Charter. The Charter marked a distinct culmination of the 40-year cooperative relationship and presented ASEAN as having international legal personality under international law.[104] The ASEAN Charter conferred an organisational personality, immunities and privilege of officials, self-binding rules, and decisions as

101 *Framework Agreements on Enhancing ASEAN Economic Cooperation*, Article 2.

102 Diane Alferez Desierto, "ASEAN's Constitutionalization of International Law: Challenges to Evolution under the New ASEAN Charter," *Columbia Journal of Transnational Law, Forthcoming* (2010).

103 ibid., 15.

104 *Charter of the Association of Southeast Asian Nations*, Article 3.

well as the regional identity on ASEAN.[105] ASEAN laws under the Charter-based system have nevertheless been a significant development of the legalisation process[106] for regulating the regional economic relations *inter se*.[107] The Charter also created both continuity and change in the region's legal framework and process.[108] ASEAN members are required to comply with the ASEAN Charter, Article 5 of which set forth that "member States shall take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter and to comply with all obligations of membership[109]". With the works of ASEAN Ministerial Bodies established under the ASEAN Charter, ASEAN frameworks for economic cooperation are increasingly entered into under terms indicating an intention to be bound by the rules, or commitments set out.[110]

Yet, it can be observed that the ASEAN Charter still adopts the principles of non-interference, consensus, and flexibility (namely ASEAN Minus-X), respecting the sovereignty of member states and providing some flexibility to the commitments. This means that some members may be excluded for the time being from an obligation while other members are to be bound.[111]

105 LIN Chun Hung, "ASEAN Charter: Deeper Regional Integration under International Law?," *Chinese Journal of International Law* (2010): 826.

106 For further discussion on the legalisation process, please see section 3.3.4 therein. See Ewing-Chow and Hsien-Li, 19-25; Davidson, 18-20; Leviter, 177.

107 Davidson, 174.

108 Desierto, 17.

109 *Charter of the Association of Southeast Asian Nations*, Article 5.

110 Davidson, 174.

111 ibid.

In terms of the precision, the extent to which rules define a specific conduct[112], ASEAN's agreements have become more precise and specific terms have been enacted by the ASEAN states in a number of areas to implement the mandate of the framework agreement.[113] ASEAN has developed a legal basis of the regional financial integration by defining strategic integration plans and action phrases and setting out details for implementing and supervising. The example of a creation of "specificity" requirement is the case of the protocols to implement package of commitments on financial services made under AFAS. The protocols are considered to be the basic agreement to implement commitments in financial services sectors from all ASEAN countries, which was agreed in a round of negotiation on the liberalisation of financial services. The protocols also include commitments on liberalisation in banking sectors resulting from bilateral negotiation under ASEAN Banking Integration Framework.

The delegation dimension is one in which the framework has been the slowest to legalise in ASEAN. There are two aspects to this dimension: (i) delegating the authority to interpret/apply the rules and resolve disputes; and (ii) delegating the authority to make further rules. ASEAN does not have the institutional apparatus of the EU, in which the creation integration is primarily driven by the European Commission's works and the regional court.[114] Nevertheless, ASEAN has legalised a dispute settlement mechanism as set forth in the ASEAN Charter as presented in Chapter VIII.[115]

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112 Leviter, 168-69.

113 Davidson, 174.

114 Philip R. Wood, *The Law and Practice of International Finance* (London, England: Sweet & Maxwell, 2010), 340-55.

115 See *Charter of the Association of Southeast Asian Nations*, Chapter VIII.

It can be observed that the international legal framework differs from the domestic legal framework, however, in that there is no delegation of rule-making authority to a separate body. Even within the WTO, the states themselves are the rule-making authority where, in many cases, the rules are developed by consensus. This arrangement is similar to that in ASEAN, where the rules and decision-making processes are based on consensus and flexibility, enabling members that are able to agree to come to an agreement, while allowing those members who are not yet ready to commit to certain obligations to agree in principle although at the same time not be bound until they are ready.[116]

116 Davidson, 175.

2. THE "ASEAN WAY"

As discussed in the previous section, ASEAN was founded with a limited character, even compared to many other regional organisations. ASEAN's goal, at that time, was to preserve long-term peace in Southeast Asia and, by unifying, to balance the roles that outside powers, including the United States, China, and Japan, played in Southeast Asia.[117] As most of the ASEAN member states were governed by autocracies, ASEAN leaders were extremely reluctant to hand over even small amounts of power to the regional organisation.[118] By respecting each country's individuality, ASEAN explicitly developed its own approach to cooperation and dispute resolution mechanism, whereby the members could mutually assist other members' political, economic, and cultural development while still avoiding dominance by any single state.[119] Until now, this specific approach of cooperation and dispute resolution mechanism still holds sway,[120] and likewise is embedded as the core principle of ASEAN cooperation,[121] called the "ASEAN Way".

This section will investigate the theoretical extent of the ASEAN Way – being the exotic feature of ASEAN cooperation. In doing so, the first part will involve a discussion of the emergence of regional norms that underpin a conceptualisation of the ASEAN Way. The second part will analyse the core principles of the ASEAN Way (in

117 See generally Joshua Kurlantzick, "ASEAN's Future and Asian Integration," in *International Institutions and Global Governance* (The Council on Foreign Relations, 2012), 1-5.

118 Lee Jones, "ASEAN and the Norm of Non-Interference in Southeast Asia: A Quest for Social Order," in *Nuffield College Politics Group Working Paper* (Oxford University Press: Oxford University, 2009), 2.

119 Narine, 31.

120 Leviter, 170.

121 See *Charter of the Association of Southeast Asian Nations*, Article 2(a).

particular, the principle of respecting national sovereignty and non-interference as the first group, and the principle of consensus and flexibility as the other) as a result of cooperation evolution in the light of legal and regional practices. The last part will analyse the extent of the ASEAN Way as the concept of "middle path" that move forwards the regional cooperation.

2.1 The ASEAN Way as the Region's Operational Norms

The ASEAN Way is a loosely used concept whose meaning remains vague and contested. Due to such deficiency, this research considers that the ASEAN Way is the "operational norms" that create the unique process of intra-mural interaction cooperation based on two groups of principles under both legal and practical perspectives, consisting of an adherence to: (i) sovereignty and non-interference principles and (ii) consensus and flexibility principles, which are contrasted with the adversarial posturing, majority vote and other legalistic decision-making procedure in Western multilateral negotiation.

This research views that ASEAN's "operational norms" are significantly evident in an evolution of ASEAN's cooperation history. The norms can be categorised as consisting of two fundamental rationales: (i) the preference of informality and a related aversion to institutionalisation of cooperation; and, (ii) the practice of consensus building.[122] The details of which can be considered as follows.

122 Amitav Acharya, *Constructing a Security Community in Southeast Asia*, ed. Michael Leifer, Politics in Asia Series (Routledge, 2001), 64.

2.1.1. Preference of Informality

In relation to the preference of informality, there are several pieces of evidence which demonstrate the unique style of regional habits. ASEAN members preferably avoid creating a formal arrangement[123] and construct agreements on the basis of mutual trust, knowledge, familiarity, and the process of non-institutionalisation of cooperation.[124] The very fact of the informality is that the establishment of ASEAN was a result of five foreign ministers' negotiation in a decidedly informal manner or "sports-shirt diplomacy"[125] where they lined up their shots on the golf course and traded wisecracks on one another's games.

An avoidance of formality caused ASEAN, at that time, not to have a personality as an international organisation under international law. The Bangkok Declaration was created in a different way than was the Treaty of Rome. As observed by Mohamad Ghazali Shafie, the Malaysian Foreign Minister, the implication of naming it a declaration instead of a treaty was significant, as treaty presupposes lack of trust. Moreover, the word "association" was meant to differentiate ASEAN from an "organisation" and thereby convey a sense of looseness and informality.[126] Based on such observation, it is clear that the sense of informality was necessary in view of the diversity of views and positions held by the ASEAN members.

123 Leviter, 168.

124 Acharya, 64.

125 ASEAN, "History," http://ASEAN.org/ASEAN/about-ASEAN/history/.

126 See Shafie, 1-2.

Moreover, while the Bangkok Declaration set out an obligation that the signatory members establish the "Annual Meeting of Foreign Ministers, which shall be by rotation and referred to as ASEAN Ministerial Meeting. Special Meetings of Foreign Ministers may be convened as required[127]", it took another ten years after the signing of ASEAN Declaration in 1967 to have the first ASEAN Summit held in Bali in 1976,[128] and there were only four summits in the first twenty-five years of ASEAN.[129] These facts significantly reflect the regional norm of preferring informality rather than an institutionalisation of cooperation.

By focusing on an early development of ASEAN's institution, it was explicit that the ASEAN Secretariat had only a small role. As appeared in the preamble of the Agreement on the Establishment of the ASEAN Secretariat, the basic mandate of the ASEAN Secretariat was only "to provide for greater efficiency in the coordination of ASEAN organs and for more effective implementation of ASEAN projects and activities[130]". The reason for having a limited mandate was due to the intention not to have a cumbersome and expensive bureaucratic body like the European Economic Community.[131] This cooperation feature demonstrates the value of interpersonal relationship among ASEAN senior government officials, which was likely to be more effective and enduring than the institutional arrangement. In this regard, Carlos Romulo, the Foreign Secretary of the Philippines, explained that "I can pick up the telephone now and talk directly to Adam Malik (Indonesia's Foreign Minister) or

127 Secretariat, "The ASEAN Declaration (Bangkok Declaration) Bangkok, 8 August 1967."

128 See ASEAN, "History," http://ASEAN.org/ASEAN/about-ASEAN/history/.

129 ibid.

130 See *Agreement on the Establishment of the ASEAN Secretariat,* Preamble.

131 See Acharya, 65.

Rajaratnam (Singapore's Foreign Minister). We often find that private talks over breakfast prove more important than formal meetings".[132] This statement is true especially in the period of pre-ASEAN Charter and shows that ASEAN remained a loose and informal cooperation with no clear format for decision-making or implementation, where issues were usually negotiated on an ad hoc basis as and when they arose. An explicit demonstration of this issue is the conflict concerning Vietnam's invasion and occupation of Cambodia in 1978. There were a series of informal discussions arranged by ASEAN in order to resolve the conflict and to build a dialogue among the Cambodian resistance factions instead of utilising the formal ASEAN institution. This included an arrangement for forums to enable direct talks between Prince Sihanouk, as the leader of the CGDK, and Hun Sen, Prime Minister of the PRK, covering two rounds of regional meetings, called the Jakarta Informal Meetings, in July 1988 and February 1989. These meetings dealt with the complex issue of power sharing among the Cambodian factions.[133]

Based on the aforesaid fact, it is obvious that a degree of looseness and informality helped increase the level of comfort among members and created a flexible decision-making environment. It has been especially important to the regional development of security dialogues and cooperation. General Ali Moertopo, a senior intelligence official of Indonesia, explained that ASEAN's success was because of "the

132 Cited in ibid.

133 See Lee Jones, "ASEAN Intervention in Cambodia: From Cold War to Conditionality," *The Pacific Review* 20, no. 4 (2007).

system of consultations that has marked much of its work, what I may call the 'ASEAN Way' of dealing with a variety of problems confronting its member nations".[134]

Nevertheless, preference for informality has limited institutionalisation process of ASEAN. The example of the drawback is the case of the regional dispute settlement (in the pre-ASEAN Charter period). Article 14 of TAC stated, "to settle disputes through regional processes, the High Contracting Parties shall constitute, as a continuing body, a High Council comprising a Representative at ministerial level from each of the High Contracting Parties to take cognisance of the existence of disputes or situations likely to disturb regional peace and harmony[135]"; however, the mechanism as such had never been used in ASEAN's history. Nonetheless, it can be argued that the non-usage of a dispute settlement mechanism under the TAC did not mean an ineffectiveness of ASEAN mechanism, it rather implied a sense of informality of cooperation process that it could increase the comfort level among members so that they could avoid a serious confrontation without resort to formal measures.[136]

2.1.2. Consensus Building

The second element of ASEAN's operational norms is the practice of consensus building. As described by Singapore's Foreign Minister S.Dhanabalan, " we have avoided the obvious danger of majority decision-making.... we have relied on the

134 Ali Moertopo, "'Opening Address' in Regionalism in Southeast Asia," (Jakata: Centre for Strategic and International Studies, 1975).

135 *Treaty of Amity and Cooperation in Southeast Asia*, Article XIV.

136 Cited in Acharya, 67.

principle of consensus, which has stood us in good stead for almost two decades[137]". This statement reflects the fact that the consensus building process underpinned ASEAN cooperation for a long period of time. It further indicated that the consensus building process was a common feature of the decision-making mechanism in many Asian countries or a product of "cultural similarities among ASEAN societies"[138] which are found to be congruent with some values of each of the member states.[139] There are some academic studies that support such notion. Among others, Jürgen Haacke noted that the ASEAN operational norms are "a distinctive diplomatic and security culture that has guided interactions among regional leaders among the member states".[140] It covers the "process of identity building which relies upon conventional modern principles of interstate relations as well as the traditional and culture-specific mode of socialisation and decision-making".[141]

By investigating the regional political culture, the conceptual background of consensus building has been constructed through a traditional style of decision making[142] consisting of two elements: "*musyawarah*" and "*mufakat*",[143] which associate with the Javanese village society's traditional approach to decision making.

137 Cited in Phan Wannamethee, "The Institutional Foundations of ASEAN," in *The Association of Southeast Asian Nations after 20 Years*, ed. Hans Indorf (Washington, DC: Woodrow Wilson International Center for Scholars, 1988), 22.

138 Acharya, 64.

139 Estrella D.Solidum, "The Role of Certain Sectors in Shaping and Articulating the ASEAN Way," in *ASEAN: Identity, Development and Culture*, ed. R.P.Anand and P.Quisuimbing (Quezon City: University of the Philippines Law Centre and East-West Center Culture Learning Institute, 1981), 134-35.

140 Jürgen Haacke, "ASEAN's Diplomatic and Security Culture: A Constructivist Assessment," *International relations of the Asia-Pacific* 3, no. 1 (2003): 58.

141 See Acharya, 28; Haacke, 58; Guan, 73.

142 See Acharya, 68; Davidson, 166.

143 ibid., 166.

Each of the traditional principles has played a big role in village politics for centuries and ultimately served as part of the regional social system.[144] The negotiations in the *musyawarah* (consultation) and *mufakat* (consensus) are not between opponents but instead emphasise the relationship as between friends and brothers.[145] *Musyawarah* is the pre-negotiation stage of intensive informal and discussion behind the scenes to work out a general consensus.[146] At this stage, the difference can be aired and the parties can subsequently use the issues as the starting point around, while the unanimous decision is finally accepted in the more formal meetings or *mufakat* – which means the unanimous decision[147], rather than across-the-table negotiations involving bargaining and give-and-take that result in deals enforceable in a court of law.[148]

As the consensus building has ramifications in the political culture rather than the legal perspective, the socio-historical context in the ASEAN consensus building process can be described as consisting of cultural elements which are found to be congruent with some values of each of the member states.[149] In this regard, it is a result of the local political cultures of ASEAN members, which take a personalistic, informal and non-contractual approach.[150] Even if ASEAN countries have formal political institutions, most of the member states are practically governed by groups of

144 ibid., 167.

145 Cited in Acharya, 68.

146 ibid.

147 Davidson, 167.

148 ibid.

149 D.Solidum, 134-35.

150 Gillian Goh, "The 'ASEAN Way': Non-Intervention and ASEAN's Role in Conflict Management," *Stanford Journal of East Asian Affairs (2003) 113* 113, no. 3 (2003): 114-15.

elite circles heavily relying on patronage networks. Such network creates an institutionalising of highly private and informal political cultures where social etiquette has its basis in indirectness and social harmony.[151] Such culture has influenced how ASEAN members interact with each other and eventually created the consensus building process and informal environment of the regional corporation. As ASEAN members have the shared standpoint, Malaysian politician Mohamad Ghazali Shafie further reflected that "our common heritage"[152] or "*kampung*"[153], which means to collect or to gather (especially the pull of togetherness in the face of a common danger), is the key success to end the political confrontation (Konfrontasi) between Malaysia and Indonesia and forms the basis of establishment of ASEAN.[154]

In furtherance of this, ASEAN has built a set of norms defining states' behaviour that each member state is required to uphold. According to the constructivist theory, the multilateral institution building in the Asia Pacific region has been process-driven by focussing on the development of a slow-moving consultative process based on existing regional norms and practices where regional actors have grown comfortable with the idea of multilateralism.[155] The multilateral institution building in the Asia Pacific region is a sociological and intersubjective dynamic, rather than a legalistic and formalistic one.[156] Therefore, ASEAN cooperation was built in order neither to balance

151 ibid., 115.

152 Mohamad Ghazali Shafie, "Reflections on ASEAN's 30 Years and Vision of the Future," *Journal of Southeast Asian Studies* 4, no. 1 (1998): 16.

153 ibid.

154 ibid., 17.

155 Amitav Acharya, "Ideas, Identity, and Institution-Building: Making Sense of the "Asia Pacific Way"," ibid.10, no. 3 (1997): 6.

156 ibid.

the powers nor to institutionalise where its nature of cooperation has created a comfort level of cooperation. Some examples include China's acceptance to join the ASEAN Regional Forum.[157] Moreover, as a result of the Asian financial crisis of 1997, "we feeling" has emerged among ASEAN+3 nations.

The reliance on the consensus building process is more explicit in advancing regional economic and political cooperation to overcome hesitancy and indifference among the ASEAN members towards intra-ASEAN economic cooperation, including ASEAN industrial joint ventures and tariff reductions.[158] In this context, consensus building was seen as a way of advancing regional cooperation schemes despite the reluctance of some of the members to participate in it. One of the clear examples of having a consensus as a mechanism for advancing the regional economic cooperation is the Ministerial Understanding on ASEAN Cooperation in Finance of 1997 as a result of the Asian Financial Crisis. Article 5 thereof sets out the principle that "Member States agree that all decisions regarding cooperation and facilitation initiated under this Ministerial Understanding shall be on the basis of consensus[159]". In the light of this, there are several empirical justifications made by ASEAN policymakers regarding the incorporation of consensus building process as regional norms. Essentially, Lee Kuan Yew, the Prime Minister of Singapore, commented that "we have made progress in an ASEAN manner, not through rules and regulations, but through *musyawarah* and

157 See Alastair Iain Johnston, "Socialisation in International Relations: The ASEAN Way and International Relations Theory," in *International Relations Theory and the Asia Pacific*, ed. John Ikenberry and Michael Mastanduno (New York: Columbia University Press, 2003), 107-44.

158 Acharya, *Constructing a Security Community in Southeast Asia*, 69.

159 *Ministerial Understanding on Cooperation in Finance*, Article V.

consensus".[160] Moreover, Singapore's Foreign Minister S. Jayakumar gave another explanation that extracts the principles integrated to the ASEAN Way. He emphasised that "the ASEAN Way stresses informality, organisation minimalism, inclusiveness, intensive consultation leading to consensus and peaceful resolution of dispute".[161]

2.1.3. The ASEAN Way and the Development of Rule-based System

The evolution of formality and legalistic approach in ASEAN has a direct impact in the shaping of the ASEAN Way from being just a norm to become the cooperation principles backed up by both legal and practical foundations. This research views that ASEAN's development of a rule-based system has supplemented the operation of the ASEAN Way. ASEAN's operational norms have been gradually incorporated into the cooperation principles which have subsequently been codified into many ASEAN legal instruments. Tommy Koh, the Professor and Ambassador-at-Large for the Government of Singapore, and others argued a supporting idea that "the ASEAN Way of relying on networking, consultation, mutual accommodation and consensus will not be done away with. It will be supplemented by a new culture of adherence to rules."[162] In this connection, ZOPFAN is the classic example of the emerging of the ASEAN Way of compromise, consensus building, ambiguity, avoidance of strict reciprocity, and rejection of legally binding obligations.[163] It was drafted based on a soft and open-

160 National Archives of Singapore, "Openning Speech of 15th ASEAN Ministerial Meeting and Post-Ministerial Conference," (ASEAN, 1982), 9.

161 Lee Kim Chew, "ASEAN Unity Showing Signs of Fraying," *Straits Times*, 23 July 1998 1988.cited in Acharya, *Constructing a Security Community in Southeast Asia*, 63.

162 Tommy Koh, Walter Woon, and Chan Sze-Wei, "Charter Makes ASEAN Stronger, More United and Effective," *The Straits Times*, 8 August 2007.

163 Acharya, *Constructing a Security Community in Southeast Asia*, 76.

ended neutralisation framework[164] yet did not set out the specifics of any legalistic measures to reach the objective neutralisation.[165] Instead, it only states that the member countries "should explore ways and means of bringing about its realisation"[166] and restates the broad commitment under the Bangkok Declaration[167], which obviously represents the approach of the ASEAN Way.

A legalistic development of ASEAN was seen under TAC, which is one of the important ASEAN documents for the reason that it legally binds its signatories.[168] This was strikingly unusual as ASEAN members normally rely on loose and informal agreements, especially during the first decade of the Association's founding.[169] According to the language, TAC has formalised the approach of ASEAN cooperation and dispute resolution by acknowledging the ASEAN Way through a legalistic way.

Another evidence of a compromise between the ASEAN Way and the rule-based system is a proliferation of ministerial and bureaucratic process that involved an expansion of ASEAN's cooperation to cover economic and other issue areas from the 1980s onward. In the light of this, ASEAN's norms of avoiding formality and relying on consensus building still underpin the regional mind-set of cooperation, especially an implementation of the commitment that is still required to be based on the consensus readiness of the members. Specifically, the language of the Framework

164 ibid.

165 ibid.

166 See *Zone of Peace, Freedom and Neutrality Declaration*, para 10.

167 Restating that "the countries of South East Asia share a primary responsibility for strengthening the economic and social stability of the region and ensuring their peaceful and progressive national development". See Secretariat, "The ASEAN Declaration (Bangkok Declaration) Bangkok, 8 August 1967."

168 *Treaty of Amity and Cooperation in Southeast Asia*, Article 18-19.

169 Dominic McGoldrick, "The ASEAN Charter," *International and Comparative Law Quarterly* 197 (2009): 200.

Agreement on Enhancing ASEAN Economic Cooperation provided that "all Member States shall participate in intra ASEAN economic arrangements. However, in the implementation of these economic arrangements, two or more Member States may proceed first if other Member States are not ready to implement these arrangements[170]".

ASEAN Charter codifies ASEAN Way whereby putting altogether norms, rules and values and setting the cooperation principle and clear targets for ASEAN. Some academic discussions have observed that the purpose of the Charter is to make ASEAN a more rules-based organisation. This point was emphasised also in the Report of the Eminent Persons Group, which explicitly linked rule-adherence to legal personality. Academic discussion further anticipated the extent to which the ASEAN Way, as symbolised by musjawarah (consultation) and mufukat (consensus), is compatible with a rules-based organisation but will be a key challenge to the organisation in years to come.[171]

2.2 The ASEAN Way as Developed into the Cooperation Principles

The nutshell of ASEAN cooperation was set forth under the Bangkok Declaration: ASEAN shall represent "the collective will of the nations of South-East Asia to bind themselves together in friendship and cooperation and, through joint efforts and sacrifices, secure for their peoples and for posterity the blessings of peace, freedom, and prosperity".[172] According to the languages of "friendship and cooperation" under the Bangkok Declaration, it is obvious that the ASEAN Way has

170 *Framework Agreement on Enhancing ASEAN Economic Cooperation Singapore*, Article I.

171 Chesterman, 205.

172 Secretariat, "The ASEAN Declaration (Bangkok Declaration) Bangkok, 8 August 1967."

existed and been amplified by intra-mural interaction conducted by members over the fifty years of cooperation. Until today where the cooperation has been legally set by virtues of the ASEAN Charter, the ASEAN Way has been developed as a combination between the traditional ASEAN operational norms and the rule-based system. Based on such development, this research considered views that the cooperation principles could be extracted from the ASEAN Way; consisting of: (i) respecting national sovereignty and non-interference as the first group; and, (ii) the principle of consensus and flexibility as the other. These principles can be considered through the lens of ASEAN legal instruments and practices, as follows.

2.2.1. Respecting Sovereignty

As commonly outlined by academic studies, a trigger point of the traditional conception of state sovereignty can be tracked to the creation of Westphalian sovereignty. As summarised by Luke Glanville, "... [the] sovereignty was established sometime around the 17th century (at the Peace of Westphalia [Peace of Münster (Gerard ter Borch, Münster, 1648)]...) and, since that time, states have enjoyed 'unfettered' rights to self-government, non-intervention and freedom from interference in internal affairs".[173] According to the Glanville's explanation, which is consistent with the Encyclopaedia of Public International Law, state sovereignty means a state's independence and legal impermeability in relation to foreign powers on the one hand, and the state's exclusive jurisdiction and supremacy power over its territory

173 Luke Glanville, "The Antecedents of 'Sovereignty as Responsibility," *European Journal of International Relations* June Vol. 17 (2011): 234.

and inhabitants on the other.[174] Significantly, the Westphalian conception of state sovereignty also implies that states, as a result of being sovereign, can enjoy the sacrosanct right to non-intervention, non-interference and self-government.[175]

Ian Brownlie points out a comprehensive definition of state sovereignty. The term "sovereignty" stands for the normal complement of state rights, especially the typical case of legal competence.[176] Brownlie has described the concept of sovereignty and equality of states as they represent a basic constitutional doctrine of the law of nations. Brownlie further indicates that such constitutional doctrine is contextualised by three key features: (i) jurisdiction exercised by states of territories and permanent populations; (ii) a duty not to intervene in the exclusive jurisdiction of other states; and (iii) a dependence of obligations which emerges from the sources of international law.[177]

In addition, the notion of state sovereignty was further clarified under the Montevideo Convention on Rights and Duties of State of 1933. Even if there were only fourteen state signatories to the convention, in fact, it reflects the general recognition of the customary nature of a state – as a basis rule of international law. According to Article 1 of the Montevideo Convention on Rights and Duties of State of 1933, "the state as a person of international law should possess the following qualifications: (a) a

174 Helmut Steinberger, "Sovereignty," in *Encyclopaedia of Public International Law*, ed. R. Bernhardt (Amsterdam: Elsvier, 2000), 501.

175 See *Charter of the United Nations and the Statue of the International Court of Justice*, Art. 2.

176 Ian Brownlie, *Principles of Public International Law*, 6 ed. (Oxford: Oxford Press, 2003), 106.

177 ibid., 574-75.

permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States".[178]

The salience of the doctrine of sovereignty and non-interference in Southeast Asia existed long before the establishment of ASEAN and previously appeared as a well-established principle of the modern Westphalian state system and the Charter of the United Nations. In a nutshell, ASEAN interstate peace is preserved through a firm reliance on the sovereignty and non-interference principle.[179] A firm adherence of ASEAN to sovereignty and non-interference principles is understood to be a result of the history of colonial intervention in Southeast Asia, military intervention during the period of the Cold War and the emergence of post-colonial states in Asia Pacific.[180] The creation of the non-interference principle of ASEAN member states in the 1960s was, therefore, a consequence of an aspiration to insulate the region from the interstates disputes, internal subversion, and secessionist movements bolstered by the neighbouring states.[181] Dominic McGoldrick rightly observed that the ASEAN Way could be seen "as a welding of basic doctrine of international law to local conditions, in which decisions reached by consensus are indicative of the sovereign equality and hence extensive consultations, as well as comfort level between member states".[182]

178 *Montevideo Convention on Rights and Duties of State of 1933*, 19.

179 Logan Masilamani and Jimmy Peterson, "The "ASEAN Way": The Structural Underpinnings of Constructive Engagement," *Foreign Policy Journal* (2014): 10

180 Robin Ramcharan, "ASEAN and Non-Interference: A Principle Maintained," *Contemporary Southeast Asia* 22, no. 1 (2000): 65.

181 See Masilamani and Peterson, 5-10.

182 McGoldrick, 200.

The Foreign Ministers at the Special ASEAN Foreign Ministers Meeting in Kuala Lumpur, Malaysia on 27 November 1971 adopted ZOPFAN for the purpose of neutralisation from any form of interference by outside powers.[183] The language of ZOPFAN explicitly stated that it was inspired by "the principles of respect for the sovereignty and territorial integrity of all states, abstention from the threat or use of force, peaceful settlement of international disputes, equal rights and self-determination and non-interference in affairs of States".[184]

Moreover, under the TAC, ASEAN members shall accept the following principles:[185]

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

(b) the right of every State to lead its national existence free from external interference, subversion or coercion;

(c) non-interference in the internal affairs of one another;

Based on the TAC, one of the essential elements of the ASEAN Way is that ASEAN members will respect sovereignty and will not interfere with other members' domestic affairs. Even today, the TAC is still effective and generally restrains member countries' abilities to hold each other accountable or to intervene in other members' affairs.[186]

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183 *Zone of Peace, Freedom and Neutrality Declaration*, 2.

184 ibid., para 4.

185 *Treaty of Amity and Cooperation in Southeast Asia*, Article 2.

186 See Masilamani and Peterson, 5-10.

By translating the ASEAN Way into legal provisions, the ASEAN Charter was designed to be respectful of sovereignty and sovereign equality under an international law.[187] It can be observed that the Charter has been carefully drafted to preserve the sovereignty of each member as the ultimate source of authority that enacts and enforces laws within its territorially defined units.[188] In this regard, a full recognition of the equality of member states' sovereignty under international law and the non-interference principle is reflected in Article 2(2), which provides that ASEAN members shall act in accordance with the following principles:

"(a) respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States; ...

(e) non-interference in the internal affairs of ASEAN;

(f) respect for the right of every Member State to lead its national existence..."[189]

By putting into practice, ASEAN members have showed a respect for sovereignty as a cornerstone of the regional cooperation, whereby they would usually criticise the actions of member states that are adversely impacting the other members' sovereignty. For example, ASEAN has issued a statement recalling the Vietnamese "pledge to ASEAN member countries to scrupulously respect each other's

187 *Charter of the Association of Southeast Asian Nations*, Article 5; McGoldrick, 200.

188 See Leviter, 195.

189 *Charter of the Association of Southeast Asian Nations*, Article 2(2).

independence sovereignty and territorial integrity" and calling for "the immediate and total withdrawal of the foreign forces from Kampuchean territory".[190]

2.2.2. Non-interference

The doctrine of non-interference is a logical corollary of the principle of sovereignty.[191] Non- interference means that states cannot seek to expand their influence by a direct appeal to citizens of another country, by occupation, or by using the home territory as a base for opposing another regime.[192] Instead, they can attempt to influence other states' behaviour only through the established diplomatic channels.[193] To this extent, John Funston points out that non-interference is not similar to non-involvement. The non-interference doctrine does not restrain states from entering into international cooperation for mutual interest in politics, economics, social affairs and other areas although such activities may affect the national sovereignty. Moreover, states are not prohibited from opposing actions by other countries that would result in adverse spillover effects, such as suppressing narcotics production.[194]

Interestingly, ASEAN's non-interference principle is an expression of a "collective commitment" of the non-communist countries to survive against the threat

190 ASEAN Secretariat, "Joint Statement the Special ASEAN Foreign Ministers Meeting on the Current Political Development in the Southeast Asia Region," in *12 January 1979* (Bangkok, Thailand: The ASEAN Secretariat, 1979).

191 Müge KINACIOĞLU, "The Principle of Non-Intervention at the United Nations: The Charter Framework and the Legal Debate," *Perceptions* (2005): 1.

192 John Funston, "ASEAN and the Principle of Non-Intervention – Practice and Prospects" (paper presented at the Council of Security Cooperation in the Asia Pacific 7th Comprehensive Security Working Group Meeting, Seoul, South Korea, 1999), 2.

193 Kalevi J. Holsti, *International Politics : A Framework for Analysis*, 7 vols. (Prentice Hall, 1994), 81.cited in Funston, 2.

194 ibid., 2.

of communist subversion.[195] Non-interference principle has been incorporated into many ASEAN instrument including ZOPFAN, TAC and, importantly, ASEAN Charter (please refer to the cited texts in the foregoing section). The context of ASEAN's non-interference focused on internal stability in order to create national resilience and regional resilience, which originally was an Indonesian conception but then became the widespread catchphrase for all ASEAN members.[196] To this extent, promoting domestic stability is a prerequisite for each individual member. When they can overcome all domestic threats, regional resilience will automatically result in the similar way as a chain deriving from the overall strength.[197]

An investigation of the history of ASEAN reveals practical implications of ASEAN's non-interference principles. Significantly, ASEAN members regularly refrain from openly criticising other ASEAN members concerning the neighbouring countries' actions on their domestic and political matters.[198] Examples of these practices are the situations where there are no open criticisms of military coups in Thailand, martial law in the Philippines or the detention without trial in Malaysia in public; any comments are expressed only through private communication.[199] Moreover, ASEAN members have a policy of denying formal support for neighbouring opposition movements[200], providing sanctuary or any other form of assistance to any rebel group.[201] A good

195 Acharya, *Constructing a Security Community in Southeast Asia*, 58.

196 ibid.

197 ibid.

198 See ibid., 58; Funston, 3.

199 See for instance, Simon Tay, "Why ASEAN Hasn't Condemned Thailand," *The Nation*, 7 August 2014., ASEAN Secretariat, "ASEAN Integration in Services," (Jakarta, Indonesia: ASEAN, 2015).

200 Funston, 3.

201 Acharya, *Constructing a Security Community in Southeast Asia*, 58.

example is the case of Thailand's repudiation of providing support concerning the tension between Thailand and Malaysia over the movement of the Communist Party of Malaya and the Muslim separationists in southern Thailand (in which Thailand is believes that Malaysia is involved).[202]

2.2.3. Consensus

The ASEAN Way is an operational norm or working style that is informal and personal, where policymakers persistently utilise the traditional approach of the decision-making process, conceptualising the Javanese formation – *musyawarah* and *mufakat* -- that the consensus making process would require an informal discussion and the strong guiding hand of a village elder.[203] In this connection, the codification of the consensus principle of the decision-making process of ASEAN, as the legal basis of consensus principle, can be found in several ASEAN instruments. Under TAC, ASEAN members shall accept the following principles:[204]

> "...
>
> (d) settlement of differences or disputes by peaceful means;
>
> (e) renunciation of the threat or use of force; and
>
> (f) effective cooperation among themselves..."

202 However, this practice is not definite as it has been ignored in some circumstances; for instance, Cambodia has surreptitiously provided sanctuary for Thai Red Shirt activists during the period of political conflict in Thailand., see Kate Bartlett, "Thai Red Shirt Activist Seeks Asylum in Cambodia," *Anadolu Agency*, 25 September 2014.

203 Acharya, *Constructing a Security Community in Southeast Asia*, 69.

204 *Treaty of Amity and Cooperation in Southeast Asia*, Article 2.

Significantly, TAC has formalised the approach of ASEAN cooperation and dispute resolution, whereby decision-making mechanisms of ASEAN (including the dispute settlement mechanism) will be based on traditions of consultation and consensus-building, including resolution of disputes through friendly negotiations.[205]

Apart from that, the ASEAN Charter has importantly incorporated the consensus requirement into its decision-making process, which consequently depicts ASEAN's unique character.[206] Article 20 of the ASEAN Charter explicitly set out that "as a basis principle, decision-making in ASEAN shall be based on consultation and consensuses".[207] Where consensus cannot be achieved, or in the case of a serious breach of the ASEAN Charter or non-compliance, such matter would be referred to the ASEAN Summit for a decision.[208] It must be noted that a meticulous definition and the implications of "consensus" are not provided in any of ASEAN documents. As a result of such ambiguity, ASEAN consensus can be described through the consideration of members' practices. Consensus building is one of the oldest and most widespread conflict management methods in Asia and involves a long process of communication, indirect negotiation, face work, and subsequent reaching of an agreement based on the least common denominator.[209] It can be understood as an amalgamation of the most acceptable view of each and every member in a socio-psychological setting in

205 ibid., Article 13.

206 Hung, 828.

207 *Charter of the Association of Southeast Asian Nations*, Article 20(1).

208 ibid., Article 20(2) and (4).

209 See Otto Federico von Feigenblatt, "Avoidance and Consensus Building in the Association of Southeast Asian States (ASEAN): The Path Towards a New 'ASEAN Way'," *Entelequia: Revista Interdisciplinar* 13, no. 1 (2011): 129.

which all parties have power over each other.[210] All members of the group can come to an agreement, so long as it satisfies the needs or interests of one party and does not harm those of other members. For a consensus to be absolute, however, all parties must share the same concerns and be willing to sacrifice part or all of their interests for the common cause.[211]

For the ASEAN consensus process, the members would maintain a high level of non-confrontation and compromise. The parties to the negotiation can debate or disagree on a particular issue behind the scenes[212]; however, they will avoid arguing their different views in public and will not embarrass other members, in order to avoid conflicts.[213] The practice of ASEAN consensus that even in a situation where it is highly likely that ASEAN members cannot reach a conclusion, means that the members will act and speak as if there is a certain level of agreement that has been achieved by way of emphasising a positive outcome of the infra-mural differences.[214] As a matter of a fact, an absolute consensus or unanimity can rarely occur when the national interests are a critical factor.[215] It cannot provide a solution on contentious and detrimental matters. However, the consensus in ASEAN's context is a style that it looks toward a "non-absolute consensus"[216] or a "way of moving forward by establishing

210 Mak Joon Num, "The ASEAN Process ("Way") of Multilateral Cooperation and Cooperative Security: The Road to a Regional Arms Register?," in *MIMA-SIPRI Workshop on 'An ASEAN Arms Register: Developing Transparency'* (Kuala Lumpur1995). cited in Acharya, *Constructing a Security Community in Southeast Asia*, 68.

211 Hai Hong Nguyen, "Time to Reinterpret ASEAN's Consensus Principle," (Crawford School of Public Policy at the Australian National University: East Asia Forum, 2012).

212 Acharya, *Constructing a Security Community in Southeast Asia*, 68.

213 Masilamani and Peterson, 11.

214 Acharya, *Constructing a Security Community in Southeast Asia*, 68-69.

215 Nguyen, 2.

216 ibid.

what seems to have a broad support".[217] To this extent, it does not mean that everyone has to accept a decision; but rather is understood as having everyone's ideas heard equally and stated in the final document in an objective and unbiased manner.[218] Therefore, not every member would be comfortable with such decision, but it would tend to go along as long as its national interests are not affected.[219]

Significantly, as described by Kishore Mahbubani, the principle of consensus is the reason that generates harmony and cooperation despite the different levels of development of its members. The main success of the consensus process is that it has helped nations like Myanmar achieve a peaceful transition from decades of harsh military rule, whereas nations in similar situations in other regions, such as Syria, have been plagued by conflict.[220] Another success of consensus in creating peace in the region was achieved by ASEAN through the 2002 Declaration on the Conduct of Parties in the South China Sea. This document set out four trust- and confidence-building measures and voluntary cooperative activities. Significantly, the parties reaffirmed "that the adoption of a code of conduct in the South China Sea would further promote peace and stability in the region and agree to work, on the basis of consensus, towards the eventual attainment of this objective".[221] Expressed this way, consensus building was seen as a way of advancing regional cooperation schemes despite the reluctance of some of the members to participate in it. It is seen by the policymakers as an

217 Acharya, *Constructing a Security Community in Southeast Asia*, 69.

218 Nguyen, 2.

219 Acharya, *Constructing a Security Community in Southeast Asia*, 69.

220 Kishore Mahbubani, "ASEAN as a Living, Breathing Modern Miracle," *Horisons* 2 (2015): 145.

221 See ASEAN, "Declaration on the Conduct of Parties in the South China Sea," http://ASEAN.org/?static_post=declaration-on-the-conduct-of-parties-in-the-south-china-sea-2.

effective tool that puts each member on an equal footing, allowing the smaller and weaker countries to have their voices heard.[222] It also helps to overcome hesitancy and indifference among ASEAN members towards the regional cooperation. Lee Kuan Yew explained that "so long as members who are not yet ready to participate are not damaged by non-participation, nor excluded from future participation, the power of veto need not be exercised...when four agree and one does not object, this can still be considered a consensus and the four should proceed with a new regional scheme.[223]

It is arguable that ASEAN consensus is considered to have a limited effectiveness when there are issues dealing with the fundamental national interests, sovereignty, and territorial integrity, and thus the members will eventually tend to exclude these contentious issues from the formal multilateral agenda so that the conflict is seen as being "swept under the carpet".[224] Also, consensus is a time-consuming process. These reasons indicate why ASEAN is not able to deal with crises in a timely fashion. Finding the lowest common denominator requires constant communication and indirect negotiation. Thus, consensus strengthens preventive diplomacy while it weakens ASEAN's ability to deal with sudden threats. The core problem of consensus building is the veto power. Since the agreement of every member is necessary to reach consensus, a single member can obstruct the process. This tactic has been used several times by Myanmar and Vietnam to force the

222 Guan, 88.

223 Acharya, *Constructing a Security Community in Southeast Asia*, 69.

224 ibid., 70.

avoidance of certain sensitive issues such as human rights and democratisation.[225] Moreover, in the case of the International Tribunal for the Law of the Sea's ruling brought by the Philippines against China under Annex VII to the UN Convention on the Law of the Sea, ASEAN failed to agree on maritime disputes several times as Cambodia blocked any mention to the ruling against China in ASEAN's statement.[226] Eventually, ASEAN only came out with the statement that it requests the parties to resolve their territorial and jurisdictional disputes by peaceful means, without resorting to the threat or use of force, through friendly consultations and negotiations by sovereign states directly concerned…".[227] Another cost created by consensus building is that agreements are difficult to implement due to their abstract and general nature. Specific details are avoided so as to reach consensus based on the lowest common denominator. This consensus leads to problems in operationalising the policy guidelines adopted by ASEAN. One example of this is the policy goals of building an ASEAN Socio-cultural community by 2020 found in the ASEAN Charter.[228]

225 Feigenblatt, 129.

226 Manuel Mogato, Michael Martina, and Ben Blanchard, "ASEAN Deadlocked on South China Sea, Cambodia Blocks Statement," *Reuters* 2016.

227 ASEAN Secretariat, "Joint Statement of the Foreign Ministers of ASEAN Member States and China on the Full and Effective Implementation of the Declaration on the Conduct of Parties in the South China Sea," http://ASEAN.org/joint-statement-of-the-foreign-ministers-of-ASEAN-member-states-and-china-on-the-full-and-efective-implementation-of-the-declaration-on-the-conduct-of-parties-in-the-south-china-sea-24-july-2016-vie/.

228 Feigenblatt, 129.

2.2.4. Flexibility

The struggle to achieve consensus among the members made ASEAN resort to adopting the flexibility principle to facilitate the cooperation, which originally developed from the non-participation concept. The concept of flexibility is aimed at dealing with a diversity of the levels of development of members where the recent development of ASEAN has codified the "flexible" commitments in the aspect of the regional economic integration. The ASEAN Charter, Article 21(2) specifically sets forth that, instead of taking a vote, "the implementation of economic commitments, a formula for flexible participation, including the ASEAN Minus-X formula, may be applied where there is a consensus to do so."[229] This means that the regional economic integration mechanism is ultimately in a form of "two-track" processes among members.[230] The members who are ready to move forward with the commitments can do so without being held back by the slower one[231], and vice versa, the slow developing members would be allowed to opt out of any economic agreement as long as there is a consensus to do so[232] by way of allowing those members who are not yet ready to commit to certain obligations to agree in principle while at the same time not being bound until they are ready.[233]

The language of flexible commitments can also be seen in the ASEAN Economic Community Blueprint (which is a formal plan for ASEAN to achieve the ASEAN Economic Community). Under the Blueprint, an achievement of the commitments on tariff

229 *Charter of the Association of Southeast Asian Nations*, Article 21(2).

230 McGoldrick, 206.

231 Guan, 89.

232 McGoldrick.

233 Davidson, 175.

reduction on sensitive products[234], non-tariff barrios[235], freer flow of services[236], financial services[237], capital movement[238] and intellectual property[239] is subject to the flexibility principle.[240] Moreover, the Implementation Plan 2009 correspondingly recognises the concept of flexibility due to the differing levels of capital market development and readiness amongst ASEAN countries. Here, it requires that the capital market cooperation in ASEAN should be implemented bilaterally first and then multilaterally as other countries become ready to join in.[241]

In addition, the flexibility principle is reflected through the regional conflict management and the implementation of commitment. Article 22 provided that "member States shall endeavour to resolve peacefully all disputes in a timely manner through dialogue, consultation and negotiation".[242] In relation to the interpretation and application, Article 25 specified that "where not otherwise specifically provided, appropriate dispute settlement mechanisms, including arbitration, shall be established for disputes which concern the interpretation or application of this Charter and other ASEAN instruments"[243]. Significantly, rather than imposing penalties on a noncomplying member, the flexibility principle has been used under Article 27 of the Charter so that

234 See Secretariat, "ASEAN Economic Community Blueprint 2008," 30.

235 See ibid., 31.

236 See ibid., 37.

237 See ibid., 38.

238 See ibid., 41.

239 See ibid., 48.

240 See ibid., 2.

241 See ASEAN Capital Market ASEAN Capital Market Forum, "Implementation Plan to Promote the Development of an Integrated Capital Market to Achieve the Objectives of the Aec Blueprint 2015," ed. ASEAN Finance Ministers Meeting (ASEAN, 2009), ii.

242 *Charter of the Association of Southeast Asian Nations*, Article 22.

243 ibid., Article 25.

"any Member State affected by non-compliance with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism, may refer the matter to the ASEAN Summit for a decision".[244]

The language under such aforementioned provisions has been demonstrated through the cooperation. This also includes avoiding certain difficult internal conflicts such as those over territory and political persecution of opponents in favour of maintaining the unity of ASEAN and permitting the discussion of other issues while disagreeing on many important ones. This leads to improved communication among parties which may be in conflict over one issue while cooperating on many others. Cooperation on regional concerns such as terrorism and development can take place among members with serious disputes partly because of ASEAN's avoidance defence mechanism.[245] The example of flexibility principle in managing the regional conflict is the case the Preah Vihear temple where there were a series of clashes between Thai and Cambodian troops along the border from 2008 – 2011. ASEAN only called for Cambodia and Thailand's conflict to "be amicably resolved in the spirit of ASEAN Solidarity, in accordance with the principles contained in the TAC and the ASEAN Charter".[246] However, as a result of an improved relationship between Cambodia and Thailand since the military cope in 2014, Cambodia is considering allowing access to the Preah Vihear temple from the Thai side in 2016 in order to help foster tourism in the area between the two countries. In this regard, General Tea Banh, the Deputy Prime

244 ibid., Article 27.

245 See Feigenblatt, 128.

246 ASEAN, "Chair's Statement of the 18th ASEAN Summit Jakarta, 7 - 8 May 2011: ASEAN Community in a Global Community of Nations," (ASEAN Secretariat: ASEAN, 2011), 23.

Minister and Minister for National Defence of Cambodia, pointed out that “I want Thai reporters to write good news for the benefit of a permanently cordial relationship, not only for the present time”.[247] This statement reflects that fact that the conflict was managed in a flexible style (based on inter-personal relationship) rather than relying on the institutional and legalistic approach.

Another ASEAN practice of conflict management which demonstrates the flexibility of ASEAN cooperation is the case of South China Sea after the International Tribunal for the Law of the Sea issued the ruling in the case “An Arbitration before an arbitral tribunal constituted under Annex VII to the 1982 United Nations Convention on Law of the Sea between the Republic of the Philippines and the People's Republic of China” dated 12 July 2016. ASEAN and China have agreed on the South China Sea Code of Conduct Framework after fifteen years of attempts to draft it. However, such framework does not create an actual code of conduct. It contains only the elements; the conclusion of the framework is a milestone in the process. Such conclusion will provide a good foundation for the next round of consultations.[248] Here, the style of flexibility is obvious as the draft framework is the first of many steps to enable ASEAN and China to work together on a sensitive issue. However, this does not mean that the strategic trust gaps between the parties would narrow overnight.

Nevertheless, the flexibility mechanism embedded in ASEAN economic cooperation would yield uncertain effects to the implementation of ASEAN economic

247 TERRY FREDRICKSON, "Cambodia Considers Opening Access to Preah Vihear," *Bangkok Post* 2016.

248 Reuters Staff, "China, ASEAN Agree on Framework for South China Sea Code of Conduct," *Reuters*, 18 May 2017.

agreements[249] even though the ASEAN Charter sets out the flexible participation that requires a consensus to do so. The negative impacts of having flexible commitments are that: (i) members will be able to delay their implementation of their commitment without violating the Charter; (ii) the regional economic integration initiatives would tend to be in a form of relaxed arrangement rather than some fixed commitments; and (iii) ASEAN cooperation would continue to be dominated by a culture where members can freely avoid the economic commitments as they do not want to impose unwanted commitments on each other.[250]

2.3. The ASEAN Way as the "Middle Path" Approach to Regional Cooperation

Critically, the global situation today increases the necessity of having an alternative model of capitalism to help create a fairer and more sustainable world. In the twentieth century, dominant countries developed a propensity to impose a preferred form of capitalism on other countries through international organisations, such as the IMF and World Bank, and the establishment of regional cooperation. This ideology is known as the "Washington Consensus", involving liberalisation of financial, capital markets and bank activities of lending for speculative real estate. The capitalist ideology was considered to be the most effective way to allocate resources and facilitate economic growth.[251] The development of capitalism has proliferated in the large middle classes over the past decade. However, there are some negative consequences of capitalism; in particular, unbridled forms of capitalism have been

249 Leviter, 196.

250 ibid., 196-97.

251 Nattapong Thongpakde and Prasopchoke Mongsawad, "Immoral Capitalism: The Need for a New Approach," in *Sufficiency Thinking : Thailand's Gift to an Unsustainable World*, ed. Gayle C. Avery and Harald Bergsteiner (Allen & Unwin, 2016), 17.

blamed for triggering periodic economic crises and excessive volatility, causing resource depletion and environment degradation.[252] The world today has encountered global financial crises, in particular the Asia financial crisis and the 2007-2008 financial crisis. Such situations demonstrate the consequences of unchecked capitalism, where greed drives predators to exploit any loophole in the financial system, and consequently causes considerable economic and social distress to others.[253] In relation to the Eurozone crisis, Joseph Stiglitz, a Nobel laureate, pointed out that the Eurozone's "economic failure has contributed to undermining political solidarity. In fact, it's led to the kind of divisiveness that makes it even more difficult for them to address the new problems they're confronting like the migration crisis."[254]

In reacting to the economic distress, nationalism in global integration affairs has re-emerged. The United Kingdom's national decision to withdraw from the EU is a good demonstration. For the United Kingdom, the nationalism and populist movements have increased while there was a widespread view that the EU was currently a dysfunctional economic entity. A growing distrust of the multinational financial, trade and defence organisations created after World War II, such as the EU and the IMF, has also been more apparent.[255] In supporting this, Ben Trott has pointed out the rationale of the withdrawal that "it's not just about a desire for Britain to dominate in the world again, but also the idea that Britain itself has been "colonised" – through immigration

252 ibid.

253 ibid.

254 Matt Philips, "Joseph Stiglitz on Brexit, Europe's Long Cycle of Crisis, and Why German Economics Is Different," QUARTZ, https://qz.com/744854/joseph-stiglitz-euro-future-of-europe-book/.

255 See George Friedman, "3 Reasons Brits Voted for Brexit," *Forbes*2016.

from the Caribbean, South Asia, and more recently Eastern Europe, and through the loss of national sovereignty, particularly to the European Union".[256]

Seeking an alternative approach to liberalisation and regional integration is an ongoing issue. There are some discussions that call for a rethinking of the reliance on capitalism. As a result of the Eurozone crisis and Brexit, Jacques Attali, the President at the Commission for Liberation for French Economic Growth, has emphasised the newly invented notion of the "positive economy" that takes into account a long-term perspective and puts the well-being of all people at its core in order to create sustainable development. He pointed out that "clever capitalism is by definition altruistic". Moreover, he further explained that "I think that there has been a rethinking – at least among a large group of people. But we are still a long way from the ideal, positive economy that puts the interests of future generations at its core. Finding a way to combine markets, democracy, and new generations is a key challenge".[257] However, according to the statement, it seems apparent that seeking an alternative approach to capitalism would encounter difficulties in application.

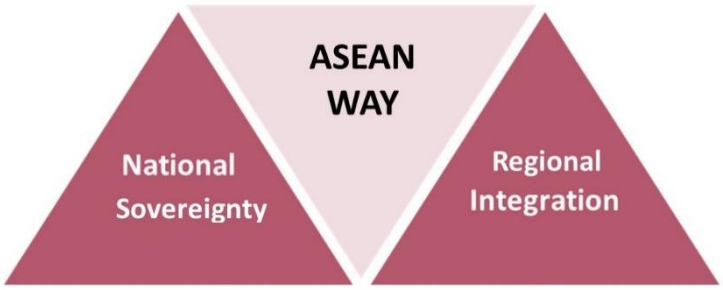
Instead of relying on the concept of capitalism to drive the liberalisation and regional integration, the oriental wisdom has created an integrative approach to regional cooperation, knowing as a "middle path" ideology. In this regard, the term "middle path (Pali: Majjhimāpaṭipadā) is a Buddhist terminology that was used to describe the character of the Noble Eightfold Path that the Gautama Buddha

256 Leila, "Brexit? – Interview with Ben Trott," http://www.leila.network/brexit-interview-with-ben-trott/.

257 Max Tholl, ""Clever Capitalism Is by Definition Altruistic"," The European, http://www.theeuropean-magazine.com/jacques-attali/9107-rethinking-capitalism-after-the-crisis.

discovered and led to his liberation (Nirvana).[258] According to the Pāli Canon of Theravada Buddhism, the term middle path was used in the Dhammacakkappavattana Sutta, to refer to the middle way of moderation, between the extremes of sensual indulgence and self-mortification.[259] In this connection, an application of the middle path ideology is broad and could be used in various perspectives. Critically, middle path ideology primarily focuses on an achievement of an ultimate goal whereby the pathway should be appropriated and fit the context. This could be demonstrated by the case of archery where the string of the bow is needed to be adjusted to fit the type and condition of usage in order to enable a shooting to hit the aimed spot.[260]

Diagram 3 **– ASEAN Way and the Regional Integration**



By applying the middle path ideology to the matter of international economic integration, an alternative form of cooperation would need a form of decision-making that is practical and flexible to different challenges while governed by ethics, morality and knowledge for the common good.[261] Significantly, the ASEAN Way comports with

258 Phrakhrupaladthananchai Arinjayo (thinkumnerd), "A Comparative Study of Buddhist Doctrine of Middie Way and the Concept of Mean in Confucianism" (Mahachulalongkornrajavidyalaya University, 2004), 7.

259 Cited in ibid., 7-8.

260 See ibid., 9.

261 Sanitsuda Ekachai and Usnisa Sukhsvasti, "Sufficiency Economy Philosophy: Thailand's Path Towards Sustainable Development Goals," (Ministry of Foreign Affairs, Thailand, 2016), 6-7.

such ideology as it emphasises the practicality and feasibility to enable ASEAN members to cooperate despite a high level of development disparity in order to reach ASEAN's ultimate goal of achieving the regional cooperation. By singling out a better route to cooperation than Western legalism[262], fifty years of ASEAN's cooperation achievement demonstrate that imposing a similar integration model as that of the EU to ASEAN, involving structuring a high degree of legalistic and institutionalised approaches[263], would not be appropriate due to several contextual differences. It further demonstrates that the methodology of achieving regional integration would need a tailor-made approach, looking at each area and identifying the criteria for assessing the feasibility and effectiveness of the relevant approach. In the light of this, consultation and consensus are used in the ASEAN's cooperation to overcome the members' development disparities while the flexibility principle further implies that the purpose or focus of coordination should be changed depending on the areas concerned.

Based on the discussion, ASEAN Way is an essential element that enables regional cooperation to move forward in accordance with the regional context and create the level of trust among member states. However, the drawback of the ASEAN Way occurs when the regional commitment has emphasised development towards the deeper regional cooperation. Essentially, the ASEAN Way impacts the construction of regional cooperation (see diagram 2). Even if the creation of the ASEAN Charter

262 See Jones, "ASEAN and the Norm of Non-Interference in Southeast Asia: A Quest for Social Order," 2.

263 See generally Alison Johnston and Aidan Regan, "European Integration and the Incompatibility of National Varieties of Capitalism Problems with Institutional Divergence in a Monetary Union," in *MPIfG Discussion Paper* (Germany: Max Planck Institute for the Study of Societies, Cologne, 2014).

established ASEAN as an international organisation under international law, the ASEAN Way still influences the shaping of the regional institutional structures as well as the regulatory initiatives. In this connection, the ASEAN Way has influenced the level of institutionalisation and legalisation intensity of ASEAN cooperation which results in several impediments in terms of an implementation and enforcement. As the ASEAN Way triggers the regional cooperation impairments, this research will focus on the impacts of the ASEAN Way in the light of capital market integration and the implementation gaps at the state level; which will be discussed in the following Chapters.

3. CONCLUSION: ASEAN'S COOPERATION AND THE ASEAN WAY

Chapter II has argued that the consideration of economic integration should be made through a discussion of institutionalisation and legalisation processes. Critically, economic integration would lead to regional institutional-building and setting-up of regulatory frameworks in several channels. ASEAN has demonstrated a development of the regional institutionalisation (as currently being an intermediate form of free-trade agreement and common market) and an evolution of legalisation process. As begun with the loose cooperation, ASEAN has established itself as having a status of legal personality and, at the same time, the cooperation has been increasingly entered into under terms and agreements. Such movement indicates an intention to be bound by the rules or commitments set out. Thus, it can be concluded that ASEAN is now developing toward a reliance on a legalistic framework and institutionalisation that are based on rules and dispute settlement mechanism.

However, ASEAN cooperation has its own operational mechanism, known as the ASEAN Way, that still holds a significant dominance in the regional cooperation habit. Due to scant academic discussion on this issue, the second part of this Chapter has argued that the ASEAN Way is the "operational norms" that create the unique process of intra-mural interaction cooperation based on two groups of principles under both legal and practical perspectives, consisting of an adherence to: (i) sovereignty and non-interference principles and (ii) consensus and flexibility principles.

The Impacts of the Eurozone financial crisis and Brexit heralds necessity of having an alternative model of capitalism to help create a fairer and more sustainable world. This research considers that the ASEAN Way comports with the concept of the

“middle path” ideology. This is because the ASEAN Way emphasises the practicality and feasibility to enable ASEAN members to cooperate despite a high level of development disparity in order to reach the ASEAN’s ultimate goal of achieving regional cooperation. Signifiantly, fifty years of the solidarity of ASEAN demonstates that the methodology of achieving regional integration is not absolute. However, it would need a tailor-made approach, looking at each area and identifying the criteria for assessing the feasibility and effectiveness of the relevant approach.

CHAPTER III THE ASEAN WAY AND ASEAN'S CAPITAL MARKET INTEGRATION

ASEAN capital market integration is a combination between ASEAN Way and the rule-based approach of regional cooperation. The very fact is that ASEAN Way is considered as a defined approach that is distinct from the formalistic decision-making systems that is based on rules. Thus, a compatibility of ASEAN Way with a rules-based organisation is the key concern to ASEAN since the preference of informality and the practice of consensus building has created some impediments to the process ASEAN capital market integration.

This Chapter intends to answer the key questions concerning how does ASEAN Way impact ASEAN capital market integration – which eventually makes the current stage of development only a partial success. Essentially, the achievement of regional capital market integration requires an interaction among different market elements; including regulators, infrastructures, intermediaries, and market regulations; hence, this Chapter will primarily focus on a comparative analysis of the impacts of the ASEAN Way on each composition of the regional capital market. This research has classified the elements vital to the creation of capital market integration as consisting of: (i) an establishment of the institutional arrangements and market infrastructures; and (ii) a creation of regulatory arrangements. In addition, the supporting elements of the regional capital market integration comprise of: (i) the regional arrangement of the capital control; (ii) financial service liberalisation; and (iii) investor protection.

In pursuing this direction, the first and second parts of this research will provide a comparative discussion concerning an implication of the ASEAN Way on the regional architecture and the regional efforts to create regional regulatory regime on capital

market. The findings would show how ASEAN integration differs from the trends of global capital market integration; which reflects both strengths and weaknesses. In the third part, it will further consider the supporting issue including the matters of: (i) the capital movement, which is predominantly a pre-requisite requirement for the creation of the regional integrated market; (ii) the market participants and financial service liberalisation among ASEAN markets; and (iii) the regional investor protection mechanism.

Moreover, it is essential to note at the outset that the term "integration" used under ASEAN documents in the context of AEC only represents an ASEAN Way aspiration towards integration "at some level". It must be highlighted that there is a distinction between the words "integration" and "cooperation", in both the qualitative and quantitative aspects. Differently, cooperation is seen in the actions to lessen discrimination, while integration comprises measures entailing the suppression of some form of discrimination.[264] Therefore, the removal of trade barriers is economic integration while an international agreement on trade policy is seen just as economic cooperation.[265]

To some extent, ASEAN only demonstrates a stage of cooperation that refers to a stage where the trade agreement would decrease or remove the tariff or so-called "border barriers"; however, the differences of regulatory policies still exist. This is in contrast with the EU integration where it represents a deep integration where there is

264 See Bella Balassa, *The Theory of Economic Integration* (Greenwood Press, 1961), 174.

265 ibid.

a modification of other barriers, for instance reconciling diverse national practices to be in line with the common rules and supra-national mechanism.[266]

Significantly, the comparison made under this Chapter would be considerably against the EU (while there may be and some other regional cooperation used; as the case may be). To this extent, even if a vision for ASEAN integration should be applied differently from the way in which other regions were built[267], the comparative analysis will be helpful for an assessment of the status quo of ASEAN integration, especially concerning capital market that it is internationally interlinked. It may arguable that a direct comparison of institutional and normative aspects between ASEAN and other comparators to map out different integration elements is likely to be simplistic and impressionistic because of the facts that the history of ASEAN, its great diversity, and different political economy of the region militates against the measuring of ASEAN integration by the experiences of the other regions.[268] Nevertheless, this research still believe that the comparative study will be an effective tool to develop a deeper understanding of ASEAN integration process, for instance, the pros and cons between different integration models, which will eventually allow policy makers to produce more precise integration mechanisms for ASEAN in the future. Therefore, the comparative analysis will be primarily used in this Chapter to the possible extent, as it

266 See Robert Lawrence, "Preferential Trading Arrangements: The Traditional and the New," in *Regional Partners in Global Markets: Limits and Possibilities of the Euro-Med Agreements*, ed. Ahmed Galal and Bernard Hoekman (Center for Economic Policy Research and the Egyptian Center for Economic Studies, 1997), 22-24.

267 See, for instance, Asian Development Bank, *The Road to ASEAN Financial Integration – a Combined Study on Assessing Financial Landscape and Formulating Milestone for Monetary and Financial Integration in ASEAN* (Mandaluyoung: Asian Development Bank, 2013).

268 Michael Ewing-Chow and Tan Hsien-Li, "The Role of the Rule of Law in ASEAN Integration," in *EUI Working Paper* (European University Institute, 2013), 3.

will provide more concretised perspectives to understand the issues and problems of ASEAN integration.

1. THE ASEAN WAY AND THE REGIONAL CAPITAL MARKET INSTITUTIONS AND INFRASTRUCTURES

This section answers the question concerning an impact of the ASEAN Way on the regional capital market institutions and regional architecture. To explore such issue, this section will focus in institutional arrangements and subsequently engage with the subject of the regional market infrastructure convergence.

1.1. The ASEAN Way and the Institutional Architecture

While trade and production integration in South-East Asia have been accelerated rapidly, regional financial integration has been relatively sluggish due to the fact that most member states have concentrated on policy and institutional changes at the domestic level.[269] It was not until 1997 that regional integration effort on the capital markets was put into the discussion as appeared in ASEAN Vision 2020[270] and Ministerial Understanding on Cooperation in Finance 1997.[271] In 2003, Declaration of ASEAN Concord II expedited the regional cooperation initiative whereby ASEAN members expressed their mutual aspiration to create a single interlinked financial market in ASEAN through the AEC 2020.[272] In tandem with this development, the goals for financial and capital market integration were established through the Roadmap on Monetary & Financial Integration of ASEAN, covering capital market development.

269 Jaseem Ahmed and V. Sundararajan, "Regional Integration of Capital Markets in ASEAN: Recent Developments, Issues, and Strategies," *Global Journal of Emerging Market Economies* 1:87 (2009): 90.

270 ASEAN, "ASEAN Vision," ed. ASEAN (1997), 2.

271 See *Ministerial Understanding on Cooperation in Finance*.

272 *Declaration of ASEAN Concord 2*, (7 October 2003).

Significantly, one component under the AEC Blueprint is that ASEAN countries agreed to “transform ASEAN into a region with “freer flow of capital” and “accelerate the free flow of professional and other services”.[273] In order to achieve this objective, the Finance Ministers at the 13th Finance Minister Meeting in 2009 discussed and further endorsed the Implementation Plan 2009.[274] This plan consequently puts in place a significant milestone to create a development of an integrated capital market in order to fulfil the objectives under the AEC Blueprint.[275]

In order to identify the impacts of ASEAN Way on the regional institutions and market infrastructure, it is essential to understand the unique institutional arrangements of capital market integration in ASEAN. After that, a comparative analysis of ASEAN capital market integration in the light of global trends is in order to enable an understanding on the impacts of ASEAN Way on the overall regional cooperation and the impediments arising from it.

1.1.1. Mapping of the Region’s Institutional Architecture

Financial cooperation in South-East Asia comprises four objectives. The first objective is to reinforce the outcomes of a market-driven process of economic and financial integration through gradual steps towards a long-term ambition of economic

273 The objectives are in order to: (i) promote greater harmonised rules in relation to capital market; (ii) facilitate mutual recognition of market professionals; (iii) promote greater flexibility of securities issuance; (iv) enhance tax laws; and (v) facilitate market driven effort. See ASEAN Secretariat, "ASEAN Economic Community Blueprint 2008," ed. ASEAN (2008), A.

274 See ASEAN Capital Market Forum, "Implementation Plan to Promote the Development of an Integrated Capital Market to Achieve the Objectives of the Aec Blueprint 2015," ed. ASEAN Finance Ministers Meeting (ASEAN, 2009), 1-10.

275 ASEAN Secretariat, "Regional Cooperation in Finance," ASEAN Secretariat, http://www.ASEAN.org/communities/ASEAN-economic-community/category/overview-13.

and monetary union.[276] The second is to develop regional self-help mechanisms as a means of crisis prevention and resolution.[277] The third is to improve the local currency financial markets, namely the domestic bond and equity markets.[278] The last objective is to promote stronger regional bargaining power in the international institutions such as the IMF and World Bank so that ASEAN can be more influential in shaping the international financial architecture.[279]

Essentially, ASEAN financial integration frameworks represent a deliberate choice with the consensual adoption of member states[280] and the imposition a formative timeframe on its members. Since the Declaration of the ASEAN Concord II, a large body of new initiatives to support regional financial and capital market integration has been taken place, and many existing initiatives have been reinforced.

276 See Ahmed and Sundararajan, 91.

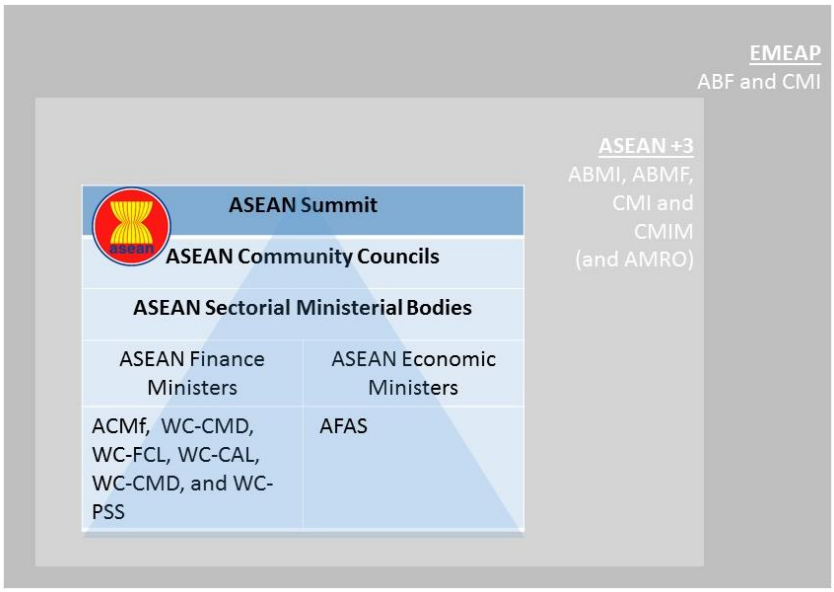
277 ibid.

278 ibid.

279 ibid.

280 *Charter of the Association of Southeast Asian Nations*, Article 21(2).

Diagram 4 **– The Outline of ASEAN's Institutional Arrangement on Capital Market Integration**



As shown in Diagram 4, the institutional structure of ASEAN capital market integration can be seen as a multi-level multitude where a large number of ASEAN task forces, working groups, and fora are now at work on a range of interrelated topics in regional capital market integration. The complex structures can be systematically mapped as follows.

1.1.1.1. ASEAN Ministers' Process – Working Committee on Capital Market Development, ASEAN Capital Market Forum, and the Cross-committee

AFM is a sectoral ministerial body under the ASEAN Economic Community.[281] It consists of each member country's Finance Minister. According to the ASEAN Charter, AFM functions to carry out the task concerning regional financial cooperation. It is

281 See ibid., Article 9(2).

empowered to determine the relevant senior officials and subsidiary bodies under its purview.[282]

In 2003, AFM Meeting endorsed RIA-FIN which consists of procedures, timelines and indicators for activities in four areas: (i) capital market development; (ii) the liberalisation of financial services; (iii) capital account liberalisation; and (iv) ASEAN currency cooperation, with the ultimate goal of the greater economic integration of ASEAN by 2015.[283] RIA-FIN intends to build capacity and lay the long-term infrastructure for the development of ASEAN capital markets, with a long-term goal of achieving cross-border collaboration among the various capital markets in ASEAN.[284] As a part of this ASEAN Ministers' process, the WC-CMD was set up and has been actively working on an initiative to achieve the overall objective of the RIA-FIN; that is, to develop deep financial markets and achieve cross-border collaboration among ASEAN capital markets.[285] It also works to align capital market development with the AEC Blueprint; providing a platform for the exchange of views and learning points on capital market developments; enhancing understanding of OTC derivatives developments and emerging regulations and working with the ASEAN Secretariat on the Joint Study on Capital Market Integration.[286] WC-CMD has developed a set of bond market development indicators, which was structured as a BMD Scorecard. The BMD Scorecard would serve as benchmark reference points for ASEAN finance officials to measure the

282 See ibid., Article 10.

283 See ASEAN Secretariat, "Regional Cooperation in Finance," http://www.ASEAN.org/communities/ASEAN-economic-community/category/ASEAN-finance-ministers-meeting-afmm.

284 ibid.

285 Securities Commission Malaysia, "ASEAN " http://www.sc.com.my/general-section/international/ASEAN/.

286 See Secretariat, "Regional Cooperation in Finance".

state of ASEAN's bond market development, openness and liquidity, and to provide a basis with which to identify market gaps and track the removal of such gaps over time.[287]

Apart from the WC-CMD, tasks concerning financial regulatory harmonisation in ASEAN is led by the ACMF[288], which was founded in 2004 under the auspices of AFM. ACMF has initially focused on the harmonisation of rules and regulations before shifting toward more strategic issues to achieve greater integration of the region's capital markets under the AEC Blueprint.[289] ACMF is a senior level body, consisting of the chairpersons of securities commissions from each member country – ten ASEAN jurisdictions.[290] ACMF meets twice a year and was constructed on a working group approach.[291] It consists of sub-working groups: A-MDP WG to facilitate the development of domestic markets to ensure they achieve the depth and maturity required to enable meaningful participation in ACMF's initiatives[292]; WG A-MAS to develop mutual recognition of prospectuses and facilitate supporting marketing services involved in cross-border offerings; WG-C(BAPEPAM) and WGDREM to develop the cross-border enforcement and dispute resolution systems; WG D-SG-Malaysia to expedite the review process for secondary listings, ASEAN corporate governance ranking/scorecard and WG B-Thai SEC to develop mutual recognition of collective investment schemes for cross-

287 ibid.

288 Ahmed and Sundararajan, 118.

289 ASEAN Capital Markets Forum, "About Acmf," ASEAN Capital Markets Fourm, http://www.theacmf.org/ACMF/webcontent.php?content_id=00001.

290 ibid.

291 Mohd Sani Ismail, "Enhancing Cooperation & Regional Integration of ASEAN Equity Markets" (paper presented at the OECD-ADBI 12th Roundtable on Capital Market Reform in Asia, Tokyo, Japan, 2012), 13.

292 ASEAN Capital Market Forum, "About a-Mdp," http://www.theacmf.org/ACMF/webcontent.php?content_id=00071.

border offerings.[293] The significant achievement of ACMF was the Implementation Plan 2009, which was endorsed at the 13th AFM Meeting in April 2009 in Pattaya, Thailand.[294] The Implementation Plan 2009 sets six principles and key phases for regulatory modernisation for member countries to achieve the purpose of capital market integration, thereby providing a clear roadmap with strategic initiatives. According to the diversity of development levels of member countries, ACMF adopts a pragmatic approach that countries can "opt-in" to participate in ACMF's initiatives based on their degree of readiness and capacity to meet the requirements of the frameworks.[295]

Since the endorsement of the Implementation Plan 2009, ACMF has made dramatic progress on the several initiatives to facilitate greater cross-border fundraising activities, cross-border distribution of products and offering of services, and extending ASEAN's reach to a broader investor bases [296] which can be summarised in Table 1 (further details will be discussed later on).

293 See Ismail, 13.

294 Forum, "Implementation Plan to Promote the Development of an Integrated Capital Market to Achieve the Objectives of the Aec Blueprint 2015," i.

295 ASEAN Capital Markets Forum, "Acmf Action Plan 2016-2020," ed. ASEAN Capital Markets Forum (2016), 1.

296 ibid., 7.

Table 1 – **Achievements according to the Implementation Plan 2009**[297]

Themes	Components	Milestones Achieved
I. Creating an Enabling Environment for Regional Integration	Harmonisation and mutual recognition frameworks	1. Expedited Entry of Secondary Listings 2. ASEAN Disclosure Standards 3. Streamlined Review Framework for Common Prospectuses 4. ASEAN Trading Link 5. ASEAN Corporate Governance Scorecard and the countries reports and assessment 6. ASEAN Collective Investment Schemes (including the framework for crossborder offering and handbook for operators) 7. Cross-recognition of qualifications on education and experience of market professionals 8. Ad hoc technical support
II. Creating the Market Infrastructure and Regionally Focused Products and Intermediaries	1. ASEAN exchange linkages 2. ASEAN corporate governance framework 3. Building ASEAN as an asset class 4. Strengthening bond markets	
III. Strengthening the Implementation Processes	1. Aligning domestic capital market development plans to support regional integration 2. Reinforcing the ASEAN working processes	

Source: Adapted from the ACMF

In order to continue the next phase of post-2015 capital market integration, the ACMF developed the ACMF Vision 2025 having the objectives of: (i) enhancing and facilitating growth and connectivity; (ii) promoting and sustaining inclusiveness; and (iii) strengthening and maintaining orderliness and resilience. The fulfilment process was designed for ten years, covering two phrases. To carry out the first phase, the ACMF has developed the Action Plan 2016 in collaboration with the industry, market

297 ibid. See also ASEAN Capital Markets Fourm, "ACMF Initiatives," http://www.theacmf.org/ACMF/webcontent.php?content_id=00017.

practitioners and other stakeholders.298 In collaboration with ADB, this five-year Action Plan is an outcomes-based plan, where six key priorities have been identified with specific initiatives designed to drive the work of the ACMF, taking into consideration associated risks, particularly transmission risks. These initiatives will be reviewed, and if necessary, augmented or replaced on a yearly basis to ensure that the strategic objectives are pursued in the most effective and efficient manner.[299] Currently, the annual Action Plan 2016, which sets out ACMF's immediate priorities for the year, was finalised during its 24th meeting.[300] A holistic review of the achievements accomplished of the Action Plan 2016 will be conducted toward the end of the five-year term. This review will provide the basis for the development of the next action plan to drive ACMF's efforts under the second phase for the five years from 2021 to 2025.[301]

To boost the performance and development, the 17th AFMM in April 2013 agreed to launch a cross-committee to develop a blueprint for the establishment of post-trade linkages for clearing, settlement and depository. The cross-committee comprises members from ACMF, WC-CAL, WC-CMD, and WC-PSS, with the objective to develop the ACMI Blueprint to enable ASEAN issuers and investors to access ASEAN's capital market efficiently from any one single access point through an integrated

298 Forum, "ACMFAction Plan 2016-2020," 1.

299 ibid.

300 Securities And Exchange Commission of Thailand, "ASEAN Capital Market Regulators Roll out Initiatives under ACMF's New 5-Year Roadmap," news release, 11 April, 2016.

301 Forum, "ACMF Action Plan 2016-2020," 1-2.

access, clearing, custody, and settlement for investors tapping cross-border ASEAN capital markets for equities, government and corporate bond. [302]

1.1.1.2. ASEAN Framework Agreement on Services and the Working Committee on Financial Services Liberalisation

RIA-FIN covers the component of financial services liberalisation where a new modality for financial services liberalisation is based on pre-agreed flexibilities.[303] There have been five additional packages of commitments in financial services under AFAS signed at the AFM Meeting (the second, third, fourth, fifth, and sixth Packages of Commitments of Financial Services under AFAS) as prescribed by WC-FSL[304] (see this Chapter for further discussion).[305]

1.1.1.3. ASEAN+3 Finance Cooperation and Executives' Meeting of East Asia-Pacific Central Banks

Interestingly, an innovation of financial cooperation of ASEAN and Asia-Pacific is also influenced by the achievements of ASEAN+3 and the EMEAP.[306] As endorsed at the ASEAN+3 Finance Ministers Meeting on 2003 among China, Japan, Korea and ASEAN, ABMI was established to develop efficient and liquid bond markets in Asia, which would enable better utilisation of Asian savings for Asian investments.[307] Activities of

302 See ASEAN Secreatariat, "Joint Ministerial Statement of the 17th ASEAN Finance Ministers' Meeting," ed. ASEAN Secretariat (2013).

303 See Secretariat, "Regional Cooperation in Finance".

304 See "Agreements & Declarations," http://ASEAN.org/ASEAN-economic-community/ASEAN-finance-ministers-meeting-afmm/agreements-declarations/.

305 Thailand Fiscal Polocy Office, "Finanical Services Liberalisation in ASEAN: Background, Ideas and Thailand's Practices," http://www.fpo.go.th/FPO/modules/Content/getfile.php?contentfileID=3571.

306 Jee-young Jung, "Regional Financial Cooperation in Asia: Challenges and Path to Development " *BIS Papar* 42 (2008): 121.

307 See above Secretariat, "Regional Cooperation in Finance".

ABMI focus on the following two areas: (i) facilitating access to the market through a wider variety of issues and (ii) enhancing market infrastructure to foster bond markets in Asia.[308] In 2012, the ABMI New Roadmap was developed, in which the direction of ABMI was further clarified. Under the ABMI New Roadmap, the previous four ABMI Working Groups have evolved into Task Forces addressing the four key areas, namely: i) promoting key issuance of local currency-denominated bonds; ii) facilitating the demand for local currency-denominated bonds; iii) improving regulatory frameworks; and, iv) improving related infrastructure for the bond markets.[309] Apart from ABMI, the ABMF was set up as a forum under the ambit of ASEAN+3 in 2010, comprising bond market experts from the region, as a common platform to foster standardisation of market practices and harmonisation of regulations relating to cross-border bond transactions in the region.[310] ABMF will supply ASEAN+3 officials with recommendations and comments on the issues that will be adopted by the Task Force 3 (improving regulatory framework) of ABMI. During the first phase of operation, ABMF produced the ASEAN+3 Bond Market Guide as a comprehensive report on the bond markets in the ASEAN+3 region.[311] To extend the discussion to various bond market issues, the second phase of ABMF engaged in the setting up of two sub forums. Sub-Forum I (SFI) has the

308 Kouji Kawashima, "Asian Bond Markets Initiative" (Reginal Financla Cooperation Division, Ministry of Finance, Japan, 2013), 4.

309 See Asian Development Bank, "ASEAN+3 New ABMI Roadmap," ed. Asian Development Bank (Asian Bond Online: Asian Development Bank, 2012), 1-4.

310 " ASEAN+3 Bond Market Fourm," Asian Development Bank, https://wpqr4.adb.org/LotusQuickr/ASEAN3abmf/Main.nsf/h_Toc/6464e9705ac986d8482577a4001763be/?OpenDocument.

311 "ASEAN+3 Bond Market Guide," Asian Development Bank, https://wpqr4.adb.org/LotusQuickr/ASEAN3abmf/Main.nsf/h_Toc/3B929170855F3F0E482579D4002E9940/?OpenDocument.

objective to close the information gap in regulations, market practices and other related areas. Sub-Forum II (SFII) focuses on harmonisation of transaction procedures.[312] ABMF has recently completed the report of the third phase.[313]

Apart from this, EMEAP implemented two Asian bond funds (ABF-1 and ABF-2)[314] in 2003 and 2005, respectively, whose funds have been in operation ever since.[315] Moreover, the regional monetary cooperation is mainly evidenced by ASEAN+3 short-term credit lines. CMI was initially created by ASEAN+3 to promote regional cooperation by way of the bilateral currency swap arrangements among ASEAN+3 central banks.[316] The current network of sovereign bilateral credit lines has two roots. The first involves ninety collaborative foreign exchange swap lines set up by ASEAN's five original members. The other is a series of securities repurchase (repo) lines initiated by EMEAP.[317] Between May 2008 and February 2009, ASEAN+3 finance ministers further agreed on a new accord to pool additional international reserves on a more considerable scale. CMIM would involve administrative resources separate from those of participating states, and is currently planned to total USD 120 billion in commitments. China, Japan and South Korea would together provide eighty per cent

312 See "ASEAN+3 Bond Market Forum (ABMF) Phase 2 Report," Asian Development Bank, https://wpqr4.adb.org/LotusQuickr/ASEAN3abmf/Main.nsf/h_Toc/1F74F9F936E39E5048257CA9002A5873/?OpenDocument.

313 "ASEAN+3 Bond Market Forum(ABMF) Phase 3 Report," Asian Development Bank, https://wpqr4.adb.org/LotusQuickr/ASEAN3abmf/Main.nsf/h_Toc/50AEB5C21DB0BA6A48257EA30034B9CA/?OpenDocument.

314 Douglas Arner, Paul Lejot, and Wei Wang, "Assessing East Asian Financial Cooperation and Integration," in *Asian Institute of International Financial Law Working Paper* (2009), 32.

315 See Jung, 126.

316 ASEAN Secretariat, "Joint Minister Stement of the ASEAN+ 3 Finance Ministers Meeting," ed. ASEAN (2000).

317 See Arner, Lejot, and Wang, 26.

of the total, and ASEAN members the remainder.[318]ASEAN+3 countries also set up an independent surveillance unit under the umbrella of CMIM, the so called AMRO. The key functions of AMRO are to monitor and analyse the overall regional economic conditions, and contribute to (i) early detection of risks, (ii) policy recommendations for remedial actions; (iii) effective decision-making of CMIM.[319]

1.1.2. An Implication of ASEAN Way on the Institutional Architectures: A Weak Regional Governance System

The ASEAN Way has significantly affected the ways in which the regional policy of integration and ASEAN institutional architecture were created, which have subsequently resulted in weak governance and yielded several drawbacks with respect to integration, as follows.

1.1.2.1. Impacts on Financial Integration Policy

Sovereignty and non-interference principles have significant dominance in the shaping of the objective of regional financial integration. This is due to the aftermath of the ASEAN financial crisis, where most of the countries in Asia Pacific followed strict monetary policy controls centralised by their central banks. From this point, non-interference in other countries' monetary policies was inflexibly maintained; especially Thailand proposed a policy of "flexible engagement". It was a proposal that the commitment to the non-interference principle should be flexible, that it should not be absolute and must be subjected to reality tests.[320] The proposal was to signify the

318 ibid., 29.

319 Reza Siregar and Akkharaphol Chabchitrchaidol, "Enhancing the Effectiveness Ofcmim and Amro: Selected Immediate Challenges and Tasks," in *ADBI Working Paper Series* (Tokyo, Japan: Asian Development Bank Institute, 2013), See 6-7.

320 Professor Dr. Surakiart Sathienthai, interview by Tir Srinopnikom, 2015, Bangkok, Thailand.

deliberate interaction among member states as a result of rapidly depreciating currencies and the withdrawal of international credit that might be better solved through a more advance cooperation than that contemplated in ASEAN process. However, the consensus decision rejected such proposal, and ASEAN members consequently resolved to create a "freer" flow of capital in ASEAN Vision 2020.[321] The conclusion that the capital mobility will eventually be "freer" significantly impacts the regional mindsets of financial cooperation. It demonstrates the limitation of cooperation that ASEAN members aim for financial integration,[322] in which ASEAN will not engage in financial rule-making that goes beyond the creation of freer capital mobility in the region.

Explicitly, the ASEAN history of financial integration shows a very distinctive approach to the regional financial integration as compared to other regions. In the EU, the financial integration objective has been set over a long period since the 1950s. The EU founding treaties clearly set forth a commitment to creating a free movement of goods, services, persons, and capital[323]; in particular the creation of a single internal market in financial services and the transformation of major markets and professional intermediaries, which are now moving towards a Capital Market Union.[324] Likewise, the capital market integration in the East Africa region has marked a mutual aspiration of

321 See above ASEAN Secretariat, ASEAN Vision 2020.

322 Arner, Lejot, and Wang, 14.

323 See *Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union*, Part III: Union Policies and Internal Actions - Title I: The Internal Market - Article 26.

324 See ; European Commission, "Capital Markets Union: Unlocking Fund for Europe's Growth," http://ec.europa.eu/finance/capital-markets-union/index_en.htm.

its member state to relinquish the regional interests. According to TEEAC, EAC[325] has pursued developing the regional capital markets through establishing a common market with free movement of capital,[326] whereby the members committed themselves to stringent commitments to remove controls on capital transactions among members and harmonise capital market infrastructure, regulations, taxation, accounting, trading systems, and cross-listings of securities.[327] It is to be noted that, even though EAC is strong on paper (yet weak in the implementation of its decisions),[328] the ambition of the EAC represents systematic decision-making process that goes beyond ASEAN.

1.1.2.2. Impacts on the Institutional Structures

From the holistic perspective, it is obvious that ASEAN capital market integration comprises a complex structure of state cooperation based on consensus, consultation[329] and a flexibility approach,[330] where numerous institutionalised organs are included under the annual ministerial meetings. The various working groups meet at regular intervals and are active at different stages of the development towards achievement objectives, yet such active working groups may take a back seat at the different periods. From this circumstance, it is clear that the regional cooperation

325 EAC is an intergovernmental organisation composed of six countries in the African Great Lakes region in eastern Africa: Burundi, Kenya, Rwanda, South Sudan, Tanzania, and Uganda.

326 *The Treaty for the Establishment of the East African Community*, Article 85.

327 ibid., Article 86.

328 Stefan Reith and Moritz Boltz, "The East African Community: Regional Integration between Aspiration and Reality," *KAS INTERNATIONAL REPORTS* (2011): 1.

329 *Charter of the Association of Southeast Asian Nations*, Article XX.

330 ibid., Article XXI.

architecture is structured in a form of "multi-cooperating bodies"[331], rather than being centralised to one main institution. This structure enables deliberate choice of the consensual adoption of member states (that comes together with an imposition formative timeframes to the members).

(a) Lack of Supranational Body

With respect to institution-building efforts, shared commitments and policies implicit in financial integration are constrained by the national objectives represented by the recognition of the non-interference principle and national sovereignty. Due to ASEAN leaders' predisposition to give priority to domestic interests over ASEAN-wide interests, the regional organisation's structure is designed to preserve the national sovereignty although the ASEAN Charter has fashioned several structural modifications and introduced institutional bodies and sub-committees.[332] Surprisingly, the main tasks of these institutional bodies and sub-committees still entail limited power and would rather be considered as coordinating and report-making bodies throughout ASEAN's operational functions to formulate recommendations for ASEAN policy-making process.[333] Unlike what the Treaty of Rome does for the EU, the ASEAN Charter neither assigns any coercive authorities, nor establishes an EU-supranational style of having rule-making organs, an organisational executive mechanism for the implementation of rules, and a judicial institution for interpreting and enforcing the

331 See further Datuk Ranjit Ajit Singh, "ASEAN: Perspectives on Economic Integration: ASEAN Capital Market Integration: Issues and Challenges," in *LSE IDEAS special report* (London School of Economics and Political Science, 2009), 29-30.

332 LIN Chun Hung, "ASEAN Charter: Deeper Regional Integration under International Law?," *Chinese Journal of International Law* (2010): 831.

333 See *Charter of the Association of Southeast Asian Nations*, Article X and XI(2); 830.

rules.[334] In the case of the EU, there is the European Council, which works as the main decision-making and legislative body of the EU, where ministers of the member states meet within the Council to discuss different issues.[335] For financial integration, ESMA was founded under its founding regulation[336] because of the recommendations of the 2009 de Larosière report that called for the establishment of a European System of Financial Supervision as a decentralised network by replacing the Committee of European Securities Regulators that previously worked to promote consistent supervision across the EU and provided advice to the European Commission. ESMA has been in operation since 2011, having the main functions to ensure markets and financial stability, complete a single rulebook for EU financial markets, promote supervisory convergence and directly supervise specific financial entities.[337]

ASEAN leaders have repeatedly rejected the idea of supranationality, which would consequently require them to give up some level of domestic sovereignty. As an organisation with an economic mandate, the forcefulness of national sovereignty and a failure to create a common market result in a great difficulty for ASEAN to influence the national policies of members[338] as ASEAN contemplates a common standpoint to fully respect state sovereignty, where each state has absolute power to

334 See; Diane Alferez Desierto, "ASEAN's Constitutionalization of International Law: Challenges to Evolution under the New ASEAN Charter," *Columbia Journal of Transnational Law, Forthcoming* (2010).

335 See European Union, "The European Council," http://www.consilium.europa.eu/en/european-council/.

336 *Regulation (Eu) No 1095/2010 of the European Parliament and of the Council of 24 November 2010 Establishing a European Supervisory Authority (European Securities and Markets Authority), Amending Decision No 716/2009/Ec and Repealing Commission Decision 2009/77/Ec*.

337 European Securities and Markets Authority, "Who We Are," https://www.esma.europa.eu/about-esma/who-we-are.

338 Ernst Haas, "The Study of Regional Integration: Reflections on the Joy and Anguish of Pretheorsing," *International Organisation* 24, no. 4 (1970): 616.

manage its own internal affairs.[339] The differences of political economies, economic development and political systems nevertheless still cause a deeply divided perception of ASEAN's prospect of integration. Essentially, the regional integration can be seen as a confrontation between members' view to facilitating further cooperation versus a firm adherence to the non-intervention concept.[340] Significantly, ASEAN members are not keen to transfer sovereignty from national to regional institution. The establishment of AEC requires a certain degree of centralised decisions, operations, and human and financial resources to govern the newly created markets, however.[341] By reviewing the structural transformation, ASEAN does not have any organ that would act as the centralised institution or as a de facto supranational decision-making or rule-making body within the community – like the European Commission and ESMA.[342] It may be argued that a lack of this sort of power in the decision-making body is the fatal weakness of future ASEAN integration.[343]

(b) Enforcement

The nature of ASEAN financial governance and the behaviour of the regional organisations and institutions are entirely dominated by the weak regional norms competing with the paramount national policies.[344] Even the governance of

339 See Ian Brownlie, *Principles of Public International Law*, 6 ed. (Oxford: Oxford Press, 2003), 106. Helmut Steinberger, "Sovereignty," in *Encyclopaedia of Public International Law*, ed. R. Bernhardt (Amsterdam: Elsvier, 2000), 501.

340 Lee Leviter, "The ASEAN Charter: ASEAN Failure or Member Failure?," *New York University Journal of International Law & Politics* 43, no. 1 (2010).

341 Asian Development Bank Institute, *ASEAN 2030 toward a Borderless Economic Community* (Tokyo, Japan2014), 198.

342 Hung, 831.

343 ibid., 832.

344 Arner, Lejot, and Wang, 8.

ASEAN has moved away from an absence of regional governance system, or the pre-Charter period[345]; the achievement of capital market integration in ASEAN still depends on: (i) the states' willingness and commitment to modernise their domestic market regulations to eliminate the regulatory disparities between each member country;[346] and, (ii) the strength of interpersonal relationships to enforce any agreements. ASEAN allows regional economic cooperation to develop flexibly[347] to implement the commitments amid the atmosphere of diverse political systems and economic gaps.[348] This governance policy arguably undermines the rule of law and ASEAN's seriousness to integrate.[349] Significantly, the recent establishment of ASEAN working groups under the control of ASEAN Sectoral Ministerial Bodies, such as the ACMF and WG-CMD, marks a remarkable step towards a creation of formal institutions, which shows a positive evolution of ASEAN institutional architecture to rely on concrete ASEAN institutions rather through a loose institutional arrangement. However, the degree of institutionalisation intensity of ASEAN is different from that of the EU where, according to the Single European Act, a common internal market was created by mutual recognition and common minimum standards set out by EU directives and taken into effective through domestic laws.

345 For instance, as exemplified by developments within the WTO. See Paul J. Davidson, "The ASEAN Way and the Role of Law in ASEAN Economic Cooperation," *Singapore Year Book of International Law and Contributors* 8, no. 165 (2004): 168.

346 Thipsuda Thawaramorn, "แนวทางการเชื่อมโยงตลาดทุนอาเซียนและการเตรียมความพร้อมของไทย" (National Defence College, 2012), 2.

347 *Charter of the Association of Southeast Asian Nations*, Article 21(2).

348 Culturally speaking, ASEAN Way was a more effective method to resolving disputes in South East Asia.

349 Ewing-Chow and Hsien-Li, 5. See also Gillian Goh, "The 'ASEAN Way': Non-Intervention and ASEAN's Role in Conflict Management," *Stanford Journal of East Asian Affairs (2003) 113* 113, no. 3 (2003).

The ASEAN Charter does not empower ASEAN institutions, in particular, the ASEAN Secretariat and the ASEAN Summit, to apply sanctions against members who fail to comply with their commitments. Therefore, much room remains. Without imposition of sanctions, there are no real incentives apart from peer pressure for member countries to respect commitments. In addition, it will be extremely difficult for ASEAN to govern the new markets the AEC creates.[350] Significantly, ASEAN has set up a mechanism to measure the implementation of the AEC Blueprint through the AEC Scorecard, which is a general indicator of commitment realisation. In effect, it subjects ASEAN members to "peer pressure" from the rest of ASEAN, as deficiencies in implementation become known. However, the scorecard is too general to qualify as commitment realisation achievement. There is no adequate breakdown and explanation.[351] In reality, AEC Scorecard relies on members' voluntary declarations instead of independent external assessments. This reduces its reliability as a natural implicit conflict of interest arises. Besides, the absence of sanctions for noncompliance also contributes to delays in implementing the AEC Blueprint.[352]

The ASEAN Charter also provides no recourse for the ASEAN Secretariat if a member government be unable or unwilling to implement the agreement.[353] Although the ASEAN Charter tries to put in place a dispute settlement mechanism[354] (where Article 20 sets forth the matters concerning a serious breach of the Charter or

350 See above ASEAN Development Bank Institute, 200.

351 See Wempi Saputra and Ari Cahyo Trilaksana, "Toward ASEAN Economic Community: Revitalising Indonesia's Position in Financial and Customs Cooperation," in *MPRA Paper* (Ministry of Finance, Republic of Indonesia, 2013), 17-20.

352 Institute, 200.

353 See Hung, 832.

354 *Charter of the Association of Southeast Asian Nations*, Chapter VIII.

non-compliance which would be referred to the ASEAN Summit for a decision[355]), it is obvious that the provisions still lack a procedural aspect regarding how states can resolve disputes and what the penalties should be.[356] Differently, the European Court of Justice has played a dramatic role in interpreting EU law to make sure it is applied in the same way in all EU countries and settling legal disputes between national governments and EU institutions.[357] This reflects a strong regional governance system, which is not similar to that in other regions.[358] Likewise, the EAC has shown a major institutional achievement in establishing the EACJ. It is envisaged that the implementation of Customs Union protocol and the extension of the EACJ's jurisdiction will create business for the court.[359]

(c) Rule-making Process

Consensus has worked well to date, especially in dealing with political and security matters. However, for economic and social issues, it often creates unnecessary rigidities.[360] ASEAN's consensus process raises a question as to the steps to be taken if the consensus fails. A reliance on consensus implies an inability to display ASEAN's distinct legal character[361] of having a separate identity from its member states

355 ibid., Article20(2) and (4).

356 See generally Goh; Davidson; Ewing-Chow and Hsien-Li; Leviter.

357 Tamio Nakamura, "Proposal of the Draft Charter of the East Asian Comminity," in *East Asian Regionalism from a Legal Perspective: Current Feature and a Vision for the Future*, ed. Tamio Nakamura (New York: Routledge, 2011), 198.

358 See Arner, Lejot, and Wang, 40-42.

359 See Diodorus Buberwa Kamala, "The Achievements and Challenges of the New East African Community Co-Operation," ed. University of Hull (2006), 9.

360 See above ASEAN Development Bank Institute, 194.

361 Hung, 831.

and imposing a separate entity's responsibilities upon its own organs[362] – due to the decision-making process, which still depends on states' willingness. As ASEAN activities become more articulated and economic-related in nature, the reliance on consensus seems to be too restrictive for making decisions. Agreeing on day-to-day matters by consensus is cumbersome and the source of avoidable delays.[363] Interestingly, a system using a qualified majority for day-to-day operational decisions, while maintaining consensus for decisions on fundamental issues, was introduced by CIMM, with percentage shares of financial contributions used as the basic criterion to decide voting powers for members. However, while decisions are based on consensus, a flexibility principle is still applied via a multi-track approach in the context of economic integration through the application of the "ASEAN Minus X" formula, allowing countries that are not yet ready to fully embrace economic liberalisation, or similar initiatives, to temporarily exclude critical sectors, or to proceed at a slower pace in implementing their commitments.[364]

ASEAN's decision-making process primarily differs from the rules-based governance that predominantly operates through formal institutions. Actors under the rules-based systems, for instance, the WTO, would engage in traditional[365] negotiations, adhere to binding norms, and resolve disputes through formalised processes.[366] While it is arguable that some other international and regional organisations, for instance, the

362 ibid., 826.

363 See ASEAN Development Bank Institute, 195.

364 ibid., 194.

365 Leviter, 168.

366 ibid.; P. J. Davidson, *The Role of Law in Governing Regionalism in Asia*, ed. N. N. Thomas, Governance and Regionalism in Asia (Oxford: Routledge, 2009), 227-28.

United Nations, may operate on the consensus basis, ASEAN consensus differs. It does not have any formal voting procedural mechanisms to break the impasse in the cases where consensus fails,[367] yet it would depend on the ASEAN Summit to decide the specific actions.[368] Therefore, the solution is unpredictable.

At the present, the cooperation of ASEAN is based on the complexity of regional agreements, or a so called "agreement web" where over 333 treaties, instruments, communiques, protocols will be binding as law in all ten ASEAN members. As ASEAN is constructed on the agreement web, ASEAN cannot operate on the overriding principles of formal, detailed and binding institutional structure to prepare, enact, coordinate, and execute policies for integration[369] while the EU can impose a separate entity's responsibilities upon its own organs.[370] For instance, the EU Commission, representing the executive power of the EU, would be responsible for ensuring the implementation of EU law, including regulations, directives and decisions to promote the general interests of the EU and to advance the integration.[371] The decisions and legislation at the EU level will directly bind the member states: they must adhere to certain precepts, and the national governments will be liable for damages for any failure to implement EU legislation to the disadvantage of their people.[372]

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367 See Rodolfo Severino, "Framing the ASEAN Charter: An Iseas Perspective," in *Framing the ASEAN Charter*, ed. Rodolfo C. Severino (Singapore: ISEAS Publishing, 2005), 3-35.

368 *Charter of the Association of Southeast Asian Nations*, Article 20(2).

369 See Denis Hew, Roadmap to an ASEAN Economic Community (Singapore: ISEAS Publications, 2005), 26–39.Hung, 830.

370 ibid., 826.

371 See European Commission, "About the European Commission," http://ec.europa.eu/about/index_en.htm.

372 See *Andrea Francovich and Others V. Italian Republic*, ECR I-5357 (1991).

1.1.2.3. ASEAN Centrality

ASEAN cooperation is unique in its nature. Despite being criticised for a lack of internal cohesion and binding rules, ASEAN has been able to assume a central position in Asia's institutional architecture for cooperation. It plays a prominent role in Asia and global integration. Through regular ministerial meetings and its secretariat, it provides a unique platform for channelling efforts at expanding regionalism across Asia and the rest of the world.[373]

ASEAN cooperation looks likely to be bound up with the wider East Asian region; in particular towards a realisation of an East Asia community.[374] In the past, ASEAN became more integrated with countries outside the region than within the region, where the development of regional private capital markets is slow and limited.[375] As discussed earlier, ASEAN centrality in the area of finance, in particular, the ASEAN+3 and EMEAP, has significantly influenced the innovation of the regional financial integration; for instance the achievement of ABMI, ABF-1, and ABF-2, ABMF, and AMRO. However, it was not until recently that ASEAN itself undertook an active role in launching initiatives to strengthen the capital market integration within the region. This slow movement was caused by several factors, such as (i) the differences in the levels of market development and (ii) the lack of convergence of regulations and rules governing markets.[376]

373 See above ASEAN Development Bank Institute, 189.

374 Mark Beeson, *Institutions of the Asia Pacific : ASEAN, Apec and Beyond*, ed. Thomas G. Weiss and Rorden Wilkinson, vol. 24, Routledge Global Institutions (Oxford, United Kingdom: Routledge, 2009), 35.

375 Ahmed and Sundararajan, 87-88.

376 ibid.

The centrality of ASEAN ominously demonstrates the reality that the intersubjective nature of the ASEAN Way not only dominates the behavioural interaction among the ASEAN member states but also interpenetrates other actors beyond the institutional frameworks of ASEAN. For ASEAN+3, a reiteration of the ASEAN Way was evidenced in the Kuala Lumper Declaration of 2005, in which it reaffirmed the principles set forth in the TAC[377] that the non-interference principle should be respected at the heart of cooperation[378] to form an integral part of the overall regional architecture in a complementary manner with ASEAN and processes.[379] For EMEAP, the organisational structure is designed to function as a cooperative forum. Until today, EMEAP has succeeded in maintaining its uniqueness as a meeting for central banks in the region for the purposes of information exchange and nurturing mutual trust among the members. The outcome of the Kuala Lumpur Declaration and EMEAP symbolises the potency of the ASEAN Way as an intersubjective structure affecting the behaviour of actors outside ASEAN. Here, the implication of the ASEAN Way is so strong that it has an ability to redefine the ASEAN's regional context without re-interpreting the normative perception.[380] Even if the ASEAN Way can provide a comfort level for all members to participate in the cooperation, the regime does not prepare to relinquish the high degree of national policy control. Instead of inducing greater regional governance, the overall cooperation between ASEAN and its external partners is

377 See ASEAN Secretariat, "Kuala Lumpur Declaration on the ASEAN Plus Three Summit," ed. ASEAN Secretariat (Ministry of Foreign Affairs of Japan2005).

378 *Treaty of Amity and Cooperation in Southeast Asia*, Article 2.

379 See above "Kuala Lumpur Declaration on the ASEAN Plus Three Summit."

380 See Taku Tamaki, "Making Sense of 'ASEAN Way': A Constructivist Approach" (paper presented at the Annual Conference of the International Political Science Association, Fukuoka, Japan, 2006), 24-25.

tantamount to a concordance to shared norms, either by way of a consensual adoption or by way of the making of the state policy, or even an indirect arrangement with the participation of stakeholders.[381] Therefore, even there is an intersubjectivity between ASEAN and its external cooperation linked by the ASEAN Way, it can still be characterised as a corollary of weak governance.

1.2 The ASEAN Way and the ASEAN's Market Infrastructure Convergence

From a legal perspective, the AEC Blueprint of 2015 provides the objective concerning ASEAN market infrastructure integration, namely, that members shall "further deepen and interlink capital markets by progressing towards more connectivity in clearing settlement and custody linkages to facilitate investment in the region,[...], in line with the objective of [ACMI Blueprint]".[382] Moreover, Implementation Plan 2009 has articulated the timeframe, by 2015, that ASEAN Exchanges shall "raise for discussion the possibility of allowing broking members to have direct market access into sister ASEAN Exchanges and for cross-border trades to be guaranteed by home clearing house".[383]

The development of ASEAN financial integrations is a function of market-driven processes[384] and is generally built on the common interest of each ASEAN member (in particular, the regional interest which is against the self-interest of each member

381 See Arner, Lejot, and Wang, 11.

382 ASEAN Secretariat, "ASEAN Economic Community Blueprint 2015," (2015), 8.

383 Forum, "Implementation Plan to Promote the Development of an Integrated Capital Market to Achieve the Objectives of the AEC Blueprint 2015," 26.

384 Bank, *The Road to ASEAN Financial Integration – a Combined Study on Assessing Financial Landscape and Formulating Milestone for Monetary and Financial Integration in ASEAN*, 26.

states).[385] By preserving this feature, the ASEAN Way has played an influential role in shaping the regional infrastructure of capital market cooperation. This section will elaborate on the cooperation of ASEAN infrastructure that can be characterised as a process of creating enabling conditions for cross-border access[386], based on consultation, consensus and flexibility[387] to facilitate further and deeper cooperation.[388] To consider the influence of the ASEAN Way on how ASEAN policy-makers have created the regional capital market infrastructure and some impediments arising from it, this section will provide an analysis concerning securities trading cooperation and will be followed with the issue of post-trade cooperation.

1.2.1. Trading Cooperation

The lack of a single ASEAN currency necessitates having a consolidated exchange market because investors, at first place, encounter the risks associated with an unexpected change in exchange rates resulting in a decrease in the attractiveness of ASEAN portfolio investments.[389] Significant efforts to create fundamental market infrastructure and to build ASEAN exchanges connectivity and the ASEAN asset class were seen in 2005 under the Joint Ministerial Statement of the 9th ASEAN Finance

385 See Michael Ewing-Chow, "Culture Club or Chameleon: Should ASEAN Adopt Legalization for Economic Integration?"," *Singapore Year Book of International Law* 12, no. 225 (2008): 228.

386 See Singh, 36; Jaseem Ahmed and V. Sundararajan, "Regional Integration of Capital Markets in ASEAN: Recent Developments, Issues, and Strategies," *Global Journal of Emerging Market Economies* 1, no. 1 (2009): 90.

387 See *Charter of the Association of Southeast Asian Nations*, Chapter VII; Forum, "Implementation Plan to Promote the Development of an Integrated Capital Market to Achieve the Objectives of the Aec Blueprint 2015," i-iii.

388 See Ahmed and Sundararajan, "Regional Integration of Capital Markets in ASEAN: Recent Developments, Issues, and Strategies," 90.

389 James McAndrews and Chris Stefanadis, "The Consolidation of European Stock Exchanges," *Current Issues in Economic and Finance* 8, no. 6 (2002): 1.

Ministers' Meeting in Vientiane.[390] In this regard, ASEAN Exchange Initiatives consist of six working groups to work on various tasks, including a study on various models for exchange alliance framework; a promotion of information technology best practice; a creation of a joint ASEAN marketing programme and joint products, and a study on clearing and settlement for the inter-linked ASEAN markets.[391]

ASEAN Finance Ministers introduced FTSE/ASEAN Indices to highlight and promote ASEAN equities as an asset class. FTSE/ASEAN and FTSE/ASEAN40 were initially created in collaboration with the FTSE Group and securities exchanges in ASEAN. There were 180 constituents in the FTSE/ASEAN Index, which served as a benchmark for the regional markets, while the FTSE/ASEAN40 tradable index is designed for institutional and retail funds, ETFs and derivatives contracts.[392] Currently, the FTSE Index family has been expanded to cover new indexes, such as the FTSE ASEAN All-Share ex Developed Index and the FTSE ASEAN Sector Indices.[393] These indices are the first internationally recognised indices for ASEAN equities as a regional market. In 2006, an ETF based on the FTSE/ASEAN 40 was created and listed on the Singapore Stock Exchange; however, this ETF was not listed on other ASEAN exchanges due to a variety of regulatory and operational factors. [394] ASEAN exchanges also introduced ASEAN Stars, which are the 180 ASEAN stocks representing the most exciting 30 issues of each country as selected

390 ASEAN Secretariat, "Joint Ministerial Statement of the 9th ASEAN Finance Ministers' Meeting Vientiane," http://www.ASEAN.org/communities/ASEAN-economic-community/item/joint-ministerial-statement-of-the-9th-ASEAN-finance-ministers-meeting-vientiane-6-april-2005.

391 See Francis Lim, "Inter-Linked ASEAN Securities Market Initiatives" (paper presented at the OECD-ADBI Roundtable on Capital Market Reforms in Asia, Tokyo, Japan, 2007), 9-11.

392 See FTSE, "FTSE ASEAN Index Series," FTSE, http://www.ftse.com/products/indices/ASEAN.

393 ibid.

394 See Ahmed and Sundararajan, "Regional Integration of Capital Markets in ASEAN: Recent Developments, Issues, and Strategies."

based on market capitalisation and liquidity. It will provide an easily identifiable reference for investors, as they are the "blue chips" of ASEAN.[395] Moreover, "Invest ASEAN" was also implemented as an action platform, owned by the ASEAN exchanges, for the promotion of the ASEAN capital market to the investment community. The Invest ASEAN platform focuses on the growth of the ASEAN capital market by connecting the ASEAN Stars with investors.[396]

1.2.1.1. Bridge of Exchanges

The significant step of creating a fundamental market infrastructure is the establishment of ASEAN exchanges collaboration and ASEAN Trading Link gateway under the first development phase in 2012.[397] The mechanism of ASEAN Trading Link (Diagram 5 and 6) enables participating brokers to execute transactions directly through Intra-ASEAN Network with the other exchanges without requiring a licence in such exchanges.[398] In this connection, the trading transaction is based on an inter-brokerage model in which brokers are the key element. If the originating brokers do not connect to the ASEAN Trading Link facility, they are required to have a bilateral agreement with at least one sponsoring broker in any target exchange and will need to open a trading account with that broker. The trade order starts from the originating broker submitting the order on the local exchange through the local ASEAN Link Gateway connecting point. The order then is routed and executed at the target exchange (as a direct client of the sponsoring broker) whereby the order routing process is transparent to the

395 The Stock Exchange of Thailand, "ASEAN Capital Market Integration: ความร่วมมือของตลาดทุนอาเซียน" (The Stock Exchange of Thailand, November 2014 2012), 12.

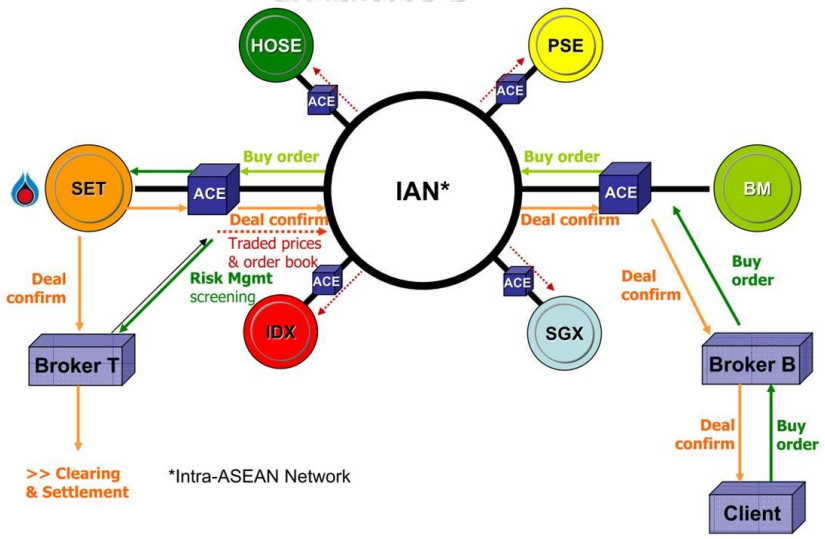
396 ibid., 15.

397 ibid., 20.

398 ASEAN Exchange Link, "Frequently Asked Questions," (ASEAN Exchange Link, 2012), 1.

investor.[399] As the Intra-ASEAN Network works as an infrastructure connecting the participating exchanges, the investor simply puts the order through his broker as usual, either via phone or self-directed online platform.[400] The product coverage includes FTSE/ASEAN Index and other ETFs.[401] All foreign securities are custodised with the sponsoring broker under a nominee account[402] and home exchange market rules and laws apply regardless of where an order was entered.[403]

Diagram 5 – **Routeing process of Trade Orders**



Source: SET

Where no ASEAN Trading Link exists, the trading connectivity would fragmently depend on the bilateral arrangement between domestic and other ASEAN brokers. According to the ASEAN Trading Link facility, domestic investors will enjoy easier and seamless access to a wider variety of products, thus providing them with more

399 The investors are only required to put the orders through their brokers the same manner as the local transactions. See ibid., 1-5.

400 ibid., 2.

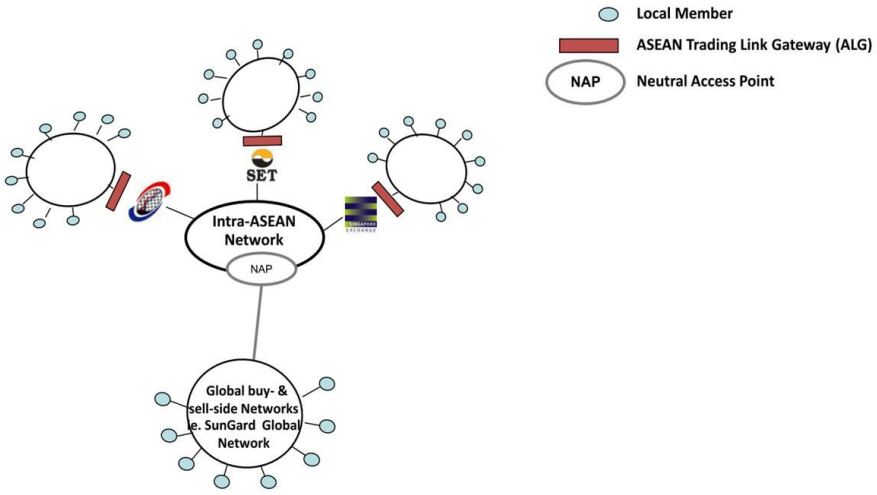
401 ibid., 3.

402 ibid., 5.

403 See above The Stock Exchange of Thailand, Capital Market Integration: ความร่วมมือของตลาดทุนอาเซียน.22.

investment alternatives. All foreign investors from outside the market can have access through the Neutral Access Points (see Diagram 5).[404]

Diagram 6 – **ASEAN Trading Link**



Source: TWG, SWG analysis

An attempt to interlink exchange markets of ASEAN is in line with the global trend where WFE plays an active leading role as an international organisation to create an improvement and harmonisation of members' exchanges.[405] Currently, the global trend among securities markets can be demonstrated as moving towards the cooperation, ranging from a lesser degree of creating a technical linkage (or pipe between exchange to facilitate cross-border trading between brokers) to the higher degree of creating an infrastructure convergence while leaving the exchange independent, and to the highest level of creating a single trading platform.[406] Taking

404 ibid., 25.

405 Economic and Social Research and Training Centre for Islamic Countries Statistical, "Stock Exchange Alliances and a Mechanism for Cooperation among the Oic Member States in the Area of Financial Markets," *Journal of Econoimic Cooperation* 26, no. 2 (2005): 123-24.

406 See Lim, 13-14.

into account this fact, an investigation of lessons arising from various forms of exchange market cooperation would, therefore, be beneficial for a comparative analysis of the ongoing status and impediments of ASEAN Trading Link and the intersubjective natures of the ASEAN Way on the regional infrastructure cooperation.

(a) Cross Listing

Cross listing is an admission for listing/trading of the securities, which are already listed on a local stock exchange, on foreign stock exchanges. Cross-listed securities will be subject to the rules and regulations of the local exchanges. Although cross-listing is subject to the preference of the companies, stock exchanges may facilitate cross-listing by opening their markets to the securities listed on other exchanges on a correspondence basis.[407]

For ASEAN, the achievement of the region on cross-listing cooperation is merely at the stage of an establishment of the framework to speed up the processing of secondary listing applications and the relevant disclosure documents. The ASEAN Way has influential roles for the implementation of such initiative as it depends on the consent and readiness of members to participate. Malaysia, Singapore and Thailand were the first three countries that signed the Expedited Review Framework (in the form of a memorandum of understanding) in 2012.[408] This is in accordance with the initiative under the Implementation Plan 2009 as endorsed by AFM in 2009.[409] According to the

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407 See above Statistical, Economic and Social Research and Training Centre for Islamic Countries, 130

408 ACMF Press Release, "ASEAN Corporations to Enjoy Expedited Review of Secondary Listings," news release, 2012.

409 See Forum, "Implementation Plan to Promote the Development of an Integrated Capital Market to Achieve the Objectives of the AEC Blueprint 2015." ASEAN Capital Markets Forum, "Expedited Review Framework for Secondary Listing," (ASEAN, 2012), 1.

Expedited Review Framework, benefits are available to corporations which are incorporated and whose shares are primarily listed on the main market of an exchange in jurisdictions which are signatories to the framework. A corporation may enjoy the benefits of this Framework even if its place of incorporation and primary listing are in different signatory jurisdictions, for example, a corporation incorporated in Thailand and primarily listed in Malaysia may enjoy the benefits if conducting a secondary listing in Singapore. [410] The eligible cooperation must fulfil the requirements set out in the framework such as: (i) the company must be incorporated in one of the signatory jurisdictions; (ii) it must comply with any other requirements under relevant laws and regulations of the host jurisdiction or as specified by the host jurisdiction or host exchange; and, (iii) the shares must be listed on the main market of the exchange in a signatory jurisdiction.[411] The signatories will review these applications within a shortened period of 35 business days compared to the normal review time of up to 16 weeks. For other ASEAN members, they may participate in the framework as and when they are ready and able to satisfy the requirements of the Expedited Review Framework.[412]

(b) Cross Membership

Cross membership is an acceptance of members of other stock exchanges for membership in a different exchange. It is a means for the intermediary institutions to access foreign stock exchanges directly. There are two types of cross membership admissions. The first type is remote membership, whereby the CSD opens

410 See above "Expedited Review Framework for Secondary Listing," 2.

411 ibid.

412 See above ACMF Press Release, 1.

both cash and securities account for remote members (or their home country's CSD) in the settlement system of the host country where the trading takes place. Essentially, settlement members are foreign brokers or their home country's CSD. The settlement of securities and payment are realised by the CSD of the country where the trading takes place.[413] The second is trading through a brokerage house in the country where the trading takes place. In this scenario, the foreign brokers directly trade through a local broker. Every broker in a target territory would have access to the matching engine of every exchange in the territory. The matching of trades in a listed security would remain concentrated on the exchange where the securities are listed, but the number of market participants placing orders would potentially include every broker licensed in the target territory.[414] Although the local broker is a direct party to the settlement, in the case of default, foreign brokers or their partners stock exchange or settlement institution are accepted as responsible for the fulfilment of due obligations. Essentially, settlement members are local brokers. The settlement of securities and cash is realised by the CSD of the country where the trading takes place.[415]

The ASEAN Trading Link follows this form of cooperation. Likewise, MILA, a part of the Pacific Alliance, is a cross-border initiative that integrates the securities markets of Chile, Colombia, Mexico and Peru. In 2010, the Santiago Stock Exchange, the Colombian Securities Exchange and the Lima Stock Exchange started the process of setting up a regional market to trade equities from the three countries. Later in 2014,

413 Statistical, Economic and Social Research and Training Centre for Islamic Countries, 130.

414 David C. Donald, "Beyond Fragmentation: Building a Unified Securities Market in China (and Asia)," in *CALS SEMINAR SERIES: CHINESE LAW* (Centre for Asian Legal Studies, Faculty of Law, National University of Singapore: National University of Singapore, 2014), 3.

415 Statistical, 130-31.

the Mexican Stock Exchange entered into MILA. MILA has been made possible through the coordinated efforts of the stock exchanges, central securities depositories and regulators of its four member countries.[416] MILA is a good example of the exchange cooperation, which was designed without any market's losing its independence or its regulatory autonomy. It introduces the interlinked trading platform with an independent technology operated by each exchange together with a mutual recognition of the regulatory and supervisory framework among MILA member countries.[417] The member exchanges connect to a MILA facility through the MILA Gateway.[418] For regulators, MILA countries have signed a multilateral memorandum of understanding, which allows for the exchange of information for authorisation, on-going supervision, and enforcement actions on a cross-border level, and have set up the basis for a regional supervisory committee made up of representatives of each regulator for monitoring and undertaking necessary supervision and enforcement actions.[419] For the brokers, there are currently fifty-one agreements that have been signed to enable operation among thirty-eight active brokers authorised to operate within the infrastructure.[420] MILA began with the secondary trading of cash equities and aims to incorporate debt markets and derivatives.[421]

416 Juan Pablo Córdoba, "The Latin American Integrated Market: Introduction to MILA" (paper presented at the Toward the 5th Decade of Sustainable Wealth, Bangkok, Thailand, 2015), 8.

417 IOSCO Task Force on Cross-Border Regulation, "Consultation Report," (International Organization of Securities Commissions, 2014), 15.

418 Córdoba, 9.

419 See IOSCO Task Force on Cross-Border Regulation, 15.

420 Córdoba, 15.

421 ibid., 14.

(c) Common Trading Platform

CTP is a central trading platform in order to enable the securities of the companies in member country jurisdictions to be traded collectively in accordance with the principles established by the participating stock exchanges. These principles consist of special rules that make up the legal, organisational and technical infrastructures of the trading platform. The approach of CTP is to provide a same order routing system to all participating stock exchanges or a common interface among them.[422]

The creation of CTP could be best illustrated by the case of NOREX, that later operates under the name of NASDAQ OMX Nordic after several mergers and reorganisation.[423] NOREX was a strategic alliance between the Nordic and Baltic stock exchanges. The NOREX Alliance was unique as the first stock exchange alliance to implement a joint system for equity trading and to harmonise rules and requirements among the exchanges with respect to trading and membership.[424] It operated on cross-membership, which means that member firms are encouraged to join the NOREX exchanges. The history of NOREX began in 1998 when the Stockholmsbörsen and the Copenhagen Stock Exchange jointly cooperated to form NOREX as a common Nordic equity market. Even though such two exchanges remained independent, they allowed cross-membership and used a single buy-and-sell order book for each security.[425] The membership was expanded in 2000 where the Iceland Stock Exchange and the Oslo

422 See above Statistical, Economic and Social Research and Training Centre for Islamic Countries, 131.

423 See Nasdaq Inc., "About Us," http://www.nasdaqomxnordic.com/about_us.

424 See Robert E. Litan, Michael Pomerleano, and Vasudevan Sundararajan·, *The Future of Domestic Capital Markets in Developing Countries*, 3 vols. (Brookings Institution Press, 2003), 292.

425 Sven Arild Andersen, "The Nordic Stock Market and NOREX" (Oslo Bors), 3-5.

Exchange joined NOREX. It has also adopted common trading rules and a uniform trading platform, so called "SAXESS" in 2001 and then became operational on all four-partner exchanges.[426] It also used a common surveillance system, so-called "SMARTS".[427] NOREX demonstrate some lessons of exchange cooperation. First, it is possible for the different exchanges to agree on a linkage structure that is mutually beneficial. The Nordic countries show an example of the long-standing cooperation that minimises the national concern on the stock exchange cooperation. Second, at all stages in an alliance, the individual exchange will consider the commercial incentive and will participate in the initiative only if it believes that such participation could create a profit.[428]

(d) Mergers and Takeovers

Another strategy of exchange collaboration is a merger with or takeover by another exchange in order to form a larger, typically regional, exchange. There have been only a few mergers and acquisitions between exchanges, where a problem regarding the linkage between exchanges is a key concern. Significantly, politics play an important role in determining whether and how the exchanges will be merged as the identity of the participating exchanges may disappear, and this can cause significant political problems.[429] The difficulty is obvious in jurisdictions where the takeover of the national stock exchange would be considered worrisome by its national government,

426 ibid., 5.

427 ibid., 17.

428 See Litan, Pomerleano, and Sundararajan·, 293.

429 Ruben Lee, "Changing Market Structures, Demutualization and the Future of Securities Trading," in *5th Annual Brookings/IMF/World Bank Financial Markets and Development Conference* (Oxford Finance Group, 2003), 10.

whatever the economic reasons proposed for doing so. The possibility that their national exchange may be subsumed into a larger market, most likely controlled by one of their neighbouring states, is often unappealing.[430]

The Euronext is the best illustration of an exchange merger. In 2000, the Paris Bourse merged with the Brussels and Amsterdam exchanges under the name of Euronext in order to take advantage of the harmonisation of the financial markets of the EU. Each exchange remains intact as a subsidiary of Euronext, N.V. and each exchange can continue to have its own listing, trading system and separate regulators.[431] Alternatively, Euronext provides a consolidated operating umbrella for the participating exchanges, whereby the trading is centralised and a uniform trading platform is implemented, allowing a single trade price to be established. Therefore, the shares listed at the national level can have the option of the trading venue from among the participating exchanges.[432] Although companies remained listed in their original market, the intention was for all financial instruments to be traded on a single integrated trading platform, and for the listing and trading rules of the merged exchanges eventually to be harmonised, resulting in a single market rulebook.[433] Issuers are subject to the supervision and monitoring rules, information obligations and public offer obligations set by the regulators in the country in which they are listed. Following the merger, the three exchanges retained their separate legal status from a regulatory

430 ibid., 11.

431 See H. S. Scott, *International Finance: Transactions, Policy and Regulations*, 7 ed. (New York: Thomson Reuters, 2011), 787.; McAndrews and Stefanadis, 2.

432 Scott, 787.

433 Lee, 11.

point of view.[434] In 2002 the group merged with the Portuguese stock exchange Bolsa de Valores de Lisboa e Porto.[435] In 2012, Euronext announced the creation of Euronext London to offer listing facilities in the UK. As such, Euronext received a status of Recognised Investment Exchange from Britain's Financial Conduct Authority in 2014.[436] Currently, Euronext operates in five Securities Markets in Amsterdam, Brussels, Lisbon, London and Paris as a pan-European marketplace.[437]

Here, some lessons can be drawn from the Euronext. The merger of the exchanges can be structured in order to maintain the national identities of the constituent exchanges, or at least continue to be marketed while creating a new trans-national institution. Through an adoption of common rules, there are a set of laws to commonly create mandatory transparency among the participated member where the pre-trade information (bid/ask quotes) and post-trade information on exchange trades must be made accessible to persons outside the exchange.[438] Pursuant to the MiFID, regulated markets[439] (the Euronext[440]) must make public their "current bid and offer prices and the depth of trading interests".[441] This was further reinforced by an

434 ibid.

435 Frank Fabozzi, *Handbook of Finance, Financial Markets and Instruments*, Handbook of Finance (John Wiley & Sons, 2008), 143.

436 Euronext, "Euronext Uk Markets Limited Received Fca Approval for Rie Status," news release, 2014.

437 "Euronext Regulated Markets," Euronext, https://www.euronext.com/en/regulation/regulated-markets.

438 Donald, 4.

439 *Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on Markets in Financial Instruments Amending Council Directives 85/611/EEC and 93/6/Eec and Directive 2000/12/EC of the European Parliament and of the Council and Repealing Council Directive 93/22/EEC*, Article 4.

440 See Euronext, "Euronext Regulated Markets".

441 *Directive 2004/39/Ec of the European Parliament and of the Council of 21 April 2004 on Markets in Financial Instruments Amending Council Directives 85/611/EEC and 93/6/Eec and Directive 2000/12/EC of the European Parliament and of the Council and Repealing Council Directive 93/22/EEC*, Article 44(1).

implementation of provisions of laws that creates a free competition among market participants. Broker or dealers who are exchange participants must be allowed to trade in securities listed on the exchange at alternative venues, with each other and with broker-dealers who are not members of the exchange.[442] In this regard, the definition of institutions other than exchanges which are brought into the market network have been clarified under MiFID.[443] Moreover, there is a provision that provides impetus for brokers to break out of old networks by giving them a duty to seek out the "best execution[444]" for a trade, which can be seen as a factor of price, trading fees and speed of execution for each trade. In the light of this, MiFID requires that "investment firms take all reasonable steps to obtain, when executing orders, the best possible result for their clients taking into account price, costs, speed, likelihood of execution and settlement, size, nature or any other consideration relevant to the execution of the order,"[445] unless there is a specific client instruction to the contrary. With these set of rules in place, brokers will seek opportunities for execution on matching platforms beyond their own trading floor, ensuring that price will overcome existing social and business networks.[446] However, notwithstanding developments in the EU, there is no example of a merger between exchanges in different countries where some form of

442 Donald, 4.

443 See *Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on Markets in Financial Instruments Amending Council Directives 85/611/EEC and 93/6/Eec and Directive 2000/12/EC of the European Parliament and of the Council and Repealing Council Directive 93/22/EEC*.

444 See generally Scott McCleskey, *Achieving Market Integration: Best Execution, Fragmentation and the Free Flow of Capital*, vol. Oxford, Securities Institute Global Capital Markets (Elsevier, 2004), 5 and 129.

445 *Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on Markets in Financial Instruments Amending Council Directives 85/611/EEC and 93/6/Eec and Directive 2000/12/EC of the European Parliament and of the Council and Repealing Council Directive 93/22/EEC*, Article 21(1).

446 Donald, 4.

the regulatory framework has been established to form the national or international set of rules or laws are applicable to all users of the merged institution.[447]

According to the different means of creating exchange connectivity, several observations can be drawn concerning the effects of the ASEAN Way on the regional market infrastructure collaboration. On the surface, the ASEAN Trading Link was built on a coordination and "flexible process" rather than imposing a strict commitment/timeframe on members.[448] ASEAN exchange cooperation is characterised by a constant attempt to achieve consensus among the ASEAN countries, where issues are collectively discussed and debated while there is substantial respect for the unique context of each country that these decisions are "non-imposing" on each member.[449] As the working groups came together, their commitment was always to strive for consensus in driving the course of actions. However, in reality, there was a discussion, but never a vote because all parties still prefer a win-win situation[450]; meaning that if some countries feel that the proposed solution is not appropriate, such idea will be revised. This situation happened during the discussion about different ways of connecting the ASEAN Exchanges (in particular, through a new special purpose vehicle model) where the regulatory constraints of some countries and the willingness of other countries were heeded to settle for an intermediate solution[451]; and eventually, the win-win situation was reached based on conciliation. According to this unique factor,

447 Lee, 12.

448 Forum, "Implementation Plan to Promote the Development of an Integrated Capital Market to Achieve the Objectives of the AEC Blueprint 2015," iii.

449 Carol Hsu and Sia Siew Kien, "Prospects and Challenges of the Development of ASEAN Exchanges," in *SWIFT Institute Working Paper* (SWIFT Institute, 2015), 16.

450 ibid.

451 ibid.

the implementation of the ASEAN Trading Link thus depends on member states' readiness/willingness to participate in such initiative; to the level they are comfortable to connect with "plug and play" infrastructure.[452] It was evidenced at the first inception in September 2012, but only Bursa Malaysia and Singapore Exchange were the first two exchanges to join the link.[453] Currently, even there are seven exchanges participating in the initiative to create virtual markets of listed companies and combine market capitalisation[454], the members of the initiative still do not cover all of ASEAN members.

At the heart of the exchange cooperation, equity market integration in ASEAN demonstrates a lesser degree of intensity than that of MILA, NOREX and Euronext. The common interests of market infrastructure building in ASEAN are only reflected through a creation of market linkage among member's exchanges.[455] It is arguable that the diverse levels of development in the individual member countries imply that a "one-size-fits-all" or "big bang" approach may not be appropriate or feasible as the objectives may vary significantly from country to country.[456] Hence, the creation of a single pan-ASEAN trading, clearing and settlement entity for the ASEAN capital market would be unrealistic.[457] The diverse levels of development results in the domestic securities markets in ASEAN still being separated and having regulatory restrictions intensity on intra-ASEAN capital flows and cross-border financial transactions. Only to

452 ibid., 21.

453 See Stock Exchange of Thailand, "Regional Collaboration of Thai Capital Market" (paper presented at the Towards the 5th Decade of Sustainable Wealth, Bangkok, Thailand, 2015), 1-5.

454 Consisting of: Bursa Malaysia, Hanoi Stock Exchange, HoChiMinh Stock Exchange, Indonesia Stock Exchange, Philippine Stock Exchange, the Stock Exchange of Thailand, and Singapore Exchange.

455 See Ulrich Volz, "ASEAN Financial Integration in the Light of Recent European Experiences" (University of London & DIE, 2014).

456 Singh, 36.

457 Hsu and Kien, 26.

some extent, the developments of ASEAN integration may be mirrored as similar efforts in Europe in the late 1990s (prior to the stage where the markets culminated in the creation of MiFID and consolidation of exchanges).[458]

Euronext is a clear example exhibiting that legal tools are essentially necessary for creating and accelerating the consolidation of securities markets. By having a common set of laws, an order to buy and sell securities listed on any member exchanges can be matched on any licensed platform within the supranational treaty area. This consolidation of exchanges allows securities to be matched on any licensed platform within the consolidated group.[459] The securities markets are interlinked through a constellation of matching platforms distributed throughout the relevant geographical areas to allow trading of securities listed on any exchanges within the whole area. This model has the advantage of using competition to drive down the price of matching orders.[460] Eventually, having a single consolidated securities trading platform would lead to some benefits to financial markets such as a standardisation of trading platform, an increase in liquidity and reduction of market fragmentation.[461]

Neither the common set of laws nor the aforementioned feature has appeared in the evolution of ASEAN Trading Link. Unlike Euronext, ASEAN Trading Link (and MILA) represents a lesser degree of regulatory integration intensity that only marks it as the first key milestone for ASEAN exchanges to create market connectivity, through "plug-and-play platform" – Intra-ASEAN Network, towards a breaking down of barriers to

458 See Clare Harrison, "ASEAN Integration Edges Forward," *IR Magazine* 2013.

459 Donald, 3.

460 ibid.

461 McAndrews and Stefanadis, 1.

cross-border access to trade in ASEAN region. A separation of ASEAN markets reflects the "institutional distance[462]" in which investors still encounter the divergence of execution rules, trading systems, cross-border regulation, capital control, infrastructure readiness, and language differences.[463] For brokers, they have to understand the different regulations of market practices, taxes and treatments for investments, which are different from country to country. For investors, the difference of treatments for resident and non-resident is the key concern.[464] In particular, the investors encounter the restrictions regarding management of foreign ownership restrictions, which fluctuates among countries. Practically, all foreign investors have to invest in the designated shares for foreign investors to have full voting rights and entitlement to dividends. If the foreign share designations are full, foreign investors can still invest in shares designated for local investors to be benefited only from capital gains, but they will not be entitled to any voting rights and dividends at the book closing date.[465] The difference of currencies among ASEAN leads to asymmetric foreign exchange regimes. Moreover, the region also encounters a diverse tax regulation for dividend payments and capital gains as well as the different tax regimes for the cross-border investment of mutual funds (further detail will be discussed in Chapter IV).[466]

Even if the ASEAN Trading Link can provide a streamlined access to ASEAN capital markets that would enable greater market participation from various

462 See Hsu and Kien, 7.

463 See Bursa Malaysia Burhad, "Common Exchange Gateway" (paper presented at the 3rd OIC Member States' Stock Exchange Fourm, 2009).

464 See Córdoba, 21.

465 Link, 4.

466 Córdoba, 23.

stakeholders and investors, it could be argued that, prior to the linkage, brokers in Singapore and Malaysia had already engaged in these cross-border transaction activities.[467] Therefore, the added-value of the trading link may be less significant. Nonetheless, it is arguable that the ASEAN Trading Link has lowered the barrier to entry for the medium-sized, in particular the Thai brokers, who otherwise would have had to bear a relatively high infrastructure cost for cross-border transactions themselves.[468]

From Euronext and NOREX's experiences, ASEAN can achieve a deeper cooperation and work toward a profound consolidation of the regional securities markets. However, this depends on the common "consensus" and the extent that ASEAN member countries mutually translate the regional initiative of integrating a capital market into country policies. As adhering to non-interference and national sovereignty remain significant concerns, the outlook for the regional infrastructure collaboration would be variable, especially depending on whether or not the national development plans will cover the policy measures to respond and reap benefit from greater market integration.[469]

1.2.1.2. Bond Market Infrastructures

Asian bond markets are composed of two segments: the regional bond market, concentrated in American-Dollar denominated debt instruments for larger issuers, and

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467 It is to be further note that the creation of connection among ASEAN domestic markets would lead to an expanding access to the order matching system located on each exchange among participating exchanges. Therefore, broker competition is increased, as every broker in target territories would have access to matching engine of every exchanges – through infra ASEAN Network. The matching of trades in such listed securities would remain concentrated on the exchange where the securities are listed, but number of market participants placing orders would potentially include every brokers licensed within each markets.

468 Hsu and Kien, 27.

469 Singh, 36.

local currency bond markets.[470] The development of market infrastructure for debt securities historically was not actively lead by ASEAN itself but rather with other ASEAN partners. Based on consultative and cooperative processes, joint efforts and full recognition on the TAC[471], the attention to regional capital market development initially focused on debt and money markets because of the 1997 Asian financial crisis[472] and has recently begun to consider wider securities market reform. As previously discussed in section 1.1.1.3. above, ABMI was started in 2003 by ASEAN+3 to develop efficient and liquid bond markets in Asia. ASEAN+3 Finance Ministers agreed on the new ABMI Roadmap to provide further momentum to future work that would be undertaken under ABMI in 2008.

A proposal is also being considered to promote linkages among ASEAN bond markets through three cooperative strategies: (i) Information Link, for instance AsianBondOnline, to allow for trade (price, volume) information exchange on a real time basis; (ii) Trading Link to allow participants of a domestic platform to access and trade on the platform of another; and. (iii) Settlement Link to allow centralised clearing and settlement, thus enabling straight-through processing.[473] The strategy is for countries that already have electronic trading platforms to start sharing trade information at the first level, possibly through a financial information provider like

470 AsianBondsOnline, "Overview," Asian Development Bank, https://asianbondsonline.adb.org/regional/structure/overview.php.

471 ASEAN Secretariat, "Second Joint Statement on East Asia Cooperation," ed. ASEAN Secretariat (2007), 1; "Joint Statement on East Asia Cooperation 28 November 1999," http://www.ASEAN.org/news/item/joint-statement-on-east-asia-cooperation-28-november-1999.

472 See Cyn-Young Park, "Asian Capital Market Integration: Theory and Evidence," in *Asian Development Bank Institute Working Paper* (2013), 1-2.

473 Ahmed and Sundararajan, "Regional Integration of Capital Markets in ASEAN: Recent Developments, Issues, and Strategies," 117.

Reuters or Bloomberg.[474] The countries that are ready to move forward to the next level can do so while others can join whenever they are ready. At present, five countries (Indonesia, Malaysia, Philippines, Singapore, and Thailand) have established or are in the process of establishing an electronic bond (E-Bond) platform.[475] Significantly, Pan–Asian bonds (collateralised bond obligations using small and medium-sized enterprise bonds as underlying assets) have been created through collaboration between Korea and Japan. In addition, extensive work is underway to develop regional credit guarantee mechanisms and for a clearing and settlement system. Finally, ways to strengthen the role of local credit rating agencies are being explored. There are progressive reports concerning the development of local currency bond markets in ASEAN+3 countries published on the ADB website.[476] For the bond market in Asia, Luxembourg Stock Exchange is a major international listing centre for international bonds. Some information vendors such as Bloomberg and Reuters, and Internet portals such as Bondweb, offer bond trading platforms specialising in physical issues.[477] However, there is no comprehensive regional trading system existing for trading physical issues. Local currency bonds are traded separately on each member exchange, and the information on market specific trading systems is disseminated independently.[478]

474 ibid., 117-18.

475 ibid., 118.

476 See ibid., 93.

477 AsianBondsOnline, "Distribution and Trading Plarforms," Asian Development Bank, https://asianbondsonline.adb.org/regional/structure/platforms/distribution_trading.php.

478 ibid.

As discussed in section 1.1.2. of this Chapter, the ASEAN Way not only influences the operation of ASEAN itself but also influences the cooperation between ASEAN and its counterparties. In Europe, there has already been considerable progress toward financial integration, especially with regard to short-term money markets and bond markets where currency unification and the adoption of uniform monetary policy have made a major contribution to this progress.[479] However, the situation in ASEAN and Asian bond markets is different. Even AEC, ABMI and ABMF are all expected to play a role in this area. They cannot be compared with the European Commission in terms of authority to make policy decisions. The Roadmaps of ABMI are not binding on the ASEAN+3 member countries and do not set out the specific timeframes for implementation, and therefore it would depend on members' voluntary adoption of the initiatives.[480]

The overall cooperation is still far behind that of the EU due to the lack of a formal institution to promote market integration.[481] On the one hand, the nature of cooperation of ASEAN+3 was built on a full recognition of TAC. This results in ABMI involving various Task Forces that meet at regular intervals and are active at different stages. This working process seems identical to the working process of ASEAN.[482] Significantly, there is no formal leader, putting ASEAN+3 cooperation into a stage of

479 Satoshi Shimizu, "The Development of Asian Bond Markets since the Global Financial Crisis - Significance and Challenges," *Pacific Business and Industries* 10, no. 38 (2010): 32.

480 See Pratiwi Kartika, "Financial Cooperation in ASEAN," in *Beyond 2015: ASEAN-Japan Strategic Partnership for Democracy, Peace, and Prosperity in Southeast Asia*, ed. Rizal Sukma and Yoshihide Soeya (Japan: Japan Center for International Exchange, 2013), 88.

481 Shimizu, 32.

482 Please see the discussion in 1.1.1. above.

"an orchestra with no conductor".[483] There is a lack of what might be called the "nucleus" to drive the cooperation – like the German-France axis in the EU and role played by the US in NAFTA.[484] Consequently, ASEAN's economic integration with its regional neighbours has created a "Spaghetti Bowl Effect[485]" in which the implementation of the initiative is voluntarily taken by the ASEAN+3 members that feel most motivated to do so taking into account their national interests.[486]

Moreover, the construction of bond market infrastructure and regulatory harmonisation in ASEAN are likely to be more difficult than in the EU because there are major differences in the national interests and the development stages of markets in Asian countries/regions, and because the implementation of the initiative still depends on the members' willingness to commit to such initiative. From this circumstance, several market impediments are found. A number of aspects need to be considered, based on physical infrastructure including trading, clearing and settlement, regulation, supervision and legal underpinnings, and derivatives markets for its improvement.[487]

Nevertheless, a development of the bond market in ASEAN and East Asia demonstrates a unique regional innovation. Under EMEAP, the creation of ABFs is a pioneer in terms of innovating the bond-type funds that are invested in jointly by

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483 Hsu and Kien, 15.

484 Lay Hong Tan, "Will ASEAN Economic Integration Progress Beyond a Free Trade Area?," *The International and Comparative Law Quarterly* 53, no. 4 (2004): 965.

485 See ibid., 964.

486 See Hsu and Kien, 15.

487 See Simon Gray et al., "Developing ASEAN5 Bond Markets: What Still Needs to Be Done?," in *IMF Working Paper* (International Monetary Fund, 2011), 17-18.

member countries to boost regional bond markets and to diversify the investment targets of members' foreign-exchange reserves.[488] The ABF-1 is a bond-type fund with a total size of USD one billion. Its investments are limited to American Dollar-denominated bonds issued by EMEAP member governments (except Japan, Australia, and New Zealand) and governmental institutions. The ABF-2 started out as USD two billion bond-type fund created with foreign exchange reserves of EMEAP members. The ABF-2 is composed of the Pan-Asian Bond Index Fund and the eight Single-market Funds.[489] The Pan-Asian Bond Index Fund is a single bond fund investing in sovereign and quasi-sovereign local currency-denominated bonds issued in eight EMEAP markets. The eight Single-Market Funds will each invest in sovereign and quasi-sovereign local currency-denominated bonds issued in the respective EMEAP markets.[490] The Single-Market Fund of Hong Kong, the ABF Hong Kong Bond Index Fund, is the first ever bond exchange-traded fund in Asia. Both the ABF Hong Kong Bond Index Fund and the Pan-Asian Bond Index Fund are listed on the Stock Exchange of Hong Kong.[491] However, through the listing and public offerings, they now also attract private funds.[492]

The development of ABF is a good example of where the regional common interests have accelerated the cooperation efforts as members felt that the reserves could be put to better use by investing them in ABF. Such investment could be used not only in the eventuality of another speculative attack on Asian countries but also

488 Jung, 126.

489 Hong Kong Monetary Authority, "Asian Bond Fund (ABF)," Hong Kong Monetary Authority, http://www.hkma.gov.hk/gdbook/eng/a/asian_bond_fund.shtml.

490 ibid.

491 ibid.

492 Jung, 126.

to build an Asian bond market and to invest in the economic growth of Asia to earn a higher return than the low return available from investments in the USA.[493] ABFs have led to positive outlooks regarding an effort to create the structural regional financial bodies – even though approaches to achieving it are still ambitious and not easily implemented,[494] and the implementation of ABFs still encounters diverse regulatory restrictions and gaps such as credit rating, taxes and investors treatments. The regional movement to create a liquid bond market is obviously involving a number of participants across East Asia region (including Australia and New Zealand) rather than from ASEAN itself. Nevertheless, ABFs are still considered as uniquely innovative because there were no funds in the markets that directly contribute to market liquidity by stimulating the issuance of notes – a departure from the conventional reserve management by including sub-investment grade sovereign securities.[495] The establishment of ABFs initiative leads to a creation of the uniquely Asia's first exchange-trade bond fund and results in two jurisdictions to permit domestic currency exchange trade funds. By emphasising its focus on the demand side[496], the ABFs also, to some extent, solve a problem of the offshore investors in buying local currency instruments and technical matters related to custodianship, enforcement of rights, reliability of transfer and taxes.[497] According to the study, ABF-2 results in the emergence of inter-dealer brokers as market makers to the newly issued bonds in the eight countries.

493 See G. Sivalingam and Izlin Ismail, "The Asian Bond Fund: A Case Study of Successful Economic and Financial Cooperation in Asia," *Investment Management and Financial Innovations,* 3, no. 1 (2006): 26-27.

494 Arner, Lejot, and Wang, 33.

495 ibid.

496 Kartika, 87.

497 Arner, Lejot, and Wang, 33.

During 2005 to 2010, there were outstanding numbers of government and corporate bonds for every country, wherein the amounts rose substantially over the years.[498] It can be eventually argued that such initiative can be considered successful if it can further remove the legal and regulatory constraints that made its initial objectives almost impossible to achieve.[499]

1.2.2. Post-Trade Cooperation

The legal foundation of post-trade cooperation can be found in the AEC Blueprint 2015, which requires ASEAN members to "[f]urther deepen and interlink capital markets by progressing towards more connectivity in clearing settlement and custody linkages to facilitate investment in the region".[500] Specifically, the Action Plan 2016 envisages the key priority for ASEAN Stock Exchange Connectivity Working Group to "work with [ASEAN Exchange Working Group] to implement enhanced ASEAN stock market connectivity including an effective and efficient post-trade linkage".[501]

In essence, the clearing and settlement processes are essential features of a smoothly functioning securities market.[502] Four main activities involved in post-trade processing of a securities transaction consist of: (i) confirmation of the terms of the trade as agreed between the buyer and seller; (ii) clearance by which the respective obligation of the buyer and seller are established; (iii) delivery of the securities from

498 Kartika, 87.

499 Arner, Lejot, and Wang, 33.

500 See Secretariat, "ASEAN Economic Community Blueprint 2015," 8.

501 Forum, "ACMF Action Plan 2016-2020," 5.

502 The Giovannini Group, "Cross-Border Clearing and Settlement Arrangements in the European Union," (EUROPEAN COMMISSION DIRECTORATE-GENERAL FOR ECONOMIC AND FINANCIAL AFFAIRS, 2002), 4.

the seller to the buyer; and (iv) payment of the funds from the buyer to the seller.[503] In the case of a domestic clearing and settlement, after a trade has been executed on the exchange, the local CCP manages the clearing activities, during which cash and securities obligations or entitlements are calculated and the different securities transactions in the same security are netted[504] whereby it may be achieved on either a gross or net basis.[505] Through a "novation", the CCP will become the buyer to every seller and the seller to every buyer that eventually helps mitigate the counterparty default risk.[506] Once a trade is novated and cleared, the delivery of securities is typically carried out in a CSD.[507] On the settlement day, the CSD effects the transfer of ownership as a result of the successful exchange of securities and cash between the different parties.[508]

Differently, cross-border clearing and settlements involve market participants buying and selling securities on non-domestic markets and/or undertaking transactions with counterparties in other countries. Such transactions result in a need to receive and deliver securities located in different countries and to make and receive the related payments.[509] The eurobond market is the classical example where issuers are

503 ibid.

504 Boon-Hiong Chan, "Post-Trade Integration in the ASEAN –Challenges and Opportunities," in *White Paper* (Deutsche Bank-Global Transaction Banking, 2013), 5.

505 See The Giovannini Group, 5.

506 The identified risks between CCP participants and the CCP are then covered by collateral arrangements, which usually comprise initial and variation margins.

According to Deutsche Bank's study, this model has been adopted in most of the clearing entities in ASEAN countries including Indonesia, Malaysia, the Philippines, Singapore and Thailand. See Chan, 6.

507 The Giovannini Group, 6.

508 Chan, 6.

509 See The Giovannini Group, 7.

located in different countries, however the trade of the eurobonds is heavily concentrated in London and the settlement usually takes place in Belgium through Euroclear.[510]

Unlike local securities trade, cross-border transactions involve complexity due to the increasing number of relationships that the international investor must have to gain access to the settlement system rather than engaging in the clearing and settlement by participants of the same CSD.[511] These relationships enable the interaction of different settlement systems, resulting in higher risks incurred on the investors. Significantly, the global trend demonstrates a move towards creating connectivity and/or the interaction[512] of different settlement systems through five options[513] that are:

(a) Direct Access

The direct access to the domestic CSD in the country where the securities are issued. In order to get a direct access, there must be a formal participation/membership in the national CSD whereby the members need to sign a legal agreement and comply with membership requirements, investing in technological interfaces and access to a payment mechanism.[514] However, the direct access is often not a real alternative because CSD normally allows only residents to become members

510 Cynthia Hirata de Carvalho, "Cross-Border Securities Clearing and Settlement Infrastructure in the European Union as a Prerequisite to Financial Markets Integration: Challenges and Perspectives," in *HWWA DISCUSSION PAPER* (Hamburg Institute of International Economics, 2004), 20.

511 ibid., 21.

512 The Giovannini Group, 8.

513 See H. S. Scott, *International Securities Regulation* (New York: Foundation Press, 2002), 428.

514 The Giovannini Group, 8.

and certain function would be troublesome to perform without a local presence.[515] To deal with this issue, non-resident institutional traders will often set up local branches or subsidiaries to acquire direct access but it is not widely used.[516]

(b) Local Agent

The local agent is normally a financial institution with a membership of the national CSD in the country where the security is issued.[517] This would allow a full range of services where the range of services provided are determined on a contractual basis and will normally involve substantial communication with the non-resident investor relating to the settlement process.[518] The local agent is the most common option for settlement of equities[519] while ICSDs are more extensively used in the cross-border settlement. However, the competition posed by ICSDs, which are increasingly acquiring the local CSD and are also eligible to offer banking services, is threatening CSD's position on the financial markets.[520]

(c) ICSDs

ICSDs offer a great web of direct and indirect access to CSDs[521] – either direct or through local agents.[522] It was originally established to settle for the Eurobond market, in particular Euroclear, Clearstream and SIS-Saga, but they have broadened

515 Scott, *International Securities Regulation*, 429.

516 The Giovannini Group, 8.

517 ibid.

518 ibid.

519 Carvalho, 22.

520 ibid.

521 ibid.

522 The Giovannini Group, 9.

their range of activities substantially. ICSDs still operate mainly in the settlement of internationally traded fixed income instruments but offer a single access point to national markets via links to many national CSDs and have become increasingly active in the settlement of government bonds and equities as well.[523]

(d) Global Custodians

Global custodians provide customers with a single access point to national CSDs in various countries via a network of sub-custodians in the countries concerned.[524] Global custodians typically have sub-custodians in different countries, which hold access to the local CSD. They are mostly dealing with equities, a market where ICSDs are less active. These sub-custodians can be local branches or subsidiaries of the global custodian or can be local agents. Use of global custodians is a favoured option among non-resident traders in securities (particularly for equity trades where the ICSDs are less active).[525] Global custodians and ICSDs now have similar functions. Moreover, global custodians often maintain accounts with an ICSD.[526] The clients of custodian banks differ from the ones who seek an ICSD to handle their operations. In general, global custodians concentrate more in institutional investors and private banks, while ICSDs attend wholesale financial clients.[527]

523 Carvalho, 22.

524 The Giovannini Group, 9.

525 This is because global custodian model can: (i) eliminate the costs of maintaining multiple access to local agents; (ii) can offer lower overall costs of settlement by exploiting economies of scale - particularly by spreading fixed costs (in particular, technology investments) over a very large number of settlement transactions; and (iii) they can offer a wide range of services to customers at low cost by exploiting economies of scope.

526 The Giovannini Group, 9.

527 Carvalho, 22.

(e) Bilateral Links

The bilateral link is a connectivity between CDSs.[528] It has been used due to the introduction of the Euro in order to facilitate the cross-border transfer of securities and to allow for the transfer of collateral for the eurosystem's credit operations.[529]

Essentially, none of the features under (a) to (e) above are found in ASEAN. There is no infrastructure connectivity existing between any of ASEAN CDSs or CCPs. However, the attempts to close differences of clearing and settlement structures in ASEAN, as well as the overall Asian countries, follow the same general trends as in the US and EU.[530] ASEAN, through the implementation of AEC Blueprint 2015 and Action Plan 2016, is working towards the efficient post-trade linkage. In EU, a single European capital market and the introduction of the Euro provided a significant momentum to the rationalisation process of stock exchanges securities clearing and settlement structures.[531] The single trading, clearing and settlement layers have been initiated such as the cooperation between NYSE Euronext and LCH Clearnet as Euroclear[532], CCP.CEE – the regional single central counterparty entity across some of the Central Eastern European countries[533], and TARGET2-Securities – a single pan-European

528 The Giovannini Group, 9.

529 Carvalho, 22.

530 See Francis Braeckevelt, "Clearing, Settlement and Depository Issues," in *BIS Paper* (Bank of International Settlements, 2006), 291.

531 See ibid., 290.

532 Euronext, "Markets - Clearing," https://www.euronext.com/nl/node/11082.

533 Hubertus Hecht, "New CCP Infrastructure to Boost Cee Capital Markets," news release, 2011, http://www.oekb.at/en/about-oekb/press-service/Pages/CCP.CEE.aspx.

platform for securities settlement in central bank money.[534] Like the EU, the US has demonstrated a relatively homogeneous clearing and settlement infrastructure due to the single currency and harmonised regulatory and tax environment, whereby US Treasuries are generally settled on an RTGS[535] basis through the Federal Reserve book-entry systems and are held in dematerialised form.[536]

The nonexistence of post-trade linkage in ASEAN leads to financial flows operating in an equally complex environment within each national boundary, characterised by different currencies, laws and market practices[537] (see further in Chapter IV). It is argued by several market operators that the existence of ASEAN Trading Link would not change the market landscape, in particular, it would not improve liquidity, unless it can improve the overriding regulations and create a centralised clearing system.[538]

The construction of the ASEAN regional clearing and settlement infrastructures can essentially demonstrate the fundamental perseverance of non-intervention, consensus and flexibility principles. The AEC Blueprint 2015 set out the commitment to fulfill the objective of the ACMI Blueprint[539]; however, the full detail of the ACMI Blueprint has not been formally published in the ASEAN's database[540] resulting in the

534 European Central Bank, "T2s," https://www.ecb.europa.eu/paym/t2s/html/index.en.html. See Chan, 7.

535 Gross settlement systems settle transactions on an instruction-by-instruction and real-time basis throughout the day.

536 Braeckevelt, 289.

537 Chan, 9.

538 From the interviews with Barnaby Nelson from BNP Paribas and Daniel Lee from DBS Vicker in The Trade Asia, "Cross-Border Trading," (2012).

539 Secretariat, "ASEAN Economic Community Blueprint 2015," 8.

540 As of 2 October 2016.

unclear direction regarding the proposed clearing and settlement model for ASEAN. This is in line with the typical ASEAN style of creating regulation by using neutral and vain words, such as "deepening (especially as envisaged in the AEC Blueprint 2015 in relation to the post-trade cooperation)[541]", "promoting", "conducting", "encouraging" or "developing". Those agreements appear to be legal achievements on some points, but their substantial use in practice, in fact, is questionable.[542] Such neutral words allow the members to interpret differently by considering their self-interests instead of looking for a collective benefit.

To this extent, even AEC Blueprint 2015 and Action Plan 2016 have envisaged the objective of deepening the integration by 2025 and 2020 respectively; at present, there is no specific time schedule for the implementation in order to establish the regional clearing and settlement infrastructure. It is still speculative whether the specific timeframe would be provided under the ACMI Blueprint; yet this would depend on the members' mutual consensus to do so – especially, in the current circumstance that the ACMI Blueprint is still in a long negotiation and drafting process.

541 See Secretariat, "ASEAN Economic Community Blueprint 2015," 8.

542 See Hung, 832.

2. ASEAN WAY AND CAPITAL MARKET REGULATIONS

This section intents to answer the core question concerning the impacts of the ASEAN Way on the regional efforts of creating the community laws – especially focusing on the laws that have direct effect on capital market integration. The beginning of this section will analyse the overall implication of the ASEAN Way the regional regulatory frameworks to see whether ASEAN Way deters a formation of the community laws. Then, it will investigate regional efforts of introducing regulations to govern the regional capital markets in the light of ASEAN's integration initiatives in which the ASEAN Way plays a crucial role in shaping the features of these regulations. After that, it will provide a discussion about rules concerning the capital movement in which it is a pre-requisite requirement to enable an integrated capital market.

2.1. ASEAN Way and the ASEAN Community Laws

ASEAN laws under the Charter-based system have nevertheless been a significant development of legalisation process[543] for regulating the regional economic relations.[544] It also created both continuity and change in the region's legal framework and process.[545] ASEAN frameworks for the economic cooperation are increasingly entered into under terms, indicating an intention to be bound by the rules, or commitments set out.[546] Nevertheless, the extent as to whether this degree of

543 For further discussion on the legalisation process, please see section 3.3.4 therein. See Ewing-Chow and Hsien-Li, 19-25; Davidson, 18-20; Leviter, 177.

544 Davidson 173-74.

545 Desierto, 17.

546 Davidson, 174.

legalisation is sufficient to create a set of community laws and whether the existing ASEAN's instruments creates a legal binding effect are questionable.

2.1.1 An Existence of ASEAN Community Laws

Even if ASEAN has developed a certain degree of legalisation; it demonstrates neither a readiness nor an aspiration to move toward "community laws" for deeper integration. It seems that ASEAN members are unlikely to develop a uniform legal system similar to the EU's in the community.

By focusing on the regional readiness, as previously discussed, there is a deficiency of supranational decision-making or law-making organic to legislating community laws. The process of ASEAN regionalism is critically based on the ASEAN Way, consisting of creating common norms that are constructed on the unique decision-making methods of "mushawarah" (consultation) and "mufakat" (consensus).[547] The behavioural norms, instead of the formal rules and regulations, therefore occupy a core position in ASEAN. Though whenever ASEAN can reach a consensus decision to take action – in particular, the decision to implement uniform laws, another subsequent challenge would concern domestic implementation of each member, which is likely to be more difficult than a formation of formal consensus at the regional level. For instance, ASEAN was facing a delay of the commencement of AEC's commencement from 1 January 2015 to 31 December 2015 due to several negotiation struggles.[548] Comparing with the EU legal system, the EU has binding legal force throughout member countries. To such extent, it has been observed that these

547 See Hung, 832; Tan, 948.

548 See Benny Hutabarat, "ASEAN Economic Community 2015: Will It Happen?," *The Jakarta Post* 2014.

rules will gain international acceptance and legitimacy once they have been created or enforced by the supra-national institution because they become precise, evenhanded, predictable and reliable.[549]

In addition, a protectionist policy and regulatory diversities[550] of each member result in difficulties to effect to date. Since national sovereignty and non-interference are the twin pillars of ASEAN integration[551], the nationalistic pressures have magnified an influence of the traditional non-interference principle.[552] Subsequently, each member has to safeguard its domestic economies and protect jobs first instead of pushing ahead with ASEAN integration. According to this reason, ASEAN countries have been unenthusiastic to encourage the formation of a binding uniform legal system as a fear of impinging on ASEAN's long-held principles of non-interference and consensus[553] in its founding document.[554] This marks ASEAN as a state-led institution not as the product of any formal and permanent decision making as of the EU.

The aspiration of ASEAN to develop a community law is uncertain. Regularly, in ASEAN's fashion, ASEAN countries prefer to have loose framework agreements with flexible practices rather than a concrete, legally binding regime.[555] It was observed that the measures and policies adopted at the ASEAN level remain at the level of

549 See HA Grigera Naon, "Sovereignty and Regionalism," *Law and Policy in International Business* 27 (1996): 1080-81.

550 See Tan, 951-52.

551 See *Charter of the Association of Southeast Asian Nations*, Article 2.

552 See generally Tuong Vu, "The Resurgence of Nationalism in Southeast Asia: Causes and Significance" (paper presented at the Issues and Trends in Southeast Asian Studies, Center for Southeast Asian Studies, University of Michigan, Ann Arbor, 2010).

553 Hung, 833.

554 See *Charter of the Association of Southeast Asian Nations*, Article 2.

555 See Hung, 832.

"promoting cooperation" rather than targeting the implementation of substantial legal agreements.[556] Consequently, it is normal for ASEAN's declarations and treaties to be vague and excessively general to set practical rules of cooperation.[557] For instance, there is no definition of "single market[558]" under Bali Concord II ,resulting in a lack of direction to implement such objective. When the scope of regional cooperation was expanded and member countries agreed to deepen an integration, ASEAN evolved itself by requiring the members to adopt a harmonious legal system and the mutual recognition principle.[559] ASEAN is still applying the modes of "consultation" and "consensus" principles to reach agreements on the delicate issues of harmonising the domestic laws of ASEAN members into a regional legal system that respects cultural sensitivities and national sovereignty.[560] In contrast, the Prospectus Directive provides that an offering prospectus that complies with uniform disclosure standards is valid throughout EU and generally prohibits both home and host states from imposing additional requirements.[561]

2.1.2. Binding Effect of ASEAN's Instruments concerning Capital Market Integration

As this research concludes that the level of ASEAN's legislation is insufficient to create a community law, the subsequent question would be whether the existing

556 ibid., 833.

557 Tan, 948.

558 See *Declaration of ASEAN Concord II*, (7 October 2003), 9.

559 See Hung, 832.

560 See ibid.

561 See *Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the Prospectus to Be Published When Securities Are Offered to the Public or Admitted to Trading and Amending Directive 2001/34/EC*.

ASEAN's laws, especially the laws concerning capital market integration, have generated a legal binding effect to its members.

By way of exploring such issue, Article 52 of the ASEAN Charter provides that any existing pre-ASEAN Charter laws, covering conventions, agreement, concords, declaration, protocols and other instruments, would continue to bind ASEAN members.[562] For other subsequent compliance, it is obvious that the ASEAN Charter obligates ASEAN member states to take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of the ASEAN Charter and to comply with all obligations of membership.[563]

The subsequent question would be whether the initiative of ASEAN's bodies would generate a legal binding effect. This research considers that endorsed documents and roadmaps issued by those bodies create a legal binding effect upon its members. This is because, notwithstanding some doubt regarding the effectiveness of an imposition of responsibility upon its own organs and member states, the ASEAN Charter has constituted the regional organisational structures, namely ASEAN Summit, ASEAN Community Councils and ASEAN Sectorial Ministerial Bodies, and provided powers to such bodies to make decisions upon the entire membership through the vote of a mere majority of its members.[564] In this regard, Article 7(2)(b) of the ASEAN Charter provides that the ASEAN Summit can deliberate, provide policy guidance and take decisions on key issues pertaining to the realisation of the objectives of ASEAN,

562 See *Charter of the Association of Southeast Asian Nations*, Article 52.

563 ibid., Article 5(2).

564 See Hung, 825.

important matters of interest to member states and all issues referred to it by the ASEAN Coordinating Council, the ASEAN Community Councils and ASEAN Sectoral Ministerial Bodies.[565] Moreover, ASEAN Sectoral Ministerial Bodies, which are under the purview of each ASEAN Community Council[566], may have under their purview the relevant senior officials and subsidiary bodies to undertake their functions in accordance with the ASEAN Charter.[567] To achieve the purpose of implementing frameworks for all existing and future ASEAN Summit's decisions, there are several documents produced by the subsidiary bodies under ASEAN Sectoral Ministerial Bodies. By being different from the EU, where there are three basic types of EU legislation: regulations, directives and decisions, the examples of formation of ASEAN laws apart from ASEAN Charter and treaties are the case of ACMF Vision 2025, the Implementation Plan 2009 and the Action Plan 2016 that are drafted by ACMF (a body established auspices of AFM). To this extent, these ASEAN documents would regularly include language that would create some obligations and timeframes on the member states. In a practical aspect, the ASEAN Sectoral Ministerial Bodies will subsequently endorse, from time to time, the documents and roadmaps drafted by its subsidiary bodies. To illustrate this, AFM has endorsed the ACMF Vision 2025 and the Action Plan 2016 at the AMF Meeting at Vientiane, Lao PDR on 4 April 2016[568], which is the extension of the Implementation Plan 2009 endorsed at the AMF Meeting at Pattaya, Thailand on

565 *Charter of the Association of Southeast Asian Nations*, Article 7(2)(b).

566 ibid., Article 9(2).

567 ibid., Article 10(2).

568 ASEAN Secretariat, "Joint Statement of the 2ndASEAN Finance Ministers' and Central Bank Governors' Meeting (AFMGM), Vientiane, Lao Pdr, 4 April 2016 Theme: Turning Vision into Reality for a Dynamic ASEAN Community," news release, 2016.

9 April 2009.[569] By having the AMF expressing an intention to comply with the obligations and timeframes, these documents thus create legal binding effect under international law and become a part of ASEAN laws.[570] This is because the ASEAN Charter empowers ASEAN Sectoral Ministerial Bodies to perform their duties and to implement ASEAN Summit's decisions in accordance with the respective mandates and the organisational structure as previously described. Consequentially, ASEAN members are obligated to take all necessary measures to effectively implement and to comply with all obligations of as such.[571]

Nonetheless, a distinction should be made with respect to some ASEAN documents produced by ASEAN subsidiary bodies since they may not create a legally binding effect under international law, such as the ASEAN Regional Guidelines on Competition Policy, which were drafted by the ASEAN Experts Group on Competition.[572] Even if the ASEAN Experts Group on Competition was established in response to the endorsement of the 39th ASEAN Economic Ministers Meeting in 2007, the guideline only serves as a reference guide for ASEAN member states in their efforts to create a fair competition environment. Unlike the ACMF Vision 2025, the Implementation Plan 2009 and the Action Plan 2016, the guideline include language demonstrating that it was not intended to be a full or binding statement on competition policy,[573] and it has not been further endorsed by any ASEAN Sectoral

569 "Joint Media Statement of the 13th ASEAN Finance Ministers' Meeting," news release, 9 April 2009, 2009.

570 Professor Kanung Luchai, interview by Tir Srinionikom, 2015, Kanung & Partners Law Office

571 *Charter of the Association of Southeast Asian Nations*, Article 5(2).

572 See ASEAN Secretariat, "ASEAN Regional Guidelines on Competition Policy," ed. ASEAN Secretariat (2010), ii.

573 ibid.

Ministerial Bodies. The guideline, therefore, does not generate any legal binding effect under the international law yet still operates as a "soft law" in the sense that it stimulates the development of best practices whereby member states should put their efforts to create a fair competition environment.[574]

As ASEAN laws have a legal binding effect, the consequence question would be the extent of enforcing such laws. In this regard, Article 20 of the ASEAN Charter provides that "in the case of a serious breach of the Charter or non- compliance, the matter shall be referred to the ASEAN Summit for decision". [575] It is obvious that such provision tries to put in place a dispute settlement mechanism.[576] However, the impediment of Article 20 is that it does not a procedural aspect regarding how states can resolve disputes and what the penalties should be.[577] In consider the matters referred pursuant to the ASEAN Charter, ASEAN Summit is required to run a meeting which can be: (i) held twice annually, and be hosted by the Member State holding the ASEAN Chairmanship; or (ii) convened, whenever necessary, as special or ad hoc meetings to be chaired by the Member State holding the ASEAN Chairmanship, at venues to be agreed upon by ASEAN Member States.[578] According to such requirements, the detailed timeframe and procedure are not provided. ASEAN Charter does not provide any provision setting out the measures dealing an imposition of penalties to breaching members. This situation reflects the mentality of ASEAN Way that it is constructed on informality and familiarity among state members; therefore,

574 ibid.

575 *Charter of the Association of Southeast Asian Nations*, Article20(2) and (4).

576 ibid., Chapter VIII.

577 See generally Goh, 1-10; Davidson; Ewing-Chow and Hsien-Li; Leviter.

578 *Charter of the Association of Southeast Asian Nations*, Article 7.

the organisation avoids imposing a stringent and institutionalised dispute resolution. Moreover, there is no provision under the ASEAN Charter that requires a recourse for the ASEAN Secretariat if a member government be unable or unwilling to implement the agreement.[579]

2.2. ASEAN Way and the Regional Endeavour to Create Regional Capital Market Regulations

It can be observed that the capital markets around the world have been increasingly internationalised or are in the process of internationalising[580] where the institutionalisation and legalisation processes are carried out in varying degrees. Due to advancement in telecommunication technology, international securities transactions and financial investment occur beyond territorial boundaries. Companies around the world realise that cross-broader issuance of securities can provide higher benefit and opportunity for fundraising – especially in Western developed countries.[581] In order to respond to increasing external economic challenges, many developed countries have recognised the harmonisation of securities regulation and have undertaken positive steps to accomplish it.[582] Among the initiatives, the European Union, through the Treaty of Maastricht,[583] is the world's first multinational securities regime. Moreover, the US

579 See Hung, 832.

580 See Pearlie M.C. Koh, "Securities Regulation in ASEAN - Is It Time for a Harmonious Tune to Be Sung?," *Singapore Journal of Legal Studies* 146 (1995): 149.

581 ibid.

582 ibid., 151.

583 See generally *Consolidated Versions of the Treaty on European Union and the Treaty on the Functioning of the European Union*.

Securities and Exchange Commission and Canadian regulatory authorities have agreed to harmonise market regulation through a reciprocal recognition of prospectus[584].

The momentums as such have emerged in Southeast Asia. ASEAN countries have also been following the similar trend to liberalise and deregulate their financial and capital markets since the late 1970s. Until now the regionalisation along with the internationalisation of ASEAN securities market are on the agenda.[585] Nevertheless, variation of securities regulations among ASEAN countries imposes certain obstacles to the internationalisation of regional capital markets. It is argued that such regulatory fragmentation could be reduced through regulatory harmonisation and creation of regional uniformity of regulations. This would allow a greater access to ASEAN markets.[586] Significantly, harmonisation of regional market regulations, especially listing, prospectus and disclosure requirements and market standards, would promote cross-broader securities transactions within ASEAN to be simpler and efficient with a lessened regulatory layer.[587] It would further increase market participants' confidence while reducing costs associated with the transaction.

As previously discussed, the development of ASEAN legalisation process does not amount to the creation of community laws. Accordingly, regulatory harmonisation of the regional capital markets in ASEAN cannot pragmatically be achieved through an

584 See generally MARK Q CONNELLY, "Multinational Securities Offerings: A Canadian Perspective," *Law and Contemporary Problem* 50, no. 3 (1998).

585 See Secretariat, "ASEAN Economic Community Blueprint 2015," 7.

586 Koh, 154.

587 ibid., 152.

implementation of community laws as of the EU.[588] By narrowing down, IOSCO has introduced the cross-border regulatory toolkit that contains tools that are used in the various jurisdictions to regulate cross-border securities market activities. These tools can be broadly classified into three main types, namely: “national treatment”, “recognition”, and “passporting”.[589] National treatment, under which all foreign products and operators are treated in the same way as domestic products and operators, relates both in terms of domestic entry and ongoing regulation requirements.[590] As a result, they are subject to comprehensive supervision by the host regulator and by their home regulator.[591] Recognition is an approach where a host regulator recognises, in whole or in part, a foreign regulatory regime either on a unilateral or multilateral basis. Therefore, the cross-border activities can be undertaken both in the domestic and foreign jurisdiction, which commonly involves a use of regulatory relief, enhanced cooperation with, and reliance on, the foreign regulator’s supervisory oversight when it is justified by the foreign regulatory regime or parts.[592] Differently, passporting refers to the system that allows the licensed or authorised holders in jurisdictions under a passport system arrangement to offer a financial product or provide financial services subject to the scope of license or authorisation received in any of the other party jurisdictions whereby no further license or

588 See for instance, *Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on Markets in Financial Instruments Amending Council Directives 85/611/EEC and 93/6/Eec and Directive 2000/12/EC of the European Parliament and of the Council and Repealing Council Directive 93/22/EEC*, (1).

589 IOSCO Task Force on Cross-Border Regulation, 7.

590 ibid., 9.

591 Andrew Godwin and Ian Ramsay, "The Asia Region Funds Passport Initiative – Challenges for Regulatory Coordination," *International Company and Commercial Law Review* 26, no. 7 (2015): 4.

592 IOSCO Task Force on Cross-Border Regulation, 15.

authorisation is required. The basis of passport system entails a set of harmonised rules that apply all over the jurisdictions under the passport arrangement.[593]

Significantly, the current stage of the regional capital market regulations can be seen as a half combination between, according to the IOSCO's toolkit, the national treatment and recognition; due to the fact that capital market regulatory harmonisation in ASEAN importantly aims to create the "freer flow of capital".[594] This consequently made the measures and policies adopted at the ASEAN level remain at the level of "promoting cooperation" that expand into various areas. As being a half amalgamation between the national treatment and recognition, there are several features of ASEAN harmonisation mechanisms that differ from other region and consequently, results in some impediments to the integration, as follows.

2.2.1. Disclosure and Distribution

Generally, an allocation of resources in a capital market economy is regularly impeded by information and incentive problems.[595] Securities regulation attempts to minimise the cost of gathering, verifying and pricing information[596]; wherein disclosure and institutions are created to facilitate credible disclosure between managers and investors.[597] Disclosure regulation is not only created due to concerns about market failures, but also the welfare of financially unsophisticated investors. By imposing

593 ibid., 27.

594 See Secretariat, "ASEAN Economic Community Blueprint 2008," A.

595 Paul M. Healy and Krishna G. Palepu, "A Review of the Empirical Disclosure Literature," in *2000 JAE Conference* (Graduate School of Business, Harvard University, 2000), 2.

596 Zohar Goshen and Gideon Parchomovsky, "The Essential Role of Securities Regulation," *Duke Law Journal* 55, no. 4 (2006): 737.

597 Healy and Palepu, 2.

minimum disclosure requirements, regulators can reduce the information gap between the informed and uninformed. Nevertheless, without such regulations, unsophisticated investors are still not prevented from investing in financial knowledge or in hiring the services of sophisticated intermediaries.[598]

Taking into account the holistic perspective of the global regulatory trend as discussed, the consideration of ASEAN's initiatives on disclosure and product distribution can be considered as follows.

2.2.1.1.Prospectus

In 2009, Securities regulators in Malaysia, Singapore and Thailand were the first group that jointly implemented the ASEAN and Plus Standards Scheme, as created by ACMF, for multi-jurisdictional offerings of securities in ASEAN.[599] The reason of having selective countries is due to the fact that the timeframe for the implementation of such initiatives for all ASEAN countries depends on the readiness of each ASEAN member on an opt-in basis.[600] ASEAN and Plus Standards Scheme deals with an offering of plain equity and debt securities in Malaysia, Singapore and Thailand by allowing the issuer to comply with one single set of common disclosure standards, known as the "ASEAN Standards", together with limited additional requirements prescribed by each jurisdiction, known as the "Plus Standards". The ASEAN Standards, a set of common standards, are based on the of IOSCO standards on cross-border offerings and fully adopts the accounting and auditing standards of the International Financial Reporting

598 See ibid., 5-6.

599 See ASEAN Capital Markets Forum, "Frequently Asked Questions - ASEAN and Plus Standards Scheme," in *Monetary Authority of Sigapore* (Singapore2009), 1.

600 ibid., Apendix I.

Standards and International Standards on Auditing.[601] The Plus Standards are the respective additional standards that may be prescribed by the individual ASEAN jurisdictions where harmonisation is not yet possible due to their individual market practices, laws or regulations.[602] Therefore, when an issuer wishes to make a multi-jurisdiction offer of securities, the issuer needs to provide only a common set of disclosure documents based on the ASEAN Standards, together with the appropriate wrap-around for the Plus Standards, to investors in each jurisdiction.

Significantly, in 2013, securities regulators of Malaysia, Singapore and Thailand have implemented the ASEAN Disclosure Standards for multi-jurisdiction offerings of equity and plain debt securities in ASEAN. The initiative is one of the capital market initiatives undertaken by the ACMF as part of the Implementation Plan 2009 endorsed by the ASEAN Finance Ministers in 2009. ASEAN Disclosure Standards replaces the ASEAN and Plus Standards Scheme announced in 2009.[603] It is based on standards on cross-border offerings set by IOSCO[604] (in particular IOSCO's International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers 1998 and IOSCO's International Disclosure Standards for Cross-border Offerings and Listings of Debt Securities by Foreign Issuers 2007[605]), as well as the International Financial Reporting Standards and International Standards on Auditing.[606] Similar to the

601 ibid., 1.

602 ibid., Apendix I.

603 "Handbook for Issuers Making Cross-Border Offers Using the ASEAN Disclosure Standards under the Streamlined Review Framework for the ASEAN Common Prospectus," in *Monetary Authority of Singapore*, ed. ASEAN Capital Markets Forum (Singapore: Monetary Authority of Singapore, 2015), 3.

604 "ASEAN Regulators Implement Cross Border Securities Offering Standards," news release, 2013.

605 "ASEAN Disclosure Standards," http://www.theacmf.org/ACMF/webcontent.php?content_id=00015.

606 ibid.

preceding ASEAN and Plus Standards Scheme, ASEAN Disclosure Standards operates on an opt-in basis and ASEAN members will adopt the scheme as and when they are ready to do so. Malaysia, Singapore and Thailand are the first three ASEAN jurisdictions to implement the scheme.[607] ASEAN Disclosure Standards will ease and improve cost savings to all issuers who make multi-jurisdiction offerings of plain equity and debt securities that require the registration of prospectuses or registration statements within ASEAN. Under the framework, issuers will only be required to comply with a set of common disclosure standards.[608]

In 2015, securities regulators of Malaysia, Singapore, Thailand and the Singapore Exchange signed the Streamline Review Framework that would complement with prospectus prepared in accordance with the ASEAN Disclosure Standards whereby issuers planning to offer equity[609] securities or plain debt[610] securities can expect a

607 "ASEAN Regulators Implement Cross Border Securities Offering Standards."

608 "Handbook for Issuers Making Cross-Border Offers Using the ASEAN Disclosure Standards under the Streamlined Review Framework for the ASEAN Common Prospectus," 3.

609 Equity means shares or stocks issued or proposed to be issued by a corporation but does not include shares or stocks issued or proposed to be issued by a special purpose acquisition company or units in a real estate investment trust, business trust or closed- end fund. Ibid., 6.

610 "ASEAN Debt Securities Disclosure Standards," (2013), 1. Plain Debt Securities shall mean bonds or Sukuk Ijarah, which have the following characteristics: 1. Denominated in any currency;

2. Fixed term with principal and any accrued interest or returns payable at expiry;

3. Fixed rate of return or floating rate of return that comprises a variable market determined rate and fixed margin; 4. Except for zero coupon bonds or Sukuk Ijarah without periodic distributions, interests or returns are to be paid periodically on dates specified in the prospectus/registration statement ;

5. Ranked at least equally with amounts owing to unsecured and unsubordinated creditors;

6. Not convertible;

7. Issued to all investors at the same price; and

8. Except for a purchase undertaking in the case of a Sukuk Ijarah, does not embed any swap, option or other derivative.

shorter time-to-market and faster access to capital across signatory countries through a streamlined review process.[611]

By reviewing the substance of ASEAN Disclosure Standards, they have substantially followed the principles set out under IOSCO's International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers 1998 and IOSCO's International Disclosure Standards for Cross-border Offerings and Listings of Debt Securities by Foreign Issuers 2007. The standards further set out the principles for a disclosure of Sukuk Ijarah issued on Shariah principles of Ijarah that meets the requirements.[612] These initiatives have successfully harmonised the disclosure requirements to disclosure all prescribed and/or material information. However, they do not standardise the liability for a person related in the prospectus.

The mechanism under the initiatives is not an automatic recognition system where an approval from a partner country provides automatic access or recognition to the rest of the system, without the need to meet local requirements.[613] In ASEAN fashion, the recognition mechanism is generally arranged through the "managed mutual recognition system" that allows that some discretion to be exercised by the authorities while the person receiving approval from home regulator would have the right to apply for a recognition in the host country. As the managed mutual recognition

611 "Handbook for Issuers Making Cross-Border Offers Using the ASEAN Disclosure Standards under the Streamlined Review Framework for the ASEAN Common Prospectus," 2.

612 See "ASEAN Debt Securities Disclosure Standards," 1.

613 Shintaro Hamnaka and Sufian Jusoh, "The Emerging ASEAN Approach to Mutual Recognition: A Comparison with Europe, Trans-Tasman, and North America," in *IDE Discussion Paper* (Institutie of Developing Economic, 2016), 6.

requires only a minimal level of prior harmonisation of standards,[614] it is obvious that ASEAN Disclosure Standards are just a harmonisation of prospectus requirements while Streamline Review Framework does not replace the national regime of each jurisdiction concerning the approval process that may be stipulated in various forms, for instance, approvals, recognition, registration of the prospectus.[615] An issuer will still have to comply with the national regulations which would differ from each jurisdiction, including the listing requirements (however, ASEAN has provided the Expedited Review Framework that allows shorter times for the admission of listing process.

ASEAN's success to create equal requirements of prospectus implies that foreign issuers would be able to enter and offer securities in a host jurisdiction in accordance with such country's regulatory regime. However, the standpoint of having the host country's approval process create a barrier to the regional capital market integration as it requires multiple approvals or more (as the case may be) in the similar way where there is a jurisdictional border in a cross-border securities transaction. Having the approval process in the host country implies that ASEAN members are not ready to implement the higher level of mutual recognition system. This reinforces the position of The ASEAN Way in ASEAN's policy direction that the state members' national sovereignty are the most concern whereby requiring the second approval process to be granted from the host country. Moreover, as ASEAN Disclosure Standards are only applicable to the plain equity and debt securities of merely the signatory ASEAN countries – not every ASEAN countries, this reflects the flexibility approach of

614 ibid.

615 See Forum, "Handbook for Issuers Making Cross-Border Offers Using the ASEAN Disclosure Standards under the Streamlined Review Framework for the ASEAN Common Prospectus," 10.

implementing the capital market integration that it would be based on the readiness of the member rather than imposing stringent commitments.

The mechanism in ASEAN is unlike that in other regions. Among others, Australia and New Zealand have the agreement on the Mutual Recognition of Securities Offerings allowing for the same securities offerings document to be issued in both countries. Issuers can extend the offer that is being lawfully made in one country to investors in the other country using the same offer documents and offer structure. The issuer would not be required to comply with most of the substantive requirements of the other country's domestic fundraising laws. [616] Instead, issuers who wish to operate under the proposed regime will have to comply with some entry and ongoing requirements, such as giving notice to the host regulator, agreed between the two countries and prescribed in each country's law.[617] In additions, EU Commission implemented the Prospectus Directive[618] and the Commission Regulation of Prospectuses[619] that set a single regime throughout the EU in relation to the content and format of prospectuses. These laws enable issuers to use the similar prospectuses

616 See Treasury Portfolio Ministers, "World First in Comprehensive Mutual Recognition of Securities Offerings," news release, 2008, http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2008/032.htm&pageID=003&min=njs&Year=&DocType=0.

617 Australian Securities and Investments Commission and Finaical Market Authority, *Offering Financial Products in New Zealand and Australia under Mutual Recognition* (New Zealand: Finanical Market Authority, 2014), 5.

618 See *Directive 2003/71/EC of the European Parliament and of the Council of 4 November 2003 on the Prospectus to Be Published When Securities Are Offered to the Public or Admitted to Trading and Amending Directive 2001/34/EC*.

619 See *Commission Regulation (EC) No 809/2004 of 29 April 2004 Implementing Directive 2003/71/EC of the European Parliament and of the Council as Regards Information Contained in Prospectuses as Well as the Format, Incorporation by Reference and Publication of Such Prospectuses and Dissemination of Advertisements*.

prepared for admitting securities to trading on their home market and to admit securities to any number of further European markets without having to re-apply for approval from the local regulator thereby placing the responsibility of the approval of the prospectus on the home jurisdiction. Irregularities found by the host jurisdiction must be referred to and addressed by the home jurisdiction. In addition, ESMA is established as the core institution to ensure consistency in the interpretation of the Prospectus Directive, having responsibility to promulgate guidelines, recommendations and standards with the aim of achieving convergence on common supervisory approaches and practice.[620]

From this circumstance, ASEAN Disclosure Standards and Streamline Review Framework do not create a level of playing field; yet just a facilitation of cross-border offering. The issuers would not get the benefit arising from the mutual recognition that it can prevent duplication of supervisory works.621 From a cost-saving aspect, even the issuers can reduce legal cost arising from the diverging regime of prospectus requirements, they have to bear costs in relation to the multiple approvals and the on-going requirements while the recognition and passporting systems can reduce the whole legal and documentation costs. In the case of Australia and New Zealand, the cost-saving for some firms, who were able to quantify, varied from approximately fifty-five to ninety-five per cent.622 Moreover, even the prospectus requirements on plain equity and debt securities in ASEAN are harmonised, the initiatives do not cover

620 See Eupean Securities and Market Authority, "Questions and Answers: Prospectuses," in *European Union* (Paris2016), 7.

621 See IOSCO Task Force on Cross-Border Regulation, 38-39.

622 ibid., 38.

ongoing disclosure obligations or listing criteria. Issuers will also encounter some other regulatory diversities on the liability[623], marketing requirements, treatments applicable to foreign issuers in the host countries and the uneven enforcement standards and practices in the field concerned (further details on this issue to be discussed in Chapter IV).[624]

2.2.1.2.Product Distribution

In 2013, the regulators of Malaysia, Singapore and Thailand have mutually established the ASEAN CIS Framework. The ASEAN CIS Framework enables the units of an ASEAN CIS[625] authorised in its home jurisdiction to be offered in other host jurisdiction under a streamlined authorisation process[626] under the condition that such ASEAN CIS has fulfilled a set of the common requirements in accordance with Standards of Qualifying CIS. The Standards of Qualifying CIS consist of two parts. The first part provides requirements of the Qualifications of the CIS operator, Trustee/Fund Supervisor, and requirements relating to Approval, Valuation, and Operational Matter.[627] The second part prescribes the Product Restrictions of Qualifying CIS.[628] Significantly, the framework will apply to CIS operators (fund managers) established in any of the three participating countries who intend to sell their domestically licensed

623 Wan Wai Yee, "Cross-Border Regulation of Securities Markets in ASEAN" (Hong Kong University, 2016), 9.

624 ibid., 10.

625 ASEAN CIS means CIS constituted or established in its Home Jurisdiction which has been Approved by its Home Regulator for offer to the public in the Home Jurisdiction, and assessed by its Home Regulator as suitable to apply to a Host Regulator for its units to be offered to the public cross-border in the Host Jurisdiction pursuant to the ASEAN CIS Framework. ASEAN Capital Market Fourm, "Handbook for Cis Operators of ASEAN CISs," ed. ASEAN Capital Market Fourm (2014), 5.

626 ibid., 3.

627 See "Standards of Qualifying CIS," (ASEAN Capital Market Forum), Part I.

628 See ibid., Part II.

non-retail or retail funds to non-retail or retail investors in the other participating countries. To facilitate the understanding of the different legislative requirements, ACMF has issued the Handbook for CIS operators of ASEAN CISs as a guidance for CIS operators in relation to necessary steps for obtaining the approval from both home and host regulators and the applicable regulatory requirements of the participating jurisdictions.

To offer units of an ASEAN CIS in a host jurisdiction, a qualifying CIS operator must first be approved by the home regulator for the offer to the public in the home jurisdiction. Once home regulator issues an approval letter, the issuer can submit the application to the host regulator to approve the prospectus for a public offer in that host jurisdiction under the streamlined authorisation process.[629] The offer of ASEAN CIS in the host jurisdiction must be accompanied by an offering document or prospectus, which complies with the laws and regulations in the host jurisdiction. Moreover, the host regulators may request additional supporting documents[630] such as the factsheet complying with the local law.

ASEAN CIS Framework demonstrates the similar issue as encountered by ASEAN Disclosure Standards and Streamline Review Framework. The requirement of having host country's approval reflects the conventional mindset of the ASEAN Way that a member still respects each other's sovereignty whereby the host country regulator still maintains its power to consider whether the approval will be granted rather than relying on home country regulator's consideration. Moreover, the decision of having

629 "Handbook for Cis Operators of ASEAN CISs," 15-17.

630 See ibid., 6-8.

signatory countries who are ready to join the initiative and the partial implementation of the initiative to non-retail investors first and then the retail investors reflects the flexibility approach of the ASEAN Way instead of imposing stringent commitments.

While ASEAN has no passporting system for ASEAN CIS, the UCITS Directive[631] in the EU successfully facilitates the cross-border marketing and offering of collective investments (funds) which invest in transferable securities. UCITS Directive enables any collective investment in transferable securities authorised by the competent regulators of a home state of the European Economic Area to be distributed across the EU, subject to the notification from the home to the host authorities. The supervision of collective investment in transferable securities is based on the principle of home country supervision and the existence of harmonised rules concerning the authorisation, supervision, structure and activities of UCITS and the information that they are required to publish.[632]

On the surface, ASEAN CIS Framework would shorten the time to market funds in different jurisdictions, which provides a wider choice for local investors. In the long run, ASEAN countries may join the ASEAN CIS framework or may merge with other Asian cross-border fund schemes (such as Asia Region Fund Passport initiated by APEC). Therefore, the ASEAN CIS Framework may provide a first-mover advantage to asset managers willing to establish a strong regional cross-border reputation and capabilities in Asia. However, with the similar problem encountered by the ASEAN Disclosure

631 See *Directive 2009/65/EC of the European Parliament and of the Council of 13 July 2009 on the Coordination of Laws, Regulations and Administrative Provisions Relating to Undertakings for Collective Investment in Transferable Securities (UCITS)*.

632 See IOSCO Task Force on Cross-Border Regulation, 30-31.

Standards and Streamline Review Framework, CIS operators face a diversity of country-specific requirements such as specific currencies for fund offerings, languages for offering documents and diversity of liabilities regulations. They would be required to comply with multiple monitoring and reporting procedures in accordance with both home and host jurisdictions as well as the different timeframes for the process in each country (further details to be discussed in Chapter IV).[633]

2.2.2. Market Standards

According to an influence of a free market economy, the invisible hand of the market would guide each trader to select the best price for execution, or so called the "best execution" principle. As a result, formal regulations should only be used when all other means are inadequate.[634] The regulations are considered as a form of state intervention through semi-dependent agencies to: (i) provide retail customers (who are presumably less-informed) with protection – as a result of asymmetric information[635]; (ii) protect the customer against monopolistic exploitation[636]; and (iii) ensure systemic

633 See BNP Paribas, "ASEAN Collective Investment Scheme Framework - Regulatory Memo," ed. BNP Paribas (2016).

634 Scott McCleskey, *Achieving Market Integration* (Butterworth-Heinemann 2004) 7

635 Markus Brunnermeier, Andrew Crockett and Charles Goodhart, *Geneva Reports on the World Economy 11: The Fundamental Principles of Financial Regulation* (Centre for Economic Policy Research, Geneva 2009) 2; See Charles Goodhart, Adair Turner and Philipp Hartmann et al., *The Future of Finance: The LSE Report*, (London School of Economics and Political Science, London 2010)

636 The Geneva Reports on the World Economy described the oligopolistic system where the market is dominated by the champion players as a dangerous situation. These champion players are too big to fail and sometimes too large to save. They are also in a position to put a great influence on the market and become more incontestable. See Markus Brunnermeier, Andrew Crockett and Charles Goodhart, *Geneva Reports on the World Economy 11: The Fundamental Principles of Financial Regulation* (Centre for Economic Policy Research, Geneva 2009) 2

stability.[637] At this point, the purpose of protecting retail consumers seems to be the major concern among other elements.[638] It is obvious that in an absence of financial regulations, customers are to determine whether they are receiving best, or satisfactory execution. This reflects the essence of free market economy that all parties can compete freely through voluntary exchange on terms settled by agreements where individuals had inalienable rights to own property, and therefore to make their own arrangements to deal with that property, and hence to make contracts for themselves. The philosophy of laissez-faire, for its part, was understood to mean that the state, and thus the law, should interfere with people as little as possible. [639] From this standpoint, "caveat emptor" comes to play an important role that buyers shall beware of sellers. This implies that sellers presume no duties to disclose information; instead, it is the responsibility.

However, when narrowing down to financial and securities markets, the reliance on the invisible hand and freedom of choice is not appropriate in creating market integrity. The market players still suffer from some degree of the information

637 Charles Goodhart, Adair Turner and Philipp Hartmann et al. highlighted that 'any market action taken by one player in a market is always likely to affect the economic position of all the other players in that market'. However, such pecuniary effects of market adjustment do not represent social externalities or result in systemic contagion, but can become so in case of bankruptcies and liquidation where the social costs associated are generally big in the case of interconnected financial intermediaries. The obvious example is the case of Lehman Brother's bankruptcy involving the social costs of, for instance: (i) the direct costs of using legal/accounting resources to wind down; (ii) the dislocation to financial markets and settlement/payment systems; and (iii) the immediate uncertainty, and ultimate potential loss, for all counterparty creditors of the financial intermediary. Therefore, the financial regulations come to mitigate the risks embedded within the financial structure. See Charles Goodhart, Adair Turner and Philipp Hartmann et al., *The Future of Finance: The LSE Report*, (London School of Economics and Political Science, London 2010) 168-169

638 Ibid.

639 Stephen Smith, *Contract Theory* (Oxford 2004) 2006: 9–10

asymmetry and market misconducts. Moreover, customers rarely know the precise time when their trades are executed. Even if they are capable of knowing the time, they, especially the retail customers, cannot have an effective access to the detailed audit trails necessary to show the best price at the time of the execution. This situation leads to a lack of specific information necessary to evaluate whether or not the customers are receiving the best price.[640] Customers could bring lawsuits to the court under the civil law doctrines (invoking the law of contract, the doctrine of agency law and fiduciary responsibility, or even the tort law). This means that the customers shall bear the burden of proof during the course of civil litigation, which is practically impossible since the customers have to elaborate how they have received poor execution or market misconducts as well as the damages incurred.[641]

Taking into account the aforementioned necessity, it is crucial to investigate whether ASEAN has developed any initiative with regard to the harmonisation of market regulations in order to control the overall market integrity and stability – apart from promoting the greater cross-border investment flows and growth of the region's capital markets[642] through the disclosure and product distribution cooperation. The discussion is as follows.

640 See Scott McCleskey, *Achieving Market Integration* (Butterworth-Heinemann 2004) 8-9

641 ibid.

642 See Forum, "ASEAN Regulators Implement Cross Border Securities Offering Standards."

2.2.2.1. Market Fraud Regulations

Theoretically, the principle of securities fraud covers a deceitful misinterpretation or non-disclosure, market manipulation and insider trading.[643] Misinterpretation or non-disclosure refers to the dissemination of information to solicit participation, in particular, the offering curricular.644 Market manipulation is a course of conduct intended to distort the price of securities with a view to deceiving other users of the market in order to make a profit or avoid a loss.[645] On the contrary, insider dealing takes place when a privileged insider having undisclosed material price-sensitive information about securities gained due to his relation with the company, exploits such information to make a profit or avoid a loss by dealing in the securities, the price of which would have been materially altered if the information had been disclosed.[646]

The effort to harmonise securities fraud rules was stipulated under neither the Implementation Plan 2009 nor Action Plan 2016. Generally in ASEAN's fashion, ASEAN regulators tend to create some of the guidelines to standardise the particular issues, which would eventually have an implication on regulatory policies. The example of the guideline includes the regional guideline on the competition policy that is to be served as a general framework (a soft law) to introduce, implement and develop competition policy in accordance with the specific legal and economic context of each

643 Philip R. Wood, *The Law and Practice of International Finance* (London, England: Sweet & Maxwell, 2010), 391.

644 ibid., 380.

645 ibid., 391.

646 ibid., 398.

member.[647] Nevertheless, none of the guidelines is found in the area of market fraud regulations.

By undertaking a different approach, the implementation of Prospectus Directive requires EU members to ensure their domestic laws on administrative[648] and civil[649] liabilities applied to the responsible persons in relation to the prospectuses. However, the Prospectus Directive does not contain any harmonised provisions in respect of civil liability for incorrect information in a prospectus or other infringements relating to prospectuses.[650] In addition, the Directive on Criminal Sanctions for Market Abuse complements the Market Abuse Regulation[651] by requiring EU members to introduce common definitions of criminal offences of insider dealing and market manipulation, and to impose maximum criminal penalties[652] for the most serious market abuse offences. Member states have to make sure that such behaviour, including the manipulation of benchmarks, is a criminal offence[653], punishable with effective sanctions everywhere in Europe.[654]

647 See Secretariat, "ASEAN Regional Guidelines on Competition Policy," 1.

648 *Commission Regulation (EC) No 809/2004 of 29 April 2004 Implementing Directive 2003/71/EC of the European Parliament and of the Council as Regards Information Contained in Prospectuses as Well as the Format, Incorporation by Reference and Publication of Such Prospectuses and Dissemination of Advertisements*, Article 25.

649 ibid., Article 6.2.

650 European Securities and Market Authority, "Comparison of Liability Regimes in Member States in Relation to the Prospectus Directive," (2013), 12.

651 *Directive 2014/57/EU of the European Parliament and of the Council of 16 April 2014 on Criminal Sanctions for Market Abuse (Market Abuse Directive)*.

652 ibid., 13.

653 ibid., 15.

654 European Commission, "New EU Rules to Fight Insider Dealing and Market Manipulation in Europe's Financial Markets Take Effect," news release, 2016.

A non-existence of securities fraud rules demonstrates the ASEAN Way's implication that ASEAN members are not ready to relinquish a high integration intensity, especially in the area that would require a modification of domestic laws due to the difference of national interests and the level of market development. Diversities of principles and sanctions regarding market frauds can induce regulatory arbitrage in the case of the single market.[655] For ASEAN, the diversities of securities fraud rules impede investors' confidence and further outlook to develop a deeper integration as it would lead to regulatory arbitrage. Therefore, ASEAN regulators, such as ACMF, should consider to study and develop the jurisdictional mapping of the various securities fraud rules within ASEAN. Taking into account the achievement in an area of competition policy, ASEAN should initiate a regional guideline that is in accordance with the international standards for the members to voluntary adopt in to their domestic laws.

2.2.2.2. Corporate Governance Standards

ACMF has shifted the focus from harmonisation of rules and regulations to engage more on strategic issues to achieve greater integration of the region's capital markets under the ACE Blueprint.[656] ASEAN CG Scorecard is one of the products of this shift that emphasises the "bottoms up" approach rather than further harmonising continuous or ongoing disclosure rules.[657] In this regard, ASEAN CG Scorecard was introduced in 2011 as an integral part of the Implementation Plan 2009 to complement

655 The de Larosière Group, "Report of the High-Level Group on Financial Supervision on the EU," (European Union, 2009), 23.

656 Asian Development Bank, "ASEAN Corporate Governance Scorecard: Country Reports and Assessments 2013–2014," (Philippines: Asian Development Bank, 2014), viii.

657 Yee, 16.

other ACMF initiatives and promote ASEAN as an asset class. The ACMF Working Group D is responsible for this initiative led by the SS (Securities Commission Malaysia) and its members including capital market regulators and corporate governance proponents from the region.[658] The scorecard aims to raise corporate governance standards of publicly listed companies in ASEAN countries and increase their visibility to investors.[659] Ultimately, the initiative would provide foreign investors and external fund managers comparable information to form part of their investment decision-making process in ASEAN firms.[660]

ASEAN CG Scorecard is a bi-annual update on the corporate governance issue. While the 2014-2015 scorecard is due for release later in 2016 or 2017, the 2013-2014 scorecard assessed public company data from 529 publicly listed companies across six ASEAN jurisdictions – Indonesia, Malaysia, Philippines, Singapore, Thailand and Vietnam – against the G20/OECD principles. The report card compared scores on 209 questions in five areas: rights of shareholders; treatment of shareholders; disclosure and transparency; responsibilities of the board; and the role of stakeholders from 2012-13. The assessment is based on experts' assessments of corporate governance performance of public limited companies in South-East Asia region. The assessments then went through a rigorous peer review for consistency and quality control.[661]

The EU takes a different approach in dealing with corporate governance issue. Even if there is no specific corporate governance directive, the proposal for a revised

658 See Bank, "ASEAN Corporate Governance Scorecard: Country Reports and Assessments 2013–2014," 7.

659 ibid., 1.

660 ibid., x.

661 ibid.

Shareholder Rights Directive addresses some of the main issues in this area.[662] This means that the issue of corporate governance still has its legal implication on EU member states. Moreover, EU demonstrates a legalistic application of corporate governance by recognising such issue as one of the responsibilities of the EU's authority. In this regard, according to the founding regulation, ESMA may act in the field of activities of market participants, including matters of corporate governance, as long as such action is necessary to ensure the effective and consistent application of the acts.[663]

By looking at a comparative perspective, the ASEAN Way still has influence on a design and implementation of ASEAN Corporate Governance Scorecard. The reliance on flexibility principle allows partial participation in the initiative as there are only six countries joining – not ten countries. Critically, instead of imposing a regular "top-down" corporate governance initiatives that legally target the implementation at the regulator level, the ASEAN CG Scorecard is a "bottom-up" initiative that focuses at the firm level. This reality implies that such initiative will not affect the member states' sovereignty, as it does not directly require member countries to modify their domestic laws due to the regulatory harmonisation. Instead, it is a report which could results in peer pressure effect. In addition, by focusing at the firm level, there is no coordination in the development of corporate rules and guidelines within ASEAN.[664]

662 European Securities and Markets Authority, "Corporate Governance for Listed Company," https://www.esma.europa.eu/regulation/corporate-disclosure/corporate-governance-listed-companies.

663 ibid.

664 Securities Investors Association (Singapore), "ASEAN and Governance" (paper presented at the Global Corporate Governance Conference, Singapore), 7.

2.3. ASEAN Way and the Capital Movement

Capital movement liberalisation is defined as a process of dismantling legal and administrative impediments to the freedom with which economic agents can transfer ownership claims across national borders.[665] In the ASEAN's context, the capital movement liberalisation implies that an economic agent in any member state is allowed to invest in or borrow funds freely from any other member state according to economic considerations alone and that no legal or administrative formalities are imposed on the movement of capital within ASEAN.[666]

Critically, an integration of regional economic requires the capital account liberalisation as the fundamental pillar of economic convergence because it enables the savings from more developed economies to help support growth in developing economies by lowering the cost of capital.[667] Here the freedom of capital to move across borders is a prerequisite for the creation of a single ASEAN market because the free or freer movement of factors of production cannot be achieved without substantial capital movement liberalisation. Freer movement of capital must, therefore, accompany the concurrent efforts to allow the free movement of goods, services, investment, and skilled labour.[668] For trade integration, capital mobility facilitates payment for current transactions through cross-border lending and borrowing. For investment, capital movement presupposes the ability to transfer funds across borders. Free movement of skilled labour also necessitates ease in transferring

665 Bank, *The Road to ASEAN Financial Integration – a Combined Study on Assessing Financial Landscape and Formulating Milestone for Monetary and Financial Integration in ASEAN*, 13.

666 ibid.

667 ibid.

668 ibid.

funds from one country to another for a range of purposes, as the sphere of economic activities becomes regional.[669] Moreover, capital mobility helps to increase the volume of gross cross-border capital flows in the capital market.[670] It helps to increase the transaction volumes by way of the two-way capital flows with lower transaction cost that can ultimately facilitate deeper and liquid national and regional markets.[671]

The topic of ASEAN capital account liberalisation can be considered as follows.

2.3.1. ASEAN's Frameworks on Capital Movement Liberalisation

The AEC Blueprint 2008 envisages the core principles of the liberalisation of capital movements in which it is to be guided by the following principles:

"a) Ensuring an orderly capital account liberalisation consistent with member countries' national agenda and readiness of the economy;

b) Allowing adequate safeguard against potential macroeconomic instability and systemic risk that may arise from the liberalisation process, including the right to adopt necessary measures to ensure macroeconomic stability; and

c) Ensuring the benefits of liberalisation to be shared by all ASEAN countries."[672]

According to the AEC Blueprint 2008, a milestone of the liberalisation process until 2015 was to be conducted "where appropriate and possible" in connection with the foreign direct investments, portfolio investments, other types of capital flows,

669 ibid.

670 ibid., 14.

671 However, capital movement liberalisation entails risks, especially given the volatile nature of global capital flows. See further ibid., 14-15.

672 Secretariat, "ASEAN Economic Community Blueprint 2008," 15.

current account transactions and other forms of facilitation in relation to the capital flows.[673]

As a continuing process, AEC Blueprint 2015 encompasses the goals for achievement by 2025 in which the capital movement liberalisation is categorised as one of the key crosscutting areas. Under the AEC Blueprint 2015, the capital movement liberalisation will be done based on the similar principles under the AEC Blueprint 2008. In addition, ASEAN will continue to monitor the progress of capital movement liberalisation among ASEAN members by utilising the ASEAN Capital Account Liberalisation Heatmap and Individual Milestones Blueprint."[674] Under ACE Blueprint 2015, the strategic action plan from 2016 to 2025 in relation to the capital movement includes enchanting the Capital Account Liberalisation Heatmap methodology as a monitoring tool and the continuation of capital account liberalisation. For 2016 – 2020, the policy action will cover the completion of the enhanced Capital Account Liberalisation Heatmap methodology with the identification of restriction to be included in the Capital Account Liberalisation Heatmap and further liberalisation of remaining restriction on flows related to trade and direct investment. The next phrase from 2021 to 2025 will involve an implementation of the enhanced Capital Account Liberalisation Heatmap methodology and further liberalisation of the remaining restrictions on portfolio investment and other capital flows subject to domestic conditions and appropriate safeguards.[675]

673 ibid., 43.

674 "ASEAN Economic Community Blueprint 2015," 10.

675 "ASEAN Economic Community 2025 Strategic Action Plans (SAP) for Financial Integration from 2016 - 2025," ASEAN Secretariat, http://ASEAN.org/storage/2012/05/SAP-for-Financial-Integration-2025-For-publication.pdf.

As complimenting to the AEC strategic action plan, the task of liberalising capital movement, as one of the components under RIA-FIN, is under the mandate of WC-CAL.[676] WC-CAL has issued ASEAN Capital Account Liberalisation Blueprint that sets out the stages of liberalisation in accordance with the degree of risk associated with such liberalisation. Under such blueprint, the liberalisation on portfolio outflows and other types of capital flows demonstrate higher risks than other liberalisation; therefore, they were placed at the latter stage of capital movement liberalisation. According to the ASEAN Capital Account Liberalisation Blueprint, from the first running to the third stages of the liberalisation commenced from 2011 to 2015. Stage I involved the current account liberalisation aiming to remove restrictions on trade-related payments and to progressively liberalise the repatriation/surrender requirements on export proceeds. Stage II scheduled to achieve the free direct investment (inflow and outflow). Stage II targeted on the portfolio inflows in order to progressively allow residents to issue securities aboard and repatriate proceeds back to home country and to progressively allow non-resident to purchase securities. Furthermore, the forth and fifth stages focus on post-2015 until 2020. Stage IV concerns the portfolio outflows in order to progressively allow any residents (instructional investors and retail investors) to purchase equity and debt securities offshore and to progressively allow non-residents to issue securities in the domestic market. Stage V will cover the liberalisation of other types of flows so that the residents would be allowed to undertake any type of external borrowing and lending.[677]

676 See "Overview," ASEAN Secretariat.

677 ASEAN Central Bank Deputy Governors, "ASEAN Capital Account Liberalisation Blueprint," (ASEAN Secretariat, 2011).

2.3.2. Influences of the ASEAN Way on the Capital Movement Liberalisation

Capital movement liberalisation is a clear example of the influence of the ASEAN Way on the regional integration process. According to the AEC Blueprint, capital flows are treated distinctly by allowing the flexible liberalisation based on member's "readiness of the economy[678]". Therefore, the milestone of capital movement liberalisation differs from other areas (for instance, trade and investment) in that the ending timeframe of capital movement liberalisation has not been determined while the full-fledged integration was targeted for the case of goods.[679] To this extent, while it is arguable that ASEAN Capital Account Liberalisation Blueprint has subsequently set the phrases and sequences for liberalisation starting from current account, direct investment, portfolio flows, and other flows, the achievements of the commitments, however, still depends on the member countries' readiness of the economy to enable the capital movement liberalisation.[680] This means that by the end of 2025 there may be no real completion of the strategic action plan as the implementation is subject to domestic conditions and appropriate safeguards[681] and the member's "national agenda[682]". In this connection, ASEAN recognises the members' sovereign power to manage their monetary polices by allowing "safeguard" clauses to be an integral part

678 Secretariat, "ASEAN Economic Community Blueprint 2008," 15.

679 See Pariwat Kanithasen, Vacharakoon Jivakanont, and Charnon Boonnuch, "Aec 2015: Ambitions, Expectations and Challenges ASEAN's Path Towards Greater Economic and Financial Integration," in *Bank of Thailand Discussion Paper* (Bangkok, Thailand: Bank of Thailand, 2011), 27.

680 Secretariat, "ASEAN Economic Community Blueprint 2008," 15.

681 "ASEAN Economic Community 2025 Strategic Action Plans (SAP) for Financial Integration from 2016 - 2025" 9.

682 "ASEAN Economic Community Blueprint 2008," 15.

of the liberalisation process so as to ensure the "potential macroeconomic stability and systemic risk that may arise from the liberalisation process" [683]

The safeguard measures cover sound and consistent macroeconomic policies, administrative mechanisms, and capital controls.[684] The sound and consistent macroeconomic policies are commonly characterised by price stability and fiscal discipline, which is a choice between exchange rate stability and monetary independence, given the working of the impossible trinity under high capital mobility.[685] Administrative measures include restrictions on cross-border trading in forwards and derivatives and offshore currency use, mutual recognition, routine ex-post reporting requirements, authorised domestic intermediaries and registration requirements. Capital controls, in the other hand, can be imposed in emergency situations in order to stem the tide of capital inflows and the resulting appreciation pressure on the currency.[686] Capital control covers all policies influencing the volume, composition, or allocation of cross-border private capital flows that result differently from completely liberalised financial markets,[687] for instance, a requirement of certain

683 ibid.

684 Yung Chul Park and Shinji Takagi, "Creating an Integrated Market by 2015: Capital Account Liberalization in ASEAN" (paper presented at the 9th NIPFP-DEA Research Meeting on Capital Flows, New Delhi, 2011), 36.

685 ibid., 37.

686 Bank, *The Road to ASEAN Financial Integration – a Combined Study on Assessing Financial Landscape and Formulating Milestone for Monetary and Financial Integration in ASEAN*, 17.

687 Alfred Steinherr et al., "Liberalizing Cross-Border Capital Flows: How Effective Are Institutional Arrangements against Crisis in Southeast Asia," in *Working Paper Series on Regional Economic Integration No. 6* (Asian Development Bank, 2006), 3.

percentage of inflows to be deposited with the central bank for a given period of time.[688]

For ASEAN, even if capital is considerably allowed to move across the national borders, the capital mobility is still not free if it is subject to some forms of control imposed by the domestic government[689], which would ultimately prevent ASEAN from becoming ASEAN single market. Critically, the existence of safeguard clause results on many ASEAN members requiring a permission, ex-ante reporting requirements, or quantity restrictions even if permission is generally granted. Commonly, ASEAN members retain restrictions on capital flows. The members restrict oversea use of their local currencies and impose more restrictions on external borrowing than portfolio inflows (see further in Chapter IV).[690]

By comparing with the case of EU, the free movement of capital, consisting of foreign direct investment, real estate investments or purchases, securities investments, granting of loans and credits; and other operations with financial institutions[691] is one of its four freedoms that create the EU single market.[692] In 1988, the European Council issued the capital liberalisation directive[693] setting the principle of full liberalisation of

688 See Bank, *The Road to ASEAN Financial Integration – a Combined Study on Assessing Financial Landscape and Formulating Milestone for Monetary and Financial Integration in ASEAN*, 17.

689 ibid., 13.

690 Park and Takagi, 13.

691 In the absence of a definition in the treaty regarding the free "movement of capital", Court of Justice of the European Union has recognised the nomenclature annexed to the Council Directive 88/361/EEC as having indicative value. See .

692 See *Treaty Establishing the European Economic Community*, Article 67-73.

693 *Council Directive 88/361/EEC of 24 June 1988 for the Implementation of Article 67 of the Treaty Establishing the European Economic Community*.

capital movements[694] between EU countries with effect from 1 July 1990 whereby removing all remaining exchange controls by mid-1990 for most of those countries maintaining this mechanism.[695] Unlike ASEAN's goal to only allow the freer flow of capital, EU considers capital movement as one of the internal market freedoms in order to create the economic and monetary union with the entry into force of the Maastricht Treaty. From 1 January 1994, not only were all restrictions on capital movements and payments between EU member states prohibited but so were restrictions between EU member states and third countries.[696] In subsequent EU accession rounds, exchange controls have been progressively eliminated in the period before EU membership. In general, all capital movements have now been fully liberalised across the EU, although some transitional periods have been granted to some newer member states for capital operations involving the purchase of real estate.[697]

694 See ibid., Article 1.

695 European Commission, "Free Movement of Capital," http://ec.europa.eu/finance/capital/overview_en.htm#when.

696 ibid.

697 ibid.

3. ASEAN WAY AND THE REGIONAL FRAMEWORKS ON SECURITIES INTERMEDIARIES AND INVESTOR PROTECTIONS

The main purpose of this section is to answer the question concerning the impacts of the ASEAN Way on regional market participants, in particular, a creation of the regional initiative to allow an entry of securities intermediaries and the establishment of regional investor protection regime. To reach the answers, a discussion with respect to the impacts of the ASEAN Way on the regional efforts of financial service liberalisation (with a specific focus on financial services and market entry) will be firstly provided. It will then be followed with an analysis concerning investor protection in relation to portfolio investments that consists of the sub-topics of regional mechanism on investment protection and the regional cooperation on cybersecurity.

3.1. ASEAN Way and ASEAN's Frameworks on Financial Services Liberalisation

By recognising an increasing significance of trade in services, ASEAN countries officially launched their effort to work towards free flow of trade in services within the region through the signing of AFAS in 1995 by ASEAN Economic Ministers during the 5th ASEAN Summit in Bangkok, Thailand.[698] The objectives of AFAS cover three elements. The first target is to enhance cooperation in services among members in order to improve the efficiency and competitiveness, diversify production capacity and supply and distribution of services of their service suppliers within and outside ASEAN. The second objective is to eliminate substantially restrictions to trade in services among members. The third goal is to liberalise trade in services by expanding the depth and

698 See ASEAN Secretariat, "ASEAN Economic Ministers," http://ASEAN.org/ASEAN-economic-community/ASEAN-economic-ministers-aem/ASEAN-economic-ministers-aem/.

scope of liberalisation beyond those undertaken by members under the GATS with the aim of realising a free trade area in services.[699]

ASEAN service liberalisation has been accomplished through the works of AEM, which is one of the sectoral ministerial forums under the control of AEC. However, the financial services are differently put under the mandate of ASEAN Finance Ministers and Central Bank Governors Meeting[700], known as WC-FSL. WC-FSL is the official level sectoral body at the 4th AFM Meeting in 2000 to facilitate the negotiations of financial services liberalisation under the AFAS, in accordance with RIA-FIN, and to facilitate financial services liberalisation of ASEAN with its dialogue partners. WC-FSL consists of representatives from the finance ministries and the central banks of member countries is mandated WC-FSL reports to the ASEAN Finance Ministers and Central Bank Governors Meeting through the ASEAN Finance and Central Bank Deputies Meeting.[701]

Article 4(1) of the AFAS requires that members "shall enter into negotiations on measures affecting trade in specific service sectors. Such negotiations shall be directed towards achieving commitments which are beyond those inscribed in each Member State's schedule of specific commitments under the GATS and for which Member States shall accord preferential treatment to one another on an MFN basis."[702]

699 See "ASEAN Framework Agreement on Services," ASEAN Secretariat, http://investASEAN.ASEAN.org/index.php/page/view/ASEAN-free-trade-area-agreements/view/757/newsid/870/ASEAN-framework-agreement-on-services.html.

700 "ASEAN Integration in Services," (Jakarta, Indonesia: ASEAN, 2015), 12.

701 ibid., 14.

702 *ASEAN Framework Agreement on Services*, Article 4(1).

In this regard, each member "shall set out in a schedule, the specific commitments it shall undertake".[703]

From the language of Article 4 of the AFAS, members are legally obliged to enter into negotiations on measures affecting trade in specific service sectors, and the results shall be set out in schedules of commitments.[704] Initially, the negotiations were organised in rounds of negotiations, each round lasted for three years. Approaches and parameters for liberalisation were set for each respective round where the commitments would be set forth in a form of "Schedule of Specific Commitment". The results of negotiations are formalised as Packages of Schedules of Commitments under the AFAS, which provide for details of liberalisation of the services sub-sectors where commitments are made. The AFAS Packages are implemented via Protocols signed by the AEM. ASEAN has so far concluded nine packages of commitments in a wide range of services sectors under the purview of AEM. Protocols signed by the AEM and provide details of liberalisation of the services sub-sectors where commitments are made.[705]

However, according to the AEC Blueprint, an approach of financial service liberalisation is undertaken differently in a form of a sequential process to ensure an orderly financial sector development and maintain financial and socio-economic stability. The liberalisation is conducted through ASEAN Minus X formula where countries that are ready to liberalise can proceed first and be joined by others later.[706]

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703 ibid., Article 4(2).

704 "ASEAN Framework Agreement on Services" 14.

705 See ibid.

706 "ASEAN Economic Community Blueprint 2008," 12.

The process of liberalisation would take place with due respect for national policy objectives and the level of economic and financial sector development of the individual members.[707] Members shall commit to progressively liberalise sub-sectors in accordance with the targets set out in Annex I of AEC Blueprint by 2015 and progressively liberalise restrictions in the remaining sub-sectors or modes, which are not identified under "pre-agreed flexibilities", by 2020.[708] There are five additional packages of AFAS commitments in financial services which were signed by the AFM under the Protocol to Implement the (Round) Package of Commitments on Financial Services under AFAS in order to provide the legal binding effects. In achieving the targets of the AEC Blueprint, members shall progressively liberalise all sub-sector as committed. By beginning with the fifth package, all GATS and previous AFAS commitment in financial services were consolidated into a single comprehensive schedule, so-called "Consolidated Schedule of Specific Commitments on Financial Services", along with new and improved commitments made under this and subsequent packages. It should be noted, however, that the numbering of package signed by AFM starts from the second package; not the first package.

3.1.1. Relationship between ASEAN Framework Agreement on Services and General Agreement on Trade in Services

As a general principle, GATS does not prevent its members from becoming a party to agreements to liberalise the trade in services.[709] Even the negotiation through

707 ibid.

708 ibid.

709 *General Agreement on Trade in Services*, Article 5.

WTO process would influence the overall financial services liberalisation; its relationship to the regional cooperation, in particular, ASEAN, is still unclear.

The rationale of ASEAN's financial service liberalisation is structured on the milestone of GATS, which aims to extend the multilateral trading system to service sector, in the same way, GATT provides such a system for merchandise trade. Generally, GATS distinguishes between four modes of supplying services: cross-border supply, consumption abroad, commercial presence, and presence of natural persons. Cross-border supply (Mode 1) covers services flows from the territory of one member into the territory of another member (such as banking services transmitted through telecommunications or mail).[710] Consumption abroad (Mode 2) refers to situations where a service consumer moves into another member's territory to obtain a service.[711] Commercial presence (Mode 3) is a situation where a service supplier of one member establishes a territorial presence, including through ownership or lease of premises, in another member's territory to provide a service (for instance, domestic subsidiaries of foreign insurance companies).[712] The presence of natural persons (Mode 4) refers to persons of one member entering the territory of another member to supply a service.[713] In this connection, Article 4 of AFAS provides that the negotiation among members shall be directed towards achieving commitments, which are beyond those inscribed in each member's schedule of specific commitments under the GATS.[714] This

710 World Trade Organisation, "The General Agreement on Trade in Services (Gats): Objectives, Coverage and Disciplines," https://www.wto.org/english/tratop_e/serv_e/gatsqa_e.htm.

711 ibid.

712 ibid.

713 ibid.

714 *ASEAN Framework Agreement on Services*, Article 4.

implies that the principles concerning the four modes of supplying services under GATS are recognised and applied under the context of AFAS.

Article 14 of AFAS further sets out that in the situation where no specific provision in relation to the terms and definitions, the provisions of the GATS shall be referred to and applied.[715] In this regard, as there is no definition of financial services under AFAS, the provision under GATS should be read in conjunction with the AFAS for the purpose of interpretation. Under the Annex of Financial Services of the GATS, financial service is any service of a financial nature offered by a financial service supplier of a member. Financial services include all insurance and insurance-related services, and all banking and other financial services (excluding insurance).[716] According to the Annex of Financial Services of the GATS, financial services include sixteen types of services, which are:

Insurance and insurance-related services[717]:

(i) Direct insurance (including co-insurance) covering life and non-life;

(ii) Reinsurance and retrocession;

(iii) Insurance intermediation, such as brokerage and agency;

(iv) Services auxiliary to insurance, such as consultancy, actuarial, risk assessment and claim settlement services.

715 ibid., 14.

716 Bank, "ASEAN Corporate Governance Scorecard: Country Reports and Assessments 2013–2014," Article 5.

717 ibid.

Banking and other financial services (excluding insurance)[718]:

(v) Acceptance of deposits and other repayable funds from the public;

(vi) Lending of all types, including consumer credit, mortgage credit, factoring and financing of commercial transaction;

(vii) Financial leasing;

(viii) All payment and money transmission services, including credit, charge and debit cards, travellers cheques and bankers drafts;

(ix) Guarantees and commitments;

(x) Trading for own account or for account of customers, whether on an exchange, in an over-the-counter market or otherwise, the following:

(a) money market instruments (including cheques, bills, certificates of deposits);

(b) foreign exchange;

(c) derivative products including, but not limited to, futures and options;

(d) exchange rate and interest rate instruments, including products such as swaps, forward rate agreements;

(e) transferable securities;

718 ibid.

(f) other negotiable instruments and financial assets, including bullion.

(xi) Participation in issues of all kinds of securities, including underwriting and placement as agent (whether publicly or privately) and provision of services related to such issues;

(xii) Money broking;

(xiii) Asset management, such as cash or portfolio management, all forms of collective investment management, pension fund management, custodial, depository and trust services;

(xiv) Settlement and clearing services for financial assets, including securities, derivative products, and other negotiable instruments;

(xv) Provision and transfer of financial information, and financial data processing and related software by suppliers of other financial services;

(xvi) Advisory, intermediation and other auxiliary financial services on all the activities listed in subparagraphs (v) through (xv), including credit reference and analysis, investment and portfolio research and advice, advice on acquisitions and on corporate restructuring and strategy.

In this regard, WTO requires that the financial services of all sixteens areas be liberalised through four modes whereby there must me a removal of measures restraining the market access and national treatment. According to Article 16 of the GATS, there are six requirements in relation to the removal of measures restraining the market access, as follows:

(a) limitations on the number of service suppliers;

(b) limitations on the total value of service transactions or assets;

(c) limitations on the total number of service operations or on the total quantity of service output;

(d) limitations on the total number of natural;

(e) measures which restrict or require specific types of legal entity or joint venture through which a service supplier may supply a service; and

(f) limitations on the participation of foreign capital.[719]

For the national treatment, members shall accord to services and service suppliers of any other members, in respect of all measures affecting the supply of services, treatment no less favourable than that it accords to its own like services and service suppliers.[720]

Significantly, AFAS adopts the principles under the GATS whereby Article 3 of AFAS requires members to eliminate substantially all existing discriminatory measures and market access limitations and prohibit new or discriminatory measures and market access.[721] This means that AFAS follows the GATS's principles of market access and national treatment. It moreover recognises the principle of most-favoured-nation treatment, under Article 2 of GATS[722], for other ASEAN members.

719 See *General Agreement on Trade in Services*, Article 16.

720 ibid., Article 17.

721 *ASEAN Framework Agreement on Services*, Article 3.

722 *General Agreement on Trade in Services*, Article 2.

3.1.2. Impacts of the ASEAN Way on Financial Services Liberalisation

At the first place, ASEAN services liberalisation was initially based on the flexibility principle. ASEAN had adopted the principle of ASEAN Minus X formula for negotiating services liberalisation. This approach originated from the decision of the AEM Retreat on 2002. Under ASEAN Minus X formula, two or more ASEAN members may proceed to liberalise an agreed services sector/sub-sector and without having to extend the concessions to non-participating members. Other ASEAN members may join at a later stage; or whenever they are ready to participate.[723] However, the launch of AEC Blueprint in 2008 marked a significant change in the liberalisation process where the liberalisation commitments were based on clear targets and timelines as outlined in the trade in the services section of the AEC Blueprint 2008 as well as other subsequent decision from the AEM.[724] From this point, the dynamic evolution of the ASEAN Way can be observed as the regional initiative on services liberalisation has moved away from a flexible approach to rely on the rule-based commitments (but still subject to the pre-agreed flexibilities).

However, financial services are treated differently from other service sectors. Here, the flexibility principle, in particular, ASEAN Minus X formula[725], is still applied in the liberalisation plan due to the sensitivities to other economic sectors and the differences in the financial development of members.[726] Here, members that are ready to liberalise can proceed first and can be joined by other members at a later stage.

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723 See Secretariat, "ASEAN Framework Agreement on Services" 16.

724 ibid., 17.

725 "ASEAN Economic Community Blueprint 2008," 12.

726 See Kanithasen, Jivakanont, and Boonnuch, 27.

Moreover, even the process requires a progressive liberalisation of the remaining by 2020; the members are still allowed to maintain the restrictions as negotiated and agreed in the list of pre-agreed flexibility, which eventually means that the end of the regional financial liberalisation has not been determined yet.[727]

It can be argued that opening of financial services without regard for sequencing and safeguards can be a precursor to excessive volatility and was a consideration in the Asian financial crisis. However, an analysis of recent crises indicates the essential function of institutions, including the law, enforcement, regulation and legal systems in lessening or making manageable the risks associated with financial liberalisation.[728] To deal with this issue, according to the AEC Blueprint 2008, all financial services liberalisation measures are subject to the prudential measures and balance of payment safeguards as provided for under the GATS.[729] The safeguard clauses are seen as an integral part of the liberalisation process. On the other side of the coin, it would, however, allow members to enable a protectionist policy[730] on financial services liberalisation, which eventually can slow down the integration process. In the context of ASEAN financial services, the key challenges of liberalisation process are whether the local financial firms are ready to compete with foreign-owned financial institutions and whether they can operate abroad. In other words, to the extent that financial services liberalisation in ASEAN will be successful and provide benefits to all member countries, this depends on whether members are able to meet those two

727 ibid.

728 Arner, Lejot, and Wang, 38.

729 Secretariat, "ASEAN Economic Community Blueprint 2008," 11.

730 See, for instance, Aaditya Mattoo and Sacha Wunsch-Vincent, "Pre-Empting Pretectionism in Services: The Gats and Outsourcing," *Journal of International Economic Law* 7, no. 4 (2004): 765-800.

challenges.[731] Interestingly, China's WTO accession commitments are more extensive than those of other most other developing economies. As a part of ASEAN+3, China's influence may result in a lead to broader financial services liberalisation among ASEAN+3 members that currently maintaining more restrictive GATS commitments.[732]

The EU undertook a different approach of financial services liberalisation. By maintaining the prudential regulation, the EU liberalisation of financial services sectors aimed to achieve the Single Market in financial services where all national legal and regulatory obstacles to the cross-border sale or purchase of financial services across all EU members have been removed.[733] The creation of a common market in financial services in EU is based on two principles. First, a system of mutual recognition, so that each member recognises the regime applied to another member as broadly equivalent. Second, the replacement of national rules with EU rules and convergence of supervisory practices.[734] EU adopted MiFID in 2004, replacing the Investment Services Directive, which later came into force in 2007. The MiFID aim is to improve the competitiveness of EU financial markets by creating a single market for investment services and activities and ensuring a high degree of harmonised protection for

731 See Tulus Tambunan, "The Challenges of Financial Services Liberalization and Integration in ASEAN," in *TREATI Seminar Series Financial Services & Telecoms* (Bangkok, Thailand: Center for Industry and SME Studies, University of Trisakti, Indonesia, 2008), 8.

732 Arner, Lejot, and Wang, 38.

733 See Her Majesty's Treasury, "Single Market: Financial Services and the Free Movement of Capital," in *Review of the Balance of Competences* (London, UK2013), 13.

734 ibid., 14.

investors in financial instruments, such as shares, bonds, derivatives and various structured products.[735]

The concept of mutual recognition has played a central role in the development of European common market in financial services from the late 1980s until today. According to MiFID, the provisions concerning "Home Member State" and "Host Member State"[736] create a single market by enabling financial services firms authorised in one member (home state) to carry on business in any other member (host state) without the need for a separate host state authorisation either by establishing a local branch or on a cross-border basis. This is referred to as the "passport" system (as discussed earlier in section 2.2.1. above). The directives also establish the respective responsibilities of home and host state regulators for business with a cross-border element and provide a framework for regulators to cooperate with each other, both in relation to routine supervisory activities and in special cases such as changes of control, recovery and resolution planning and investigations.

For ASEAN, AFAS recognises the principle of mutual recognition whereby each member can "recognise the education or experience obtained, requirements met, or licenses or certifications granted[737]" by other members for the purpose of licensing or certification of service suppliers. Such recognition may be based on a bilateral or

735 See European Commission, "Investment Services and Regulated Markets (Mifid 1 & Mifid 2)," http://ec.europa.eu/finance/securities/isd/index_en.htm.

736 *Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on Markets in Financial Instruments Amending Council Directives 85/611/Eec and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and Repealing Council Directive 93/22/EEC*, Article 4.

737 *ASEAN Framework Agreement on Services*, Article 5.

multilateral arrangement.[738] In relation to the capital market, the Implementation Plan 2009 has envisaged the commitment of ACMF to develop the ASEAN Mutual Recognition Guidelines to provide broad principles to govern and support the mutual recognition and harmonisation among ACMF member countries.[739] Crucially, taking into account diverse levels of capital market development and readiness amongst ASEAN countries, the mutual recognition initiatives are implemented bilaterally first and then multilaterally depending on the readiness to join in whereby focusing on the non-retail investor first and subsequently the retail investor.[740] The crucial point is that the creation of a mutual recognition regime for financial services would be based on the readiness of members where Article 5 of AFAS explicitly provides that there is no requirement that any members shall accept or enter into mutual recognition agreements or arrangements.[741]

By reading from the provision of AFAS and languages of the Implementation Plan 2009, it is obvious that the process is based on a flexible approach where ASEAN members are not legally required to negotiate and enter into the mutual recognition arrangement. Even in the case where there is a mutual recognition agreement, it would only be applicable on the specific issue only to facilitate the flow of services under AFAS. Until now, ASEAN has concluded and signed mutual recognition only in the professional services covering: Mutual Recognition Agreement on Engineering Services, Mutual Recognition Agreement on Nursing Services, Mutual Recognition Agreement on

738 ibid.

739 See Forum, "Implementation Plan to Promote the Development of an Integrated Capital Market to Achieve the Objectives of the Aec Blueprint 2015," 8.

740 ibid., 9.

741 See *ASEAN Framework Agreement on Services*, Article 5.

Architectural Services and Framework Arrangement for the Mutual Recognition of Surveying Qualifications, Mutual Recognition Agreement on Medical Practitioners, Mutual Recognition Agreement on Dental Practitioners, Mutual Recognition Agreement Framework on Accountancy Services, and Mutual Recognition Agreement on Tourism Professionals.[742]

By focusing on the professionals, the current ASEAN mutual recognition regime does not include other types of recognition mechanisms, in particular, the license to operate as securities intermediaries in the same manner as MiFID does for the EU. In relation to services related to capital markets, ACMF has launched the cross-recognition on education and experience of market professionals by granting fast-track authorisation to foreign market professionals already authorised in another jurisdiction by recognising their home certifications based on agreed policy issues. In this connection, the securities regulators of Singapore and Thailand signed a Memorandum of Understanding in 2007 to establish a framework for the mutual recognition of the product knowledge examination required for market professionals dealing with securities and collective investment schemes in Singapore and Thailand.[743] It could be further observed that the fact of having Singapore and Thailand in such arrangement implies the reliance on the flexibility approach under the ASEAN Way.

742 See Clearstream, "Investment Regulation - Philippines," http://www.clearstream.com/clearstream-en/products-and-services/market-coverage/asia-pacific/philippines/investment-regulation---philippines/6704.

743 See Monetary Authority of Singapore, "Securities and Futures Act (Cap. 289): Frequently Asked Questions on Mutual Recognition of Mas and Thai Sec Product Knowledge Examinations," ed. Monetary Authority of Singapore (Singapore2010), 1-4.

3.2 ASEAN Way and the Regional Investor Protections Mechanisms

Theoretically, all investors should have free access to all investment products and would have the right to decide for themselves which products to buy, or which provided them with the best combinations of risk and return. The investment decision should be deliberately made by considering the investors' current and expected income, current portfolio of assets and obligations and their acceptable risk level. Vice-versa, the asset providers would provide a range of investment products that meets investors' demands and consequently, the investor would be responsible for any loss arising from their investments.[744] However, the reality of the marketplace is far more complicated. Not every investor has access to the same information and will be equally capable of evaluating such information. Moreover, the providers of investment products are not always honest and straightforward in their dealings with investors. They seem to have more critical information on the offered products than consumers do and, at the same time, may often have an economic incentive not to reveal such information to consumers. Therefore, the governments and regulators are responsible for dealing with these market complexities, or at least to balance the perceived costs of doing nothing to protect investors against the perceived benefits of proactive intervention to protect them.[745] In such situation, policymaking of financial regulation involves a philosophic tug of war between: (i) regulatory capitalism versus (ii) free market ideology.[746] The regulatory intervention itself is costly. Moreover, the

744 See Franklin R. Edwards, "Hedge Funds and Investor Protection Regulation," in *Federal Reserve Bank of Atlanta Financial Markets Conference "Hedge Funds: Creators of Risk?"* (Sea Island, Georgia: Columbia Business School), 3.

745 ibid., 4.

746 Phillip Wood, *The Law and Practice of International Finance* (Thomson Reuters, London 2007) 341

potentially large cost of investor protection regulation is that it may preclude a certain class of investors from participating in certain investment products.[747]

In the ASEAN context, ASEAN policy-makers are aware of the importance to create confidence to investors making a portfolio investment in ASEAN. Therefore, the consideration of the regional arrangements in relation to the investor protection of portfolio investments and the policy implication in the light of the ASEAN Way are to be subsequently discussed. This research will further consider the issue regional cooperation on cybersecurity and cybercrime due to the fact the nature capital market is at the forefront of technological developments, for instance, the trading of securities occurs essentially through purely electronic systems, and at speeds unparalleled to those involving human interactions.

3.2.1. Regional Mechanisms on Investor Protection

The regional mechanism in relation to portfolio investment protection is found under ACIA, which is an ASEAN agreement being effective from 2012. In principle, ACIA is applicable to measures adopted or maintained by ASEAN members in relation to investors of different ASEAN members and any investments, in its territory, of an investor of a different ASEAN state which have existed as of 29 March 2012 or after.[748]

In order to gain benefit from ACIA, an investment must be within the definitions of "investment" and "covered investment" as defined under Article 4 of ACIA.[749] In this regard, an investment in shares, stocks, bonds and debentures and any other forms

747 See Edwards, 5.

748 *ASEAN Comprehensive Investment Agreement*, Article 3.

749 ASEAN Secretariat, *ASEAN Comprehensive Investment Agreement (ACIA) – a Guidebook for Businesses and Investors* (Jakarta, Indonesia: ASEAN, 2013), 4.

of participation in a juridical person and rights or interest derived therefrom[750], such as shares, bonds held in a company or corporation[751] is considered as within the scope of "investment". It also includes claims to money or to any contractual performance related to a business and having financial value,[752] such as profit sharing agreement or partnership agreement.[753]

According to Article 4 of ACIA, "covered investment" can be understood as investments in another ASEAN members which existed as of 29 March 2012 (the date of ACIA's entry into force) or established, acquired or expanded thereafter, and admitted according to the laws, regulations and national policies of the host ASEAN members.[754]

ACIA is the result of a merger between two previous agreements, namely, ASEAN IGA and the AIA into a single comprehensive investment agreement.[755] ASEAN IGA is an investment guarantee agreement among signatory ASEAN members and focuses on the protection and promotion of investments. It does not explicitly categorise the types of investments to be covered under ASEAN IGA; therefore, all types of investments that meet the conditions under ASEAN IGA would receive benefit

750 *ASEAN Comprehensive Investment Agreement*, Article 4(c).

751 *ASEAN Comprehensive Investment Agreement (ACIA) – a Guidebook for Businesses and Investors*, 5.

752 The investment does not mean claims to money that arise solely from commercial contracts for sale of goods or services; or the extension of credit in connection with such commercial contracts. *ASEAN Comprehensive Investment Agreement*, Article 4(c).

753 *ASEAN Comprehensive Investment Agreement (ACIA) – a Guidebook for Businesses and Investors*, 6.

754 *ASEAN Comprehensive Investment Agreement*, Article 4(a).

755 OECD, "Southeast Asia Investment Policy Perspectives," in *Investment Policy Review* (2014), 25.

arising from such agreement.[756] Differently, AIA is only limited to foreign direct investment and does not cover portfolio investments.[757] Before ACIA, an interaction of liberalisation and protection provisions of ASEAN was considered separately through both ASEAN IGA and AIA. ACIA therefore simplifies and clarifies the ASEAN investment regime in a manner that provides a clear interaction of liberalisation and protection provisions.[758] It also provides an inclusion of portfolio investment due to the importance of portfolio investment that can yield the overall regional economic development. However, having due regard to economic development and readiness of members, ACIA allows for a reservation in relation to the portfolio investment protection under Article 9.[759]

The investors under ACIA can be either a natural person or a juristic person that is making or has made an investment in the territory of any other ASEAN member. [760] Interestingly, the scope of the definition of investors under ACIA is wider than the scope of the definition in both ASEAN IGA and AIA, which only cover ASEAN natural persons.[761] According to ACIA, a natural person must be a national, citizen, or permanent resident of ASEAN members while a juristic person can be any legal entity established under the law of an ASEAN members.[762] However, ASEAN members may make a reservation

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756 See Thanyaluck Thongrompo, "Analysis of 2009 ASEAN Comprehensive Investment Agreement: Study on Development of ASEAN Investment Liberalisation and the Advisability for Thailand to Become Its Party" (Thammasat University, 2011), 38.

757 ibid.

758 See OECD, 25.

759 See *ASEAN Comprehensive Investment Agreement*, Article 9.

760 See ibid., Article 4(d).

761 See Thongrompo, 39.

762 See *ASEAN Comprehensive Investment Agreement*, Article 4(e) and (g).

in relation to the protection of permanent resident of ASEAN members under the list of horizontal section.[763]

ACIA covers the protection for any investors from outside ASEAN; it includes setting up a juridical entity in any one of the ASEAN members in order to be considered as a juristic person under ACIA. This is due to an aspiration to expand the scope under ASEAN IGA and AIA to cover the ASEAN-based foreign investors who have a substantive business operation in order to attract investment flows into the region. However, such provision is subject to the reservation under the horizontal section.[764] The third-country national or legal entity must own or control (have the power to name a majority of its directors or legally direct the actions of) such juristic person. The latter must also carry out substantive business operations in the ASEAN members where it was first established.[765]

ACIA is constructed on the principle of non-discrimination, comprised of the principles of national treatment and most-favoured-nation treatment and the freedom to appoint senior management and boards of directors.[766] According to ACIA, ASEAN-based investors can now benefit from state-of-the-art provisions for the treatment of investment and investors, which are enforceable by an effective investor-state dispute settlement (ISDS) system.[767] The benefit of protections under ACIA includes the National Treatment and Most-Favoured-Nation treatment, meaning that the members

763 See Thongropo, 41.

764 ibid., 42.

765 See Secretariat, *ASEAN Comprehensive Investment Agreement (ACIA) – a Guidebook for Businesses and Investors*, 5.

766 OECD, 26.

767 ibid.

will not treat ASEAN investors less favourably than either local or foreign competitors (or like businesses). At the same time, ACIA allows ASEAN investors to select senior management, irrespective of their nationalities, to manage their investments in ASEAN. ACIA also prohibits ASEAN members from imposing any performance requirement, such as a production quota or export target, on any ASEAN investors and their investments.[768] In the event of any conflict with host governments, ASEAN investors are given the option of resolving the disputes through alternative dispute settlement mechanisms or referring the dispute to domestic courts or to binding international arbitration.[769] ACIA also provides investors with guarantees of full protection and security, fair and equitable treatment, compensation in case of strife, protection against unlawful expropriation and the right to the free transfer of funds.[770]

3.2.2. The Policy Consideration of Investor Protection Arrangement in the Light of the ASEAN Way

By looking at the policy level, an investment treaty is a "grand bargain" between a promise of protection for the prospect of investment flows whereby the host country is obliged to ensure the protection of foreign investment and the limitation of the sovereignty of host country in order to protect the incoming investment.[771] By considering the forms, the international investment agreement initially took the form of bilateral investment treaties that concern the protection of

768 Secretariat, *ASEAN Comprehensive Investment Agreement (ACIA) – a Guidebook for Businesses and Investors*, 8.

769 ibid., 9.

770 *ASEAN Comprehensive Investment Agreement*, Article 13.

771 See Pariwat Kanithasen, "Safeguarding Public Policy Space in International Investment Agreements: An ASEAN Perspective," *Thammasat Review of Economic and Social Policy* 1 (2015): 10.

the already-established investments in the host country.[772] Subsequently, the development of free trade agreements, in particular, NAFTA, makes investment chapters as an incorporated part of the free trade agreements as a supplement to trade in goods and services liberalisation.[773]

Due to the non-existence of a multilateral investment agreement at the global scale, there is a growing proliferation of bilateral investment agreements[774] in several forms. Among other, the soft-law approach under the OECD Declaration on International Investment and Multinational Enterprises, APEC Non-Binding Investment Principles and APEC Investment Transparency Standards set up the principles related to investments that have no binding effects – even though they may be politically enforceable through peer pressure.[775] Differently, an incorporation as the investment chapter in the free trade agreements, in particular Chapter 11 on Investment under NAFTA and Colonia Protocol for the Reciprocal Promotion and Protection of MERCOSUR (Southern Common Market) Investments, create legally enforceable rules in relation to the scope of investments and investors to be protected, binding obligation in terms of standard treatments (such as expropriation and compensation) and a mechanism of dispute settlements.[776]

Another form of investment agreement is a sector-specific investment agreement. In this connection, GATS contain investment provisions on selected areas

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772 See ibid., 11.

773 ibid.

774 See ibid., 12.

775 See Sophie WERNERT, "Analysis of Regional Investment Frameworks Worldwide" (paper presented at the MENA-OECD Investment Programme, Amman, Jordan, 2010), 7-9.

776 See ibid., 9.

and measures relating to trade, for instance, the transfer of fund provision under Article 11 of GATS.[777] In addition, Energy Charter Treaty of 1994, which is an international agreement that establishes a multilateral framework for cross-border cooperation in the energy industry, contains provisions on trade, energy-sector investment, energy efficiency and environmental considerations. It further articulates sovereignty over natural resources and the openness to foreign investment and grants a series of protective rights for investors, including a dispute settlement mechanism.[778]

Various forms of the instrument contain a different degree of obligation, binding character and enforcement.[779] In this regard, the most advanced form of investment agreement is the comprehensive agreement[780] where ACIA is one of the most ambitious regional tools to date. As discussed, the development of ACIA with reference to its two predecessors makes ACIA more comprehensive than the two predecessors, with updates from best international practices. It includes substantive protection provisions as well as pre-establishment national treatment and Most-Favoured Nation provisions with a positive list approach, as well as a timeline for investment liberalisation. It also has a more advanced dispute settlement mechanism.[781]

At the policy level, ASEAN's achievement in developing the regional approach of protection and liberalisation of investment creates an opportunity to accelerate the harmonisation and standardisation of investment policies of ASEAN members. It also provides an opportunity for rationalising the international investment agreements

777 See *General Agreement on Trade in Services*, Article 11.

778 See *Energy Charter Treaty of 1994*.

779 See ibid., 13.

780 See ibid., 11.

781 ibid., 12.

regime.[782] OECD observes that ASEAN stands as a frontrunner in innovations of investment-rule making which would have some spillover benefits at a domestic regulatory level as it has spread awareness of the need to modernise some investment rules.[783] A replacement of ASEAN respective bilateral investment treaties with an investment chapter of the regional agreement would consolidate the global treaty network and thus ease the harmonisation between investment treaty policies and domestic investment regulations.[784] However, it would require adding ASEAN treaties to the existing network of bilateral treaties leading to a multiplication of treaty layers.[785]

In the light of the ASEAN Way, an achievement of ACIA demonstrates a dynamic relationship between the ASEAN Way and the regional integration where the elasticity of the ASEAN Way, as a regional mechanism, is flexible enough to deal with the rising mutual concern of ASEAN members to promote the regional economic development by attracting the investment flows within the region, which would impact the ability of host country in order to protect the incoming investment at the same time. Critically, ACIA has advanced concerns on the protection of states' interests, compared to the previous regimes whereby balancing the combating notions between the respect of sovereignty and the regional necessity of improving investment protection mechanism. With an aspiration to improve the investment provisions of the ASEAN IGA and AIA, ACIA provides clearer substantive provisions and establishing more comprehensive dispute settlement mechanisms. Therefore, ACIA will support a more competitive and

782 See OECD, 28.

783 ibid., 36.

784 See ibid., 28.

785 ibid.

attractive investment atmosphere, which will also restore ASEAN investors' confidence after the 1997 Asian financial crisis.[786] By recognising the needs of quality investments for sustainable development, ACIA gives more regulatory space to carry out public-purpose measures (especially in extraordinary circumstances). [787] It further allows members to make a reservation and grants more flexibility, especially for CLMV countries.

Interestingly, the investor state dispute settlement mechanism under ACIA has been used against the Thai government. As revealed on August 2014, major Malaysian investors of Tongkah Harbour Public Company Limited – a Thai listed minding company, have established investor state dispute settlement under ACIA as a result of a dispute between Tongkah Harbour Company Limited (a group company of Tongkah Harbour Public Company Limited) and local community of Wang Sa Pung District, Loei Province. The local community has blocked Tongkah Harbour Company Limited from distributing gold production from the company's minding site which eventually incurred business loss to Tongkah Harbour Public Company Limited (as the mother company). However, further details regarding the dispute solution have not been disclosed by the Thai government.[788]

In order to achieve the harmonisation of investment regime, only an introduction of ACIA is not sufficient but it needs to compliment with an enactment or modification of domestic laws. The amendment of ASEAN investment agreements

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786 See Pakittah Nipawan, "The ASEAN Way of Investment Protection: An Assessment of the ASEAN Comprehensive Investment Agreement" (University of Glasgow, 2015), 210.

787 See further ibid.

788 "ผู้ถือหุ้น"ทุ่งคา"ยื่นฟ้องรบ. ก.ล.ต.มีนปมต้านเหมืองทองคำจ.เลยบานปลาย," *Prachachat* 2014.

reflects a successive stage of development that is more advanced than other regional cooperation. ASEAN opts for a top-down approach to the legal harmonisation process in view of achieving the ASEAN Economic Community.[789]

However, the conventional the ASEAN Way of respecting member sovereignty and allowing flexibility can still be observed where the CLMV countries are granted special and differential treatment that permits them to execute their ACIA commitments in accordance with their stage of development.[790] The ASEAN's style of institutional arrangement of having no enforcing authority makes the implementation of ACIA difficult. ASEAN members have a lack of domestic ownership of the legal reforms. The flexibility process raises a question regarding feasibility as the harmonisation is undertaken among countries at very different levels of development. Eventually, an effective implementation of ACIA depends on members' willingness to undertake regulatory reforms in line with the provisions of ACIA.[791]

3.2.3. Cybersecurity

Increasing and pervasive uses of technologies bring products and services at lower costs as well as create convenience, speed and reliability. By realising this importance, ASEAN has established some institutional and regulatory mechanisms on cybersecurity and cybercrimes prevention. Essentially, AMMTC is a meeting at ASEAN Ministerial level that reviews works by various ASEAN bodies on transnational crimes. It sets the pace, direction for regional collaboration on combating such crime.[792] There,

789 See OECD, 27.

790 See ibid.

791 ibid., 28.

792 ASEAN Secretariat, "ASEAN's Cooperation on Cybersecurity and against Cybercrime" (paper presented at the Octopus Conference: Cooperation Against Cybercrime, Strasbourg, France, 2013), 3.

ASEAN Ministers of Interior/Home Affairs signed ASEAN Declaration on Transnational Crime in 1997 during the first AMMTC. During the third AMMTC held in 2001 in Singapore, ASEAN Ministers responsible for transnational crime agreed to include cybercrime in the Work Programme to Implement the ASEAN Plan of Action to Combat Transnational Crime. AMMTC's function is complemented by the work of SOMTC whose main functions are to review policy strategies and implementation of SOMTC's work programmes and report the development of their work to AMMTC.[793] Cybercrime is incorporated as a component under the Work Programme to Implement the ASEAN Plan of Action to Combat Transnational Crime—which introduced the cybercrime component as adopted by the second SOMTC in 2002. The 9th AMMTC in 2013 has further endorsed such SOMTC's creation of the new working group on cybercrime.

Apart from AMMTC and SOMTC, the issue of cybercrime has been brought under ARF, which is a forum to foster constructive dialogue and consultation on political and security issues of common interest and concern and to make significant contributions to efforts towards confidence-building and preventive diplomacy in the Asia-Pacific region.[794] In 2006, ARF issued a Statement on Cooperation in Fighting Cyber Attack and Terrorist Misuse of Cyber Space to work together to improve their capabilities to adequately address cybercrime including the terrorist misuse of cyber space. In 2012, ARF further issued Statement on Cooperation in Ensuring Cyber Security that covers measures to intensify regional cooperation on security in the use of information and communication technologies.

793 ibid., 7.

794 ibid., 3.

Another successful ASEAN cybersecurity initiative was achieved by TELMIN. At the senior official meeting in 2003, TELMIN adopted the Singapore Declaration, stating that each member state should set up its own CERT by 2005 as an official point of contact for dealing with computer security incidents in Internet community. [795] Although this goal was not completed on time, today all member states have their own CERT. The effectiveness of each national CERT is reliant heavily upon individual national resources and capabilities, further perpetuating intra-bloc asymmetry instead of cultivating political and legal harmonisation. Moreover, the 10th TELMIN in 2011 adopted the ASEAN ICT Master Plan 2015. In this regard, an initiative under the master plan requires ASEAN members to further put in place: (i) an implementation of common minimum standards for network security to ensure a level of preparedness and integrity of networks across ASEAN, (iii) establishment of the ASEAN Network Security Action Council to promote CERT cooperation and sharing of expertise, and (iii) sharing of best practices on the protection of data and information infrastructure across ASEAN.

Significantly, cybersecurity and cybercrime policies primarily function as mechanisms that support ASEAN's growing economy with the main purpose to limit crimes that obstruct the further development of legal business channels.796 This scenario demonstrates ASEAN's function as a regional trade group rather than demonstrating an aspiration of creating a pathway towards the political integration with the formal institution. With ten member states consisting of different levels of

795 ibid., 10.

796 Stacia Lee, "ASEAN Cybersecurity Profile: Finding a Path to a Resilient Regime," University of Washington, https://jsis.washington.edu/news/ASEAN-cybersecurity-profile-finding-path-resilient-regime/.

development, types of governance, and political attitudes, it is extraordinarily difficult to produce unanimously approved legislation[797] on a consensus basis. So while initiatives such as e-ASEAN, the Declaration on Transnational Crime, and TELMIN appropriately discussed the need for stronger, integrated cybersecurity development and coordination, the lawmaking process in relation to such concerns at both ASEAN and national levels is limited.

The approach of dealing with cybersecurity in EU significantly differs from the approach in ASEAN in an aspect that has been implemented through a clear formal institution with binding effect. In this regard, the European Parliament adopted the Directive on Security of Network and Information Systems[798] as a cooperation milestone between member states on the vital issue of cybersecurity. The directive lays down security obligations for operators of essential services (in critical sectors such as energy, transport, health and finance) and for digital service providers (online marketplaces, search engines and cloud services). Each EU country will also be legally required to designate one or more national authorities, to set up a Computer Security Incident Response Team and networks and to establish a strategy for dealing with cyber threats.[799] In this connection, the European Union Agency for Network and Information Security was set up to support policy-making and implementation, and

797 ibid.

798 See *Directive (EU) 2016/1148 of the European Parliament and of the Council of 6 July 2016 Concerning Measures for a High Common Level of Security of Network and Information Systems across the Union*.

799 European Commission, "The Directive on Security of Network and Information Systems (NIS Directive)," https://ec.europa.eu/digital-single-market/en/network-and-information-security-nis-directive.

work closely together with members and private sector to deliver advice and solutions.[800]

The regional cybersecurity initiatives reflects a strong influence of the ASEAN Way. An adherence on sovereignty and non-interference means the there is no formal rule-making body at the ASEAN level to create and implement a harmonisation of cybersecurity and cybercrime laws. ASEAN's institutional structure on cybersecurity and cybercrime is a good example of the ASEAN style of creating a "multi-cooperating bodies" that are plentiful in name but sparse in potency. There is no centralised authority and single coordination procedure across ASEAN and national organisations.

To this extent, some ASEAN nations are wary of supranational organisations and are hesitant to allocate any part of their sovereignty to a regional body, resulting in political organs ill-equipped to achieving their goals.[801] As an example of this is the case of AMMTC, which was created to oversee the implementation of the 1997 Declaration on Transnational Crime. However, the AMMTC does not have the power to force individual member states into updating the national law and policing to adequately address transnational crime. In addition, AMMTC also lacks effective coordination capabilities critical to the prosecution of transnational crime and cybercrime, with neither ASEAN bodies, such ARF, nor the national police and/or agencies.

800 See European Union Agency for Network and Information Security, "About ENISA," https://www.enisa.europa.eu/about-enisa.

801 See Lee. above

4. CONCLUSION: ASEAN WAY AND ITS IMPACTS TO THE REGIONAL CAPITAL MARKET INTEGRATION

This research has found that the governance of ASEAN has significantly shifted from an absence of regional governance system, from the pre-Charter period, to an establishment of regional governance system under the ASEAN Charter. The ASEAN Way has significantly influenced the institutionalisation and legalisation processes of ASEAN. Accordingly, this research has identified the impacts of the ASEAN Way on the regional integration in several aspects.

The first part of this Chapter has identified the impacts of the ASEAN Way on the regional institutional architecture where the findings are as follows:

1. ASEAN capital market integration comprises of a complex structure of state cooperation based on consensus, consultation[802] and flexibility.[803] The regional cooperation architecture is structured in a form of "multi-cooperating bodies"[804] – rather than being centralised to one authoritative institution — and enables deliberate choice of the consensual adoption of member states. Critically, the ASEAN Charter assigns neither any coercive authorities nor any supranational style of having rule-making organs. The cooperation of ASEAN is based on the complexity of "agreement web" instead of supranational authority. ASEAN allows the regional economic cooperation to develop flexibly[805], which undermines the rule of law and ASEAN's seriousness to integrate.[806]

802 *Charter of the Association of Southeast Asian Nations*, Article XX.

803 ibid., Article XXI.

804 See further Singh, 29-30.

805 *Charter of the Association of Southeast Asian Nations*, Article 21(2).

806 Ewing-Chow and Hsien-Li, 5.

2. The ASEAN Way not only dominates the behavioral interaction among the ASEAN member states but also interpenetrates other actors beyond the institutional frameworks of ASEAN, such as ASEAN+3. Even if the ASEAN Way can provide a comfort level for all members to participate in the cooperation, the regime does not prepare to relinquish the high degree of national policy control.

3. The regional market infrastructures were constructed on the basis of the ASEAN Way. Obviously, ASEAN Trading Link was put up on a coordination and flexible process rather than imposing a strict commitment/timeframe on members.[807] The implementation of the ASEAN Trading Link hence depends on the level that members are comfortable to connect with "plug and play" infrastructure.[808] Therefore, a separation of ASEAN markets still exists. Moreover, ASEAN is still working on post-trade cooperation frameworks and the result is speculative.

4. The development of market infrastructures on debt securities, ABMI and ABMF, historically were not actively led by ASEAN itself yet developed together with other ASEAN partners. The implementation of the initiatives still depends on the member's willingness to commit to such initiatives. Surprisingly, the ABFs, demonstrates a unique regional innovation. For the post-trade infrastructure, there is no infrastructure connectivity existing between any of ASEAN CDSs or CCPs.

In the second part of this Chapter, this research has pointed out the impacts of the ASEAN Way on the attempts to create regional laws, especially the regulations

807 Forum, "Implementation Plan to Promote the Development of an Integrated Capital Market to Achieve the Objectives of the AEC Blueprint 2015," iii.

808 Hsu and Kien, 21.

of capital market and the regional approach of regulatory harmonisation. The research has found that:

1. Even the creation of the ASEAN Charter marked a significant step of the regional legalisation process; the existing institutional structure demonstrates neither an aspiration nor a readiness to move towards “community laws” for deeper integration. Therefore, ASEAN only hints at some degree of legalisation of community law, which has lesser intensity than the EU.
2. To date, ASEAN has issued a series of regulatory initiatives on capital market integration. For disclosure and product distribution, ASEAN has significantly improved a harmonisation of prospectus requirements, which was previously in a form of ASEAN Standards altogether with the Plus Standards. ASEAN Disclosure Standards and Streamline Review Framework ease and improve cost savings to all issuers who make multi-jurisdictional offerings of plain equity and debt securities that require the registration of prospectuses or registration statements within ASEAN. Apart from that, ASEAN CIS Framework enables the units of an ASEAN CIS[809] authorised in its home jurisdiction to be offered in other host jurisdiction under a streamlined authorisation process.[810]
3. However, the mechanisms of ASEAN Disclosure Standards and ASEAN CIS Framework are not the automatic mutual recognition system. They also do not standardise the liability for a person related to the offering, as the regulatory

809 ASEAN CIS means CIS constituted or established in its Home Jurisdiction which has been Approved by its Home Regulator for offer to the public in the Home Jurisdiction, and assessed by its Home Regulator as suitable to apply to a Host Regulator for its units to be offered to the public cross-border in the Host Jurisdiction pursuant to the ASEAN CIS Framework. Fourm, "Handbook for Cis Operators of ASEAN CISs," 5.

810 ibid., 3.

regimes of the signatory countries are not harmonised. The standpoint of having the host country's approval process creates a barrier to the regional capital market integration as it implies multiple approvals or more (as the case may be) in the similar way where there is a jurisdictional border in a cross-border securities transaction. This further implies that there is no consensus from ASEAN and ASEAN members are not ready to implement the higher level of mutual recognition system. This circumstance reinforces the position of the ASEAN Way in ASEAN's policy direction where the state members' national sovereignty are the most concern. Eventually, such initiative would not create a level of playing field yet just a facilitation of cross-border offering. The issuers would not get the benefit arising from the mutual recognition that it could prevent duplication of supervisory works.[811] From a cost-saving aspect, even the issuers can reduce legal costs arising from the diverging regime of prospectus requirements, they have to bear costs in relation to the multiple approvals and the on-going requirements.

4. An effort to harmonise securities fraud rules was stipulated under neither the Implementation Plan 2009 nor the Action Plan 2016. The lack of securities fraud rules demonstrates the ASEAN Way's implication that ASEAN members are not ready to relinquish a high integration intensity, especially in the area that would require a modification of domestic laws due to the difference of national interests and the level of market development. Diversities of principles and sanctions regarding market frauds can induce regulatory arbitrage in the case of the single market.[812] For ASEAN, the diversities of securities fraud rules impede investors'

811 See Regulation, 38-39.

812 The de Larosière Group, 23.

confidence and further outlook to develop a deeper integration as it would lead to regulatory arbitrage.

5. The development of ASEAN CG Scorecard demonstrates the influence of the ASEAN Way of cooperation. As a “bottom-up” initiative that focuses at the firm level, the scorecard would have no legal effects. Such initiative does not affect the member states’ sovereignty as it does not directly require member countries to modify their domestic laws because of the regulatory harmonisation. At the firm level, there is still no coordination in the development of corporate rules and guidelines within ASEAN.
6. The freedom of capital to move across borders is a prerequisite for the creation of a single ASEAN market. The free or freer movement of factors of production cannot be achieved without substantial capital movement liberalisation. Even ASEAN has put the capital movement liberalisation under the legal frameworks – the ACE Blueprint and ASEAN Capital Account Liberalisation Blueprint, capital flows are still treated distinctly by adopting the flexibility principle under the ASEAN Way. The liberalisation capital movement is based on member’s readiness whereas an exact timeframe of capital movement liberalisation has not been determined yet. This means that by the end of 2025 there may be no real completion of the strategic action plan because the implementation is subject to domestic conditions and appropriate safeguards. Critically, the existence of a safeguard clause means that many ASEAN members require a permission, ex-ante reporting requirements, or quantity restrictions even if permission is generally granted. The consequence of the restrictions substantially impairs the ASEAN’s pathway towards the creation of single market and prevents an optimal allocation

of resources and the integration of open, competitive and efficient financial markets and services.

The third part of this Chapter provides an analysis regarding the impacts of the ASEAN Way on financial services liberalisation and investor protection. The research has found that:

1. Although there is a momentum towards rule-based commitments where the liberalisation was put on clear targets and timelines as outlined in the trade in the services section of AEC Blueprint 2008, the financial services are still treated differently from other service sectors. In this connection, the flexibility principle, in particular, ASEAN Minus X formula[813], is still applied in the liberalisation plan due to the sensitivities to other economic sectors and the differences in the financial development of members.[814] The members are still allowed to maintain the restrictions as negotiated and agreed in the list of pre-agreed flexibility, which eventually means that the end of the regional financial liberalisation has not been determined yet. ASEAN members can enable the protectionist policy[815] on financial services liberalisation, which eventually can slow down the integration process.
2. In terms of investor protection, ASEAN has succeeded in the development of a regional comprehensive investment protection regime that covers the portfolio investment. An achievement of ACIA demonstrates a dynamic relationship between the ASEAN Way and the regional integration where the flexibility of the

813 Secretariat, "ASEAN Economic Community Blueprint 2008," 12.

814 See Kanithasen, Jivakanont, and Boonnuch, 27.

815 See, for instance, Mattoo and Wunsch-Vincent, 765-800.

ASEAN Way is capable to deal with the rising concern of ASEAN members to promote the economic development so as to attract the investment flows in the region. However, with an ASEAN's style of top-down harmonisation approach, an effectiveness of implementation of ACIA is still questionable as it still depends on members' willingness to undertake regulatory reforms in accordance with the provisions of ACIA.

3. In relation to cybersecurity, however, there is no rule-making body at the ASEAN level to create and implement a harmonisation of cybersecurity and cybercrime laws, even though a number of ASEAN's existing cybersecurity initiatives are plentiful. However, they are sparse in potency due to a concern about sovereignty making the regional organs ill-equipped to carry out their tasks.

CHAPTER IV A COMPARATIVE ANALYSIS OF MEMBERS' PRACTICES

Chapter III argued that the governance of ASEAN has shifted from an absence of a regional governance system (the pre-Charter period)816, to the establishment of a regional governance system under the ASEAN Charter. The ASEAN Way has significantly influenced the institutionalisation and legalisation processes of ASEAN while the regional achievement still depends on the states' willingness and commitment to modernise their domestic market regulations to eliminate the regulatory disparities between the member countries. 817 Implementation of the regional commitments relies on the strength of interpersonal relationships to enforce any agreements.818 The ASEAN Charter allows the regional economic cooperation to develop flexibly819 to implement the commitments amid an atmosphere of diverse political systems and economic gaps. 820 Although the general objectives and overarching regional commitments have been developed, comprehensive initiatives have been lacking. Based on the ASEAN Way, individual ASEAN member countries can take steps toward integration if and when they believe they are ready. This readiness could be a function of several things, including achieving an adequate strengthening of relevant policy frameworks and institutions, as well as broadly favourable domestic economic and financial conditions.

816 For instance, as exemplified by developments within the WTO. See Paul J. Davidson, "The ASEAN Way and the Role of Law in ASEAN Economic Cooperation," *Singapore Year Book of International Law and Contributors* 8, no. 165 (2004): 168.

817 Thipsuda Thawaramorn, "แนวทางการเชื่อมโยงตลาดทุนอาเซียนและการเตรียมความพร้อมของไทย" (National Defence College, 2012), 2.

818 Professor Dr. Surakiart Sathirathai, interview by Tir Srinopnikom, 2015, Bangkok, Thailand.

819 *Charter of the Association of Southeast Asian Nations*, Article 21(2).

820 Culturally speaking, ASEAN Way was a more effective method to resolving disputes in South East Asia.

Thus, ASEAN regional cooperation still encounters a separation of ASEAN markets. The developmental gap existing between ASEAN financial markets defines and divides the monetary and fiscal policy goals of each member state. This, in turn, means that integration efforts are often retarded by national restrictions and regulations, which are exacerbated by the sovereignty, non-intervention and consensus principles. As a result, there remains significant disparity in the regulatory, normative and cognitive institutions in the financial markets among the ASEAN countries. These differences are attributable to the uneven developments of the respective capital markets in ASEAN. Some countries are still at the stage of opening up their economies while others are already established players in the global financial markets. Such reality is reflected by the fact that some ASEAN members do not even have stock markets yet, while other bourses have very few companies listed.

As ASEAN continues to remain sensitive toward the policy objectives of member states, various exclusions and exceptions and a time consuming national legislative process, this Chapter answers the key questions to what extent that the ASEAN Way triggers discrepancies and implementation gaps among ASEAN members where it impedes the goal of integrating the regional financial markets. In doing so, this research will provide a discussion of the regional development landscape to reveal the development gaps among ASEAN members. It will then investigate the disparity of domestic capital market governance and market infrastructure connectivity. The second part will analyse the implementation of regulatory harmonisation initiatives, in particular, ASEAN Disclosure Standards and ASEAN CIS Framework. It will further look at the auxiliary issues of the discrepancy of domestic market standards and foreign exchange restrictions. The subject of market participants will be discussed in the third part by focusing on market participants. It will begin with the domestic implementation to opening up the market access of securities intermediaries. The discussion on such issue will specifically focus on the national regulatory frameworks for establishing a local presence of foreign securities firms and services providers. On another side of the

coin, the subsequent part will discuss the topic of implementation gaps on investor protections; covering the areas of dispute settlement, enforcement actions concerning false or misleading statements and cybersecurity.

1. A COMPARISON OF ASEAN'S MARKET DEVELOPMENT LANDSCAPES, DOMESTIC REGULATORS, AND MARKET INFRASTRUCTURES

The first part of this Chapter will identify the extent of discrepancy in terms of an implementation of the initiatives on regional market governance of member countries and infrastructures connectivity. It will further identify how such discrepancy creates impediments to the regional market integration. In doing so, the issues of development diversities, domestic-regulator divergence, and insufficiency of regional infrastructure connectivity will be comparatively discussed in order.

1.1.Market Development Landscapes – the Region of Diversities

The integration of capital markets requires a high level of institutional readiness, sound regulatory frameworks, and efficient market infrastructure. However, ASEAN has a vast disparity of development, socio-economic and financial stability.[821] Generally, huge development gaps within and across countries are the major weakness of ASEAN[822] as they result in the disparities in governance system and effective implementation of the rule of law. The development gaps also remain high between CLMV countries and the rest of ASEAN members; even excluding Brunei and Singapore,

821 See Datuk Ranjit Ajit Singh, "ASEAN: Perspectives on Economic Integration: ASEAN Capital Market Integration: Issues and Challenges," in *LSE IDEAS special report* (London School of Economics and Political Science, 2009), 36.

822 See Asian Development Bank Institute, *ASEAN 2030 toward a Borderless Economic Community* (Tokyo, Japan2014), 48.

which have already achieved a high-income status.[823] Half of ASEAN's members are lower to upper-middle income countries.

ASEAN countries differ considerably in the levels of development of national capital markets, including in the level of observance of international regulatory and governance standards. These differences would nevertheless constrain progress toward regional integration.[824] As reflected in the degree of observance of global supervisory and market standards, there are already large differences in regulatory regimes and market infrastructure. In this regard, FTSE, a British provider of stock market indices under a joint investment between London Stock Exchange and Financial Time, has conducted an annual review of all markets contained in its global benchmarks and classified information about market structures, offering investors risk management insight into the regulatory and trading practices of the markets included in the global and regional indices. The classification of markets ranges from Developed, Advanced Emerging, and Secondary Emerging to the lesser degree of Frontier within global benchmarks.

In this regard, six of the ten ASEAN countries are members of the FTSE Global Equity Index Series. According to the latest classification, as of September 2016, Singapore is considered as a Developed market. Malaysia and Thailand are classified as Advanced Emerging markets while Indonesia and the Philippines are ranked as Secondary Emerging. Vietnam comes in the latest type, as a Frontier market.[825] As

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823 ibid.

824 Jaseem Ahmed and V. Sundararajan, "Regional Integration of Capital Markets in ASEAN: Recent Developments, Issues, and Strategies," *Global Journal of Emerging Market Economies* 1, no. 1 (2009): 95-96.

825 See FTSE, "FTSE ASEAN Index Series," FTSE, http://www.ftse.com/products/indices/ASEAN.

shown in Table 2, the classification has taken into account the different aspects of capital market development. It looks at the market and regulatory environments where all ASEAN Developed and Advance Emerging markets pass the scoring in every criterion while Secondary Emerging and Frontier markets fail some of the requirements such as the free and well-developed equity, foreign exchange markets, and the registration process for foreign investors. The classification further considers the issue of custody and settlement where the Developed market meets all requirements while Advance Emerging, Secondary Emerging, and Frontier markets variously do not meet some of the requirements, for instance, the availability of conducting stock lending and free delivery. Eventually, the classification further assesses the dealing landscape of each member, where the Developed market meets all requirements but Advance Emerging, Secondary Emerging, and Frontier markets differently pass some of the requirements.[826]

Table 3 also shows each ASEAN country's equity market capitalisation and its total number of listed companies. As at end-2014, the market capitalisation of ASEAN countries within the emerging markets category surprisingly outweighed the market capitalisation of the countries classified as Developed (Singapore) and Frontier (Vietnam).[827] At the current stage, there is a different level of market complexity. For the most advanced market, Singapore operates a predominantly disclosure-based regime for capital markets. SGX rules augment the disclosure-based regime with high baseline admission standards and continuing requirements on issuers. SGX operates a centralised electronic marketplace for trading, clearing and settling securities and

826 FTSE Russell, "From Frontier to Developed – the FTSE ASEAN Index Series," in *Research* (2015), 4.

827 ibid., 5.

derivative products.[828] However, there are no stock exchange and self-regulatory organisation in Brunei and Myanmar. These two countries are in the development stage for an establishment of the capital market.

Some of the newly established markets are still illiquid. As of 2012, only three companies were listed on the CSX, indicating that most companies in Cambodia have not been ready to fulfil mandatory requirements to go public. In the same manner, financial activities in Lao PDR still are based on agricultural sectors, which are considered micro in capitalisation. At present, there are five listed companies on the stock exchange: Generation-Public Company, Electricite du Lao, Banque Pour Le Commerce Exterieur Lao, Lao World, Petroleum Trading Lao PCL and Souvanny Home Trading Public Company.[829]

828 Penelitian dan Pelatihan Ekonomika dan Bisnis, "SWOT Analysis on the Capital Market Infrastructures in the ASEAN+3," in *ASEAN+3 Research Group Final Report and Summary* (ASEAN, 2014), 83.

829 Laos Securities Exchange, "The History of LSX," http://www.lsx.com.la/en/about/history.jsp.

Table 2 – **FTSE's Classification on ASEAN Markets**

Criteria	Developed	Advanced emerging	Secondary emerging	Frontier
World Bank GNI Per Capita Rating				
Creditworthiness				
Market and Regulatory Environment				
Formal stock market regulatory authorities actively monitor market (e.g., SEC, FSA, SFC)	X	X	X	X
Fair and non-prejudicial treatment of minority shareholders	X	X		
Non or selective incidence of foreign ownership restrictions	X	X		
No objection to or significant restrictions or penalties applied to the investment of capital or the repatriation of capital and income	X	X	X	X
Free and well-developed equity market	X	X		
Free and well-developed foreign exchange market	X	X		
Non or simple registration process for foreign investors	X	X		
Custody and Settlement				
Settlement - Rare incidence of failed trades	X	X	X	X
Custody-Sufficient competition to ensure high quality custodian services	X	X	X	
Clearing & settlement - T + 3 , T + s for Frontier	X	X	X	X
Stock Lending is permitted	X			
Settlement - Free delivery available	X			
Custody - Omnibus account facilities available to international investors	X	X		
Dealing Landscape				
Brokerage - Sufficient competition to ensure high quality broker services	X	X	X	
Liquidity - Sufficient broad market liquidity to support sizeable global investment	X	X	X	
Transaction costs - implicit and explicit costs to be reasonable and competitive	X	X	X	
Short sales permitted	X			
Off-exchange transactions permitted	X			
Efficient trading mechanism	X			
Transparency - market depth information/visibility and timely trade reporting process	X	X	X	X

Table 3 – **ASEAN Individual Market's Capitalisation**

ASEAN Member State	World Bank GNI Per Capita Rating, 2012	Development category within FTSE GEIS	Equity market capitalisation ($m, as at 31/12/14)	Total number of listed companies (as at 31/12/14)
Singapore	High	Developed	752,831	479
Malaysia	Upper Middle	Advanced Emerging	459,004	900
Thailand	Upper Middle	Advanced Emerging	430,427	585
Indonesia	Lower Middle	Secondary Emerging	422,127	483
Philippines	Lower Middle	Secondary Emerging	261,841	254
Vietnam	Lower Middle	Frontier	52,427	672

Source (Table 2 – 3): FTSE

1.2. Fragmentation of Domestic Capital Market Governances

Even if ASEAN evidences a lesser form of integration intensity, one regional achievement so far is that ASEAN members are moving, in the same direction, toward establishing or internationalising their domestic markets. By having the ASEAN Way as the integration cornerstone, the notion of respecting members' national sovereignties causes the regulatory practices of each country to be diverted according to the domestic institutional characteristics. Although ASEAN has established ACMF as a forum for securities markets regulators, consisting of all regulators from ASEAN members, ACMF does not deal with the issue of promoting adoption of the synchronised model of financial regulator and supervision among members, as it would excessively impact each member's sovereignty. Moreover, there is currently no political will within ASEAN to create a supra-national securities agency akin to the EMSA in EU to formally work on standard-setting tasks.

ASEAN members undertake different approaches to construct their domestic institutional arrangements of financial supervision. As the international financial centre, MAS is the sole regulator in Singapore having regulatory oversight of financial services. It deals with the increasing complexity of financial services marketplace and financial innovation, where the lines between banking, securities and insurance are so blurred that they are often difficult to classify.[830] MAS is Singapore's central bank and financial regulatory authority.[831] Before its establishment, monetary functions were administered in accordance with the various statutes pertaining to money, banking,

830 See George A. Hofheimer, "Evaluating the Single Financial Services Regulator Question," (Filene Research Institute, 2009), 11-13.

831 Monetary Authority of Singapore, "About MAS," http://www.mas.gov.sg/About-MAS.aspx.

insurance, securities and the financial sector performed by government departments and agencies. Singapore currently has an integrated financial regulatory structure, under which the MAS has the authority to regulate the banking, securities, futures, and insurance industries in the nation-state.[832] In the capital market aspect, MAS has the power over the SFA that establishes a framework for authorisation of markets and licensing of intermediaries, the scope of regulated activities, and an enforcement mechanism in securities aspects. MAS also administers the Financial Advisers Act (2001) regulating financial advisory activities in respect of investment products, and the distribution or marketing of specific functionally similar investment products.[833]

The trend of reforming the structure financial regulators is also seen in Indonesia. OJK, established in 2011, acts as the financial services authority of Indonesia. OJK has replaced the Indonesian Capital Market and Financial Institution Supervisory Agency and received some power regarding the supervision of every banking activity from the Bank Indonesia.[834] Such restructure results in the OJK being a centralised financial and banking regulatory body.[835] It is an autonomous institution, which directly reports its duties to the parliament and is free from interference by other parties, with functions, duties, and authority to regulate, supervise, examine, and investigate financial services sector in Indonesia.[836]

832 See ibid.

833 See ibid.

834 See Otoritas Jasa Keuangan, "About OJK," http://www.ojk.go.id/en/tentang-ojk/Pages/Visi-Misi.aspx.

835 ibid.

836 See Bisnis, 45.

In a different way, some ASEAN countries implement the model of having two regulators for the banking sector and the securities market. These countries include Malaysia, Philippines, Thailand and Vietnam. For Malaysia, SS is a statutory body entrusted with the responsibility of regulating and systematically developing Malaysia's capital markets. It has direct responsibility for supervising and monitoring the activities of market institutions and regulating all persons licensed under the capital market.[837] SS was established under the Securities Commission Act 1993, and it reports to the Minister of Finance. It has the power to investigate and enforce the areas within its jurisdiction.[838] It is also a self-funding organisation whose income is derived from the collection of retribution and application fees.[839]

In the same manner, PSEC is an independent government agency of the Philippines, which supervises the securities market, self-regulatory organisations, investment houses, and securities dealers/brokers.[840] It also supervises investment companies, finance companies and pre-need firms. PSEC also oversees the operations of the stock exchange and its members, and ensures compliance with the provisions of the securities act. It also issues rules and regulations on long and short term papers, subject to approval by the Monetary Board.[841]

837 See Suruhanjaya Sekuriti, "What We Do," https://www.sc.com.my/about-us/what-we-do/.

838 ibid.

839 ibid.

840 See Securities and Exchange Commission Philippines, "About Us," http://www.sec.gov.ph/about/powers-and-functions/.

841 ibid.

For Thailand, the SEC is an independent public agency under the SEA with the duty to supervise and develop the Thai capital market to ensure efficiency, fairness, transparency, and integrity.[842] Every securities issuance for sale to the public must receive approval from the SEC. After listing, the SEC continues to oversee the issuer's disclosure of information to ensure that it is complete and timely and in compliance with governing regulations to protect the interest of investors.[843]

Established in 1996, SSC oversees and regulates securities trading on Vietnam's two official exchanges. From March 2004, the SSC formed as a part of the Ministry of Finance. All exchange regulations are issued by the SSC. SSC has the power to suspend trading in securities, delete listings of companies to protect investors' interests, and grant or revoke licenses relating to securities issuance, brokerage and custody services.[844]

A separate regulator would work well in the market environment where there are still limited connections among sector components, or there is no (or few) practice of universal banking or evidence of conglomerates in these countries.[845] This means that moving to encompass more complex and multifunctional operations in these countries are still not necessary (even though it has been done in Indonesia). Nevertheless, the crucial problem of having separate regulators is that the number of

842 *Securities and Exchange Act (Fifth Amendment)*, Article 8 and 17.

843 See ibid., Article 18-20.

844 See Ministry of Finance, "Development History of the State Securities Commission," http://www.ssc.gov.vn/ubck/faces/en/enmenu/enpages_engioithieu/introduction?_afrLoop=33684460625907812&_afrWindowMode=0&_afrWindowId=null#%40%3F_afrWindowId%3Dnull%26_afrLoop%3D336/;l84460625907812%26_afrWindowMode%3D0%26_adf.ctrl-state%3Dnooxmgpvd_70.

845 See Kenneth Kaoma Mwenda, *Legal Aspects of Financial Services Regulation and the Concept of a Unified Regulator* (Washington DC, USA: International Bank for Reconstruction and Development, 2006), 48.

regulatory bodies increases the complexity of reviewing, monitoring processes as well as enforcing the legal rules due to a hardship to achieve regulatory compliance. For instance, the generally slow response of PSEC to issues raised is partly a result of having to go through four separate and distinct regulatory authorities for approval, while the MAS acting as a super-regulatory, eliminates such regulator distance.[846]

Some ASEAN members have just established the domestic securities market. Lao PDR opened its own stock exchange in 2011 along with Cambodia, which also established its own stock exchange in the same year.[847] For Cambodia, the Securities and Exchange Commission was established in 2009 according to the Trading of Non-Government Securities (Preah Reach Kram No. NS/RKM/1007/028), and the minister of economy and finance serves as the chairman.[848] For Lao PDR, the main function of the Lao Securities and Exchange Commission Office is to supervise the Lao Securities Exchange. Both commission and exchange are still one of the units under the umbrella of the Bank of Lao established according to law No. 05/NA.[849]

Brunei and Myanmar countries do not have structured securities and capital activities, however. Therefore all of the financial supervisory activities are conducted by or through the central bank. As established under AMBD Order of 2010, AMBD, acts

846 See Carol Hsu and Sia Siew Kien, "Prospects and Challenges of the Development of ASEAN Exchanges," in *SWIFT Institute Working Paper* (SWIFT Institute, 2015), 11.

847 See Lao Securities Exchange, "The History of LSX," http://www.lsx.com.la/en/about/history.jsp.

848 Securities and Exchange Commission of Cambodia, "About Secc," http://www.secc.gov.kh/english/m11.php?pn=1.

849 Bank of the Lao P.D.R, "Lao Securities Commission Office," http://www.bol.gov.la/Goverment1/ceosecurities-exchange.html.

as the Brunei's central bank[850] and administers and enforces the: Banking Order, 2006; Islamic Banking Order, 2008; International Banking Order, 2000; Finance Companies Act, Chapter 89; Hire Purchase Order, 2006; Pawnbrokers Order, 2002; and Money-Changing and Remittance Businesses Act, Chapter 174.[851] AMBD conducts the formulation and implementation of monetary policies, the regulations and supervision of financial institutions as well as currency management.[852]

Similarly, Myanmar does not have a securities exchange. CBM was created according to the Central Bank of Myanmar Law (1990), which makes CBM responsible for financial stability and supervision of the financial sector in Myanmar while there is no separate securities regulator. In the pipeline, Myanmar is planning for new laws on financial institutions, foreign exchange management, and securities exchange.[853]

To develop a deeper recognition system, a significant level of harmonisation of both standards and procedures of the regulatory governance system is necessary to be achieved to enable a higher level of trust among the regulators of participating countries. It is a challenge for the regulators and regulatory institutions to meet the requirements for coordination to reach equivalence or mutual recognition as the different participating member ASEAN jurisdictions are at different stages of economic development with very different legal traditions; in particular the diversities of regulatory supervision, ranging from the centralised structure of regulator (to supervise a high complexity of financial transaction) to the non-existence of separate securities

850 See Autoriti Monetari Brunei Darussalam, "2014," http://www.ambd.gov.bn/about-ambd/establishment-of-autoriti-monetari-brunei-darussalam-(ambd).

851 ibid.

852 ibid.

853 See Bisnis, 70-71.

regulator (so that it is under the mandate of the national central bank). Such diversity has significantly impeded ASEAN members' trust of other countries' regulatory regimes[854]; especially the Frontier markets, where regulatory standards and practices still need further development and to be assessed by international organisations. This is because recognition of other countries' regulatory regimes, in particular, those having lesser degree of development, may create a negative impact on the financial system of the recognising country. This challenge is particularly acute if the proposal for harmonisation initiatives is intended to be extended beyond the participating member states to the other ASEAN jurisdictions with stock exchanges.[855]

In addition, the integrated capital markets would require close enforcement cooperation among securities regulators as the transaction are done on a cross-border basis. Nonetheless, by recognising the sovereign power of each member, ACMF undertakes an approach of encouraging ASEAN members to voluntarily be the members of IOSCO MMoU for the purpose of cooperation and information sharing in relation to the enforcement that would eventually facilitate the effectiveness of regional mutual recognition arrangements.[856] Currently, only five ASEAN members – Indonesia, Malaysia, Singapore, Thailand, and Vietnam -- are members of IOSCO MMoU, while the other members, such as the Philippines, do not participate due to legal limitations concerning exchange of information.[857] From this scenario, it is obvious that

854 See Thawaramorn, 71.

855 Wan Wai Yee, "Using Law and Regulation to Foster Capital Markets Integration in ASEAN: The Experiences of the ASEAN Disclosure Standards in Singapore, Malaysia and Thailand," in *Finance in Asia – Integration and Regional Coordination* (Singpore Management University, Singapore: Melbourne Law School, 2016), 42.

856 Thawaramorn, 71.

857 ibid.

the regional cooperation in the area of enforcement of the securities laws and regulations among domestic regulators is still limited. ASEAN currently has not come out with the regional model law on a multilateral information sharing but relies on the IOSCO MMoU participation or another bilateral arrangement. Still, IOSCO MMoU contemplates that cooperation and information exchange will normally be on a bilateral basis between one "requesting authority" and one "requested authority", instead of between more than two authorities or regulators in parallel.[858] Critically, the integrated regional market would need information sharing to take place among multiple regulators on a parallel basis, rather than on a bilateral basis between two regulators.

Besides, even if five ASEAN countries are members of IOSCO MMoU, the hardship would be that the country having a single financial regulator may be able to provide more efficient cooperation and information sharing than those countries having separate financial regulators since a separation of regulators would involve more time, costs and procedures to gather information from different domestic authorities.

1.3. Divergence of Domestic Market Infrastructures

The issue concerning the divergence of domestic market infrastructures in respect of the equity and debt markets (with a specific focus on corporate bond markets) can be considered, as follows.

858 See Andrew Godwin and Ian Ramsay, "The Asia Region Funds Passport Initiative – Challenges for Regulatory Coordination," *International Company and Commercial Law Review* 26, no. 7 (2015): 7.

1.3.1. Equity Markets

As discussed in Chapter III, ASEAN has already focused on developing the region's capital market by building capacity and laying the long-term infrastructure to achieve integration of capital markets in ASEAN. The regional initiatives that put in place an integrated cross-ASEAN trading infrastructure enabling greater market participation from various stakeholders and investors, has been done through the establishment of ASEAN Trading Link. Such collaboration is expected creates a streamlined access to ASEAN capital markets with various benefits such as the attraction of investment flow into the region. However, the institutional distance and foreign ownership limit on equities still persist as the main impediments.

1.3.1.1. Institutional Distance

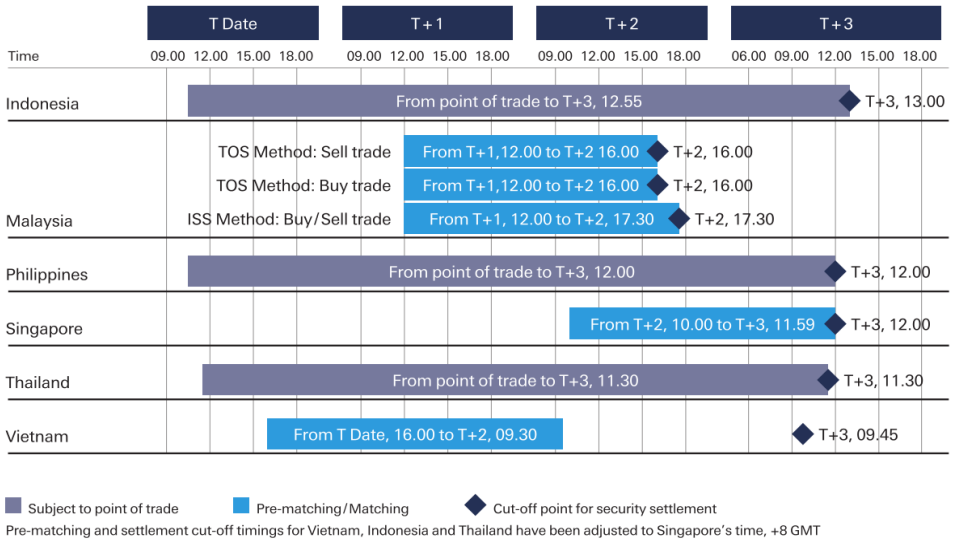
ASEAN Trading Link is not the consolidation of exchanges. By being crafted on the basis of the ASEAN Way, ASEAN Trading Link represents a lesser degree of integration intensity where the markets are connected as "plug-and-play" without having a legal harmonisation or a common set of laws in relation to the purchase of securities listed on any member exchanges to allow to be matched on any licensed platform. Therefore, separation of ASEAN markets still persists reflecting the "institutional distance[859]" in which investors still encounter the divergence of execution rules, trading systems, cross-border regulation, capital control, infrastructure readiness, and language differences.[860]

859 See Hsu and Kien, 7.

860 See Bursa Malaysia Burhad, "Common Exchange Gateway" (paper presented at the 3rd OIC Member States' Stock Exchange Fourm, 2009).

In contrast with Europe, which was already integrated, many basic infrastructures are still needed in the case of ASEAN. Although the ASEAN exchanges are increasingly moving toward standardised trading platforms to increase their competitiveness, their trading practices are still inconsistent. Crucially, this is because the introduction of ASEAN Trading Link was not accompanied by a standardised trading practice. As presented in Diagram 7, a comparison among ASEAN Trading Link members shows that the different permissibility around netting and segregation of trading accounts (such as the use of omnibus account), and the different clearing and settlement cycles (T+2, T+3) coupled with differences in time zones, business calendars or operating hours could cause trading or settlement delays. Hence, the lack of harmonisation led to uncertainty and inefficiency in cross-border trading, consequently causing investors to be reluctant to transact in ASEAN exchanges.[861]

Diagram 7 – **Different Settlement Timing**



Source: Deutsche Bank Direct Securities Services as of 2013

861 Siew Kien Sia, Carol Hus, and Wen Jing Teo, "Implementing ASEAN Stock Trading Links: Tackling the Institutional Challenges," in *Pacific Asia Conference on Information Systems* (Taiwan).

Table 4 demonstrates the reality that there are currently no infrastructure links existing between any of the ASEAN CSDs or CCP among ASEAN Trading Link members. ASEAN securities trading and post-trade infrastructure developments, so far, have been limited in geographical boundaries. Similarly, the extent of domestic division between clearing and settlement entities also differs. These entities are separated in some countries such as Indonesia and Philippines while integrated in others, for instance, Singapore and Thailand.

Table 4 – **ASEAN Vertical Clearing and Settlement Structure for Equity Securities**

<table>
<tr><th></th><th>Indonesia</th><th>Malaysia</th><th>Philippines</th><th>Singapore</th><th>Thailand</th><th>Vietnam (HNX)</th><th>Vietnam (HOSE)</th></tr>
<tr><td>Trading</td><td>Indonesia Stock Exchange (IDX)</td><td>Bursa Malaysia (BM)</td><td>Philippine Stock Exchange (PSE)</td><td>Singapore Exchange (SGX)</td><td rowspan="2">Stock Exchange of Thailand (SET)</td><td>Hanoi Stock Exchange (HNX)</td><td>Ho Chi Minh Stock Exchange (HOSE)</td></tr>
<tr><td>Matching</td><td>Kustodian Sentral Efek Indonesia (KSEI)</td><td rowspan="2">Bursa Malaysia Securities Clearing (BMSC)</td><td>Philippine Depository & Trust Corporation (PDTC)</td><td rowspan="3">Central Depository (CDP)</td><td rowspan="3">Vietnam Securities Depository (VSD)</td><td rowspan="3">Vietnam Securities Depository (VSD)</td></tr>
<tr><td>Clearing</td><td>Kliring Penjaminan Efek Indonesia (KPEI)</td><td>Securities Clearing Corporation of the Philippines (SCCP)</td><td rowspan="2">Thailand Clearing House(TCH)</td></tr>
<tr><td>Securities Settlement</td><td>Kustodian Sentral Efek Indonesia (KSEI)</td><td>Bursa Malaysia Depository (BMD)</td><td>Philippine Depository & Trust Corporation (PDTC)</td></tr>
<tr><td>Cash Settlement</td><td>Approved Commercial Banks</td><td>Bank Negara Malaysia (BNM)</td><td>Approved Commercial Banks</td><td>Approved Commercial Banks</td><td>Approved Commercial Banks</td><td>Bank for Investment & Development of Vietnam (BIDV)</td><td>Bank for Investment & Development of Vietnam (BIDV)</td></tr>
</table>

Source: Deutsche Bank Direct Securities Services as of 2013

Moreover, there is a diversity of stock exchange ownership structure among ASEAN Trading Link members. Some exchanges remain pure private companies (Indonesia Stock Exchange)[862] or the shareholder-based, revenue-earning corporation[863] (Philippines Stock Exchange) where they are controlled and owned by broker

862 See Hsu and Kien, 12.

863 Philippine Stock Exchange, "About PSE," http://www.pse.com.ph/corporate/home.html?tab=0.

members. However, some exchanges in other ASEAN members, in particular, Malaysia and Singapore, have been demutualised and established as shareholder-owned and profit-driven companies.[864] However, exchanges of some countries remain government enterprises or operate under government controls, such as Thailand (where SET is a juristic entity under the SEA[865]) and Vietnam (where Hanoi Stock Exchange is a State-owned single - member limited liability company[866]). As a result, the exchanges are subjected to different business norms and employ different criteria in assessing business decisions.[867] The commercial orientations are stronger in some of ASEAN exchanges, such as Malaysia and Singapore stock exchanges, as a result of organisational structure. This causes differences in the strategic priorities. A shift from not-for-profit mutual organisation to for-profit organisation with ownership separated from access to trading may allow the exchange to respond more effectively to competitive pressure and to act separately from the interests of individual members thereby creating a more streamlined and market-oriented exchange.[868] Demutualised exchanges typically follow a less democratic decision making process and can be faster in implementing new changes, especially an introduction of deeper integration of ASEAN Trading Link.

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864 Hsu and Kien, 12.

865 *Securities and Exchange Act (Fifth Amendment)*, Article 153.

866 See HANOI Stock Exchange, "HNX Introduction," http://www.hnx.vn/en/web/guest/lich-su-phat-trien.

867 Hsu and Kien.

868 See Korea Institute of Finance, "SWOT Analysis on the Capital Market Infrastructures in the ASEAN+3 Member Countries and Its Implications," in ASEAN+3 Research Group Final Report and Summary (ASEAN, 2014), 17.

1.3.1.2. Foreign Holding Restrictions

Crucially, ASEAN countries have implemented dissimilar foreign investment restrictions on the share ownership of key industries in their countries. To some extent, some countries may have rolled out beneficial policies to attract more foreign investors, hoping that increased capital inflows and business activity will stimulate the economy. Nonetheless, national governments are often wary simultaneously of ceding control to foreign entities over industries they deem to be sensitive.

The similar trend of foreign business laws exists in all ASEAN countries. In general, the laws impose restrictions on foreign ownership. These restrictions may be stipulated in general foreign business law (or under the negative lists) and some specific laws concerning certain sectors such as banking. By having foreign shareholding limits, the corporation would be legally obliged to maintain the percentage of foreign shareholder below the provided limits. Among ASEAN Trading Link members, Singapore has no foreign ownership limit, except as may be stipulated in the individual companies' constitution documents or by-laws over some industries (such as banking and stockbroking companies, airlines, national shipping lines and media companies).[869] When the limit is reached, the shares will be differentiated into local and foreign shares, and foreign investors are allowed to buy foreign shares only. A foreign investor buying local shares will not be allowed to receive such shares into his account, and the shares must be sold.[870]

869 See ASEAN Secretariat, "Foreign Equity Policies," http://ASEAN.org/?static_post=foreign-equity-policies.

870 Clearstream, "Investment Regulation - Singapore," http://www.clearstream.com/clearstream-en/products-and-services/market-coverage/asia-pacific/singapore/investment-regulation---singapore/7600.

However, the Malaysian government has allowed, since June 2003, foreign investors to hold one-hundred per cent of the equity in all investments in new projects, as well as investments in expansion/diversification projects by existing companies, irrespective of the level of exports and without excluding any product or activity, while equity and export conditions imposed on companies prior to 17 June 2003 will be maintained.[871] Generally, foreign shareholding limits on Malaysian companies are: seventy per cent for domestic investment banks and domestic Islamic banks; forty-nine per cent for local insurance companies and Takaful operators; and thirty per cent for other Malaysian companies.[872]

Some of ASEAN countries maintain negative lists of reserved industries. In Thailand, according to the Foreign Business Act of 1999, foreigners are generally allowed to participate up to forty-nine per cent in a company engaged in restricted businesses according to the Schedules attached to the Act.[873] Similarly, Philippines and Indonesia prescribed a negative list under the Foreign Investment Act 1991 as amended[874] and the negative list under Presidential Regulation No. 44 of 2016[875] (periodically amended), respectively, where the percentage of foreign equity would be limited pursuant to the laws. In Indonesia, banks may only list up to ninety-nine per cent of their share capital; the remaining one per cent must be owned by resident

871 See Malaysia Investment Development Authority, "Guidelines on Equity Policy," http://www.mida.gov.my/home/starting-up-business/posts/.

872 Clearstream, "Investment Regulation - Malaysia," http://www.clearstream.com/clearstream-en/products-and-services/market-coverage/asia-pacific/malaysia/investment-regulation---malaysia/6584.

873 See *Foreign Business Act, B.E.2542*, Article 4.

874 See *Executive Order No. 184 Promulgating the Tenth Regular Foreign Investment Negative List*.

875 See Kristo Molina, "Indonesia's New 2016 Negative List," White&Case LLP, http://www.whitecase.com/publications/alert/indonesias-new-2016-negative-list.

Indonesian investors. Indonesian financing companies are allowed to have foreign ownership up to eighty-five per cent of the paid-up capital.[876] In the Philippines, foreign investors may purchase shares of a listed company without prior approval within the limit for foreign ownership, but where the limit has been reached, no approval for an exception can be granted by the regulators, and the shares exceeding the limit must be sold or converted to the local registry.[877] In the same manner, Vietnam generally applies a foreign equity cap. However, according to the Decree 60/2015/ND-CP, a public company will no longer be subject to any foreign equity cap if it meets the condition provided therein.[878]

Interestingly, instead of imposing a mandatory sale, some ASEAN countries have created a mechanism to facilitate foreign investors to be able to invest in domestic equities flexibly. In Malaysia, once the limit is reached, the company can ask for a separate listing of foreign and local content, although this is not mandatory. Shares that have reached their limit may, therefore, be traded singly or separately. Foreigners can continue to buy and hold shares exceeding the limit and not quoted separately (foreign shares). In practice, such shares are considered as “restricted shares” and rank pari passu with non-restricted shares but do not bear any voting rights.[879] In the same manner, Thailand has separated pools of equities between foreign and domestic investors. Foreign investors have to invest in securities designated for foreign investors

876 Clearstream, "Investment Regulation - Indonesia," http://www.clearstream.com/clearstream-en/products-and-services/market-coverage/asia-pacific/indonesia/investment-regulation---indonesia/11084.

877 "Investment Regulation - Philippines," http://www.clearstream.com/clearstream-en/products-and-services/market-coverage/asia-pacific/philippines/investment-regulation---philippines/6704.

878 See Vietnam International Law Firm, "Vietnam: Foreign Equity Cap for Public Companies Lifted," ed. Clifford Chance (Clifford Chance, 2015).

879 See Clearstream, "Investment Regulation - Malaysia".

on the foreign board to fully obtain all voting rights and financial benefits. In case that the foreign ownership limit has been reached and foreign investors cannot acquire securities designated for foreign investors, they may choose to trade in domestic liquidity pool by investing in securities designated for local investors on the local board. They are allowed to flexibly buy and sell securities on the local board to gain capital gain from the price movement; however, foreigners are not entitled to obtain any voting rights or dividends from the company if they hold securities designated for local investors on the book-closing date.[880]

1.3.2. Bond Markets (Focusing on Corporate Bonds)

As discussed in Chapter III, the development of market infrastructures on debt securities historically was not actively led by ASEAN itself; but under ASEAN+3. ABMI's current efforts are focusing mainly on the facilitation of issues, including cross-border issues, including the establishment of the credit guarantee facility and provision of market information. However, based on full recognition of sovereignty, consultative and cooperative processes, the nature of cooperation of ASEAN+3 was built on a full recognition of TAC and there is no formal institution. The implementation of the initiative is voluntarily taken by the ASEAN+3 members that feel most motivated to do so taking into account their national interests.[881] Critically, ASEAN countries put considerable efforts into developing their domestic bond markets, for instance, Philippines launched an inter-dealer platform to encourage exchange trading of fixed income securities. Malaysia established Foreign Exchange Administration rules of no

880 See The Stock Exchange of Thailand, "Foreigners' Participation in Thai Listed Companies," https://www.set.or.th/en/news/econ_mkt_dev/files/Foreigners_Participation.pdf.

881 See Hsu and Kien, 15.

withholding tax, no capital gains tax, and no restrictions on investing in Malaysian ringgit bonds.[882] Apart from such efforts, an implementation problem among ASEAN members exists. The problems primarily concern the issues of credit rating agency and infrastructure connectivity.

1.3.2.1. Credit Rating Agencies

Despite the steady growth of the ASEAN local currency bond market, cross-border bond investment within the region (or intra-ASEAN bond investment) remains relatively small[883] triggering a challenge for regional bond market integration. One proposal to spur cross-border bond investment is to have a regional credit rating facility for ASEAN. To this extent, credit rating agencies have a structural importance for bond market development since they assess and rate the creditworthiness of bond issuers and bond issues, thus helping address the asymmetric information[884] between borrowers and investors.

In terms of institutional cooperation, ASEAN does not have regional cooperation concerning credit rating while some of the domestic credit rating agencies in ASEAN countries are members of the ACRAA.[885] Among others, TRIS Rating Co., Ltd. is the only Thai credit rating agency that is the member of ACRAA. Malaysian has two credit rating agencies, Rating Corporation Bhd and Rating Agency Malaysia Bhd, which are members

882 See Finance, 24.

883 See Marvin Raymond F. Castell et al., "The International Discussions on the Credit Rating Agencies and Enhancing Infrastructure to Strengthen the Regional Credit Rating Capacity in the ASEAN+3 Region," (Manila, Philippines: De La Salle University – Angelo King Institute (DLSU-AKI), 2013), 81.

884 ibid.

885 See Association of Credit Rating Agencies in Asia, "ACRAA Members," http://www.acraa.com/acraamembers.asp.

of ACRAA. Similarly, Philippine Rating Service Corporation is the only Philippine credit rating agency, while Credit Rating Indonesia and PT Moody's Indonesia are Indonesian rating companies that are the members of ACRAA.

ACRAA is an international forum that undertakes activities to promote the adoption of best practices and common standards. Since it operates as a membership international organisation, discrepancy of credit rating activities still exist. Most of the credit rating agencies are not comparable across borders in terms of rating methodology, rating criteria, definitions, benchmarks and the overall rating process. For instance, rating symbols and definitions seem to vary across the credit rating agencies.[886]

Even if ABMI and ACMF try to promote the mutual recognition among ASEAN members on the rating made by international credit rating agencies; they impose only an ASEAN style of the non-binding initiative. As shown in Table 5, there is a discrepancy of mutual recognition of international credit rating agencies for corporate bonds. At the current stage, there is no mutual recognition of domestic credit rating agencies among five countries in ASEAN, and the diversity of domestic regulatory arrangement exists. Significantly, Singapore does not have any home-grown credit rating agency but instead relies on international rating services. Singapore's Securities and Futures Regulations 2005 only requires that the issuer of the bonds being offered have been given a credit rating by a credit rating agency where the information must be disclosed in the prospectus.[887] Nevertheless, Indonesia, Malaysia, Philippine and Thailand still

886 See generally Castell et al., 85-102.

887 Singapore Bond Market Guide, "ASEAN+3 Bond Market Guide," (Asian Development Bank, 2012), 23.

require credit rating to be conducted by their domestic credit rating agencies for certain types of issuing bonds. In Thailand, all domestic issuance of bonds by Thai companies must require a credit rating by domestically approved credit rating agencies.[888] Similarly, all Malaysian ringgit corporate bonds are required to be rated by a rating agency registered with the Malaysian regulator.[889] On the extreme side, Philippine and Indonesia only recognise their domestic credit rating agencies.[890]

Table 5 – **Domestic Recognition of International Credit Rating Agencies**

Issuers/Countries	Singapore	Thailand	Malaysia	Philippine	Indonesia
International organisations	Yes	Yes	Yes	No	No
International companies	Yes	Yes	Yes	No	No
Subsidiaries of international companies	Yes	Yes	Yes	No	No
Domestic companies partially offer bond abroad	Yes	Yes	Yes	No	No
Domestic bonds offered by domestic companies	Yes	No	No	No	No

Source: Standard & Poor's

888 *Capital Market Supervisory Board Notification No. Torjor.9/2552 Re: Application and Approval for a New Issuance of Debt Instruments*, Section 21.

889 Securities Commission Malaysia, "Guidelines on Private Debt Securities," (2012), Chapter 7.09.

890 See *Securities Regulation Code Rule 12.1-6*; *Bapepam-Lk Rules No. Ix.C.11: Rating of Debt Securities*.(respectively)

1.3.2.2. Infrastructure Connectivity

Settlement systems of the corporate bond market have no regional linkage. Each country has its own settlement arrangements for different types of instruments and the participation in these systems is generally limited to the locally regulated participants. Corporate bonds can be generally listed and traded on the national stock exchange and settled through the central clearing and depository systems associated with that exchange. Even through CCPs exist in the form of markets operated by the regular exchanges, they do not cover over-the-counter market for bond trading where the majority of trading takes place and settles on a bilateral basis (except Singapore). Within the region, Table 6 demonstrates the reality that there are currently no ASEAN regional links among CSDs among five ASEAN members. ASEAN regional clearing and settlement infrastructures can essentially demonstrate the fundamental perseverance of non-intervention, consensus and flexibility principles. However, Singapore is the only ASEAN country that has bilateral and unilateral links with other non-ASEAN CSDs. Clearly, each market has its own regulatory structure.

Table 6 –**Entities and Linkage of Corporate Bonds Settlement**

Countries	Settlement Organisation for Bonds Traded on a Stock Exchange	Settlement Organisation for Unlisted Corporate Bonds	International Links used for Settlement
Indonesia	Indonesian Central Securities Depository	Directly between the counterparties by reregistration at the nominated transfer agent.	No.
Malaysia	Bursa Malaysia Securities Clearing Sdn Bhd.	Clearing is conducted through a delivery, versus payment, system between concerned institutions.	No.
Philippines	Philippines Central Depository	Clearing is conducted through a delivery, versus payment, system between concerned institutions.	No.
Singapore	Debt Securities Clearing and Settlement System operated by the Stock Exchange of Singapore	Debt Securities Clearing and Settlement System operated by the Stock Exchange of Singapore	Central Depository (Pte) Ltd. has bilateral links with Japan Securities Settlement and Custody and unilateral

Countries	Settlement Organisation for Bonds Traded on a Stock Exchange	Settlement Organisation for Unlisted Corporate Bonds	International Links used for Settlement
			links with Clearstream, DTCC and Shenzhen Securities Registrars Ltd.
Thailand	The Thailand Securities Depository Co., Ltd.	Counterparties make their own direct settlement arrangements.	No.

Source: adapted from Asian Development Bank and AsianBondOnline

When regional governments, supranational bodies and corporations issue bonds in international currencies such as US dollars, Euros, yen, and sterling, these bonds may be issued in the international market and settled through one of the international CSDs and/or they may be listed on the stock exchange in the country whose currency is used and settled through the CSDs linked with the relevant exchange.[891] Moreover, the linkage of CSDs is more to enable international market participants to trade and settle local bonds than to facilitate local market participants trading and settling international bonds.[892] However, there is no initiative, at the ASEAN level, to deal with regional settlement connectivity of securities or to require that the regulations within that market do not preclude the national CSD from forming

891 See Asian Development Bank, "Settlement and Emerging Linkages in Selected ASEAN+3 Countries," (Asian Development Bank, 2005), 3.

892 ibid.

international links and that the participation criteria for the settlement systems (both for government and corporate bonds) permit regional market participants in addition to other regional depositories.[893] This lack results in intra-ASEAN bond investment remain relatively small.

2. A COMPARISON OF DOMESTIC IMPLEMENTATION OF REGULATORY HARMONISATIONS

The creation of the ASEAN Charter marked as a significant step in the regional legalisation process; however, the existing institutional structure demonstrates neither an aspiration nor a readiness to move toward "community laws" for deeper integration. This part will, hence, identify the extent of discrepancy, as a result of the ASEAN Way, in connection with the domestic implementation of regulatory harmonisation among related ASEAN members.

In exploring such issue, the specific matter of ASEAN Disclosure Standards and ASEAN CIS Framework will be discussed. This research will further look at the auxiliary issues of the discrepancy of domestic market standards (especially, insider trading and corporate governance) and foreign exchange restrictions on portfolio investments.

2.1.Disclosure and Distribution of Securities

As previously discussed, ASEAN Disclosure Standards are just a harmonisation of prospectus requirements, while Streamline Review Framework does not replace the national regime of each jurisdiction concerning the approval process that may be stipulated in various forms, for instance, approvals, recognition, registration of the

893 See ibid., 1-2.

prospectus.[894] Similarly, even ASEAN CIS Framework enables the units of an ASEAN CIS[895] authorised in its home jurisdiction to be offered in another host jurisdiction under a streamlined authorisation process[896], it is still subject to the host state's approval. This reflects the ASEAN-Way direction of respecting national sovereignty and the fact that the signatory members do not have a consensus to implement the automatic mutual recognition system, which requires a higher degree of regulatory harmonisation. It also demonstrates the reality that the domestic regulators do not trust the supervision and regulatory arrangements of other members. Consequently, an issuer will have to comply with the national regulations which would differ in each jurisdiction.

2.1.1. Implementation Problems of ASEAN Disclosure Standards

Crucially, ASEAN Disclosure Standards have been inactively used. Table 7 shows the companies that are cross-listed on the participating members at the end of 2014. For companies that are cross-listed on SGX and either Bursa Malaysia or SET, particularly those that have undergone IPO and/or listing in the 2010-2014 period, none of them has utilised the mutual recognition processes in the ASEAN Disclosure Standards in their offerings. For example, in the case of IHH Healthcare Berhad which held simultaneous public offerings in Singapore and Malaysia in 2012, the prospectuses

894 See ASEAN Capital Markets Forum, "Handbook for Issuers Making Cross-Border Offers Using the ASEAN Disclosure Standards under the Streamlined Review Framework for the ASEAN Common Prospectus," in *Monetary Authority of Singapore*, ed. ASEAN Capital Markets Forum (Singapore: Monetary Authority of Singapore, 2015), 10.

895 ASEAN CIS means CIS constituted or established in its Home Jurisdiction which has been Approved by its Home Regulator for offer to the public in the Home Jurisdiction, and assessed by its Home Regulator as suitable to apply to a Host Regulator for its units to be offered to the public cross-border in the Host Jurisdiction pursuant to the ASEAN CIS Framework. ASEAN Capital Market Fourm, "Handbook for CIS Operators of ASEAN CISs," ed. ASEAN Capital Market Fourm (2014), 5.

896 ibid., 3.

for the concurrent offers made in Malaysia and Singapore had Malaysian and Singapore "wrap-around" respectively.[897] The ASEAN Disclosure Standards were not used for the public offering. In the case of Malaysia Smelting Corporation Berhad, the company was already listed on Bursa Malaysia before an IPO was held in Singapore. Thus, the public offering only occurred in Singapore and was not made to the public in Malaysia.[898]

Table 7 – **Cross-listings in the Participating Members**

Issuer	Stock Exchange of Primary Listing	Year of Primary Listing/Offering	Dual or Cross-Listings
Sri Trang Agro-Industry Plc	SET	1993	SGX(2011); convert to secondary listing in 2014
Malaysia Smelting Corporation Berhad	Bursa Malaysia	1994	SGX (2011)
IHH Healthcare Berhad	Bursa Malaysia	2012	SGX (2012)

Source: SGX (as of 31 December 2014)

The inactiveness of ASEAN Disclosure Standards remarkably stemmed from the fragmentation of supervision regimes and insufficient regulatory harmonisation. Although the requirement regarding the registration of prospectus is similar in Malaysia,

897 Yee, 21.

898 ibid.

Singapore and Thailand according to Section 232 of CMSA[899], Section 240 of SFA[900] and Section 65 of SEA, respectively[901], the underlying theories of financial supervision are considerably different across the signatory countries of ASEAN Disclosure Standards. Singapore is based on a disclosure-based regulatory regime,[902] where the onus of assessing the merit of any securities rests with the investors whose money is being put at risk. Thus investors have to assess and determine the investment merits of the offering, while the regulator only plays a role to regulate the disclosure of material information.[903] It is only required, under the Singapore laws, for a submission of an application for the listing of Equity Securities or Plain Debt Securities on the Mainboard of SGX, in compliance with the SGX-ST Listing Manual and/or other requirements as prescribed by the SGX.[904]

Section 212 of CMSA requires a submission of an application to SS for an approval to make an offer of Equity Securities or Plain Debt Securities[905] to the general public in Malaysia (by way of listing and quotation of such securities on the Main Board of a stock exchange in Malaysia).[906] Currently, Malaysia is under the transition process of shifting to the disclosure-based regulation system;[907] hence SS only requires a submission of an application for recognition to make an offer of Plain Debt Securities

899 *Capital Markets and Services Act*, Section 232.

900 *Securities and Futures Act (Cap. 289)*, Section 240.

901 *Securities and Exchange Act (Fifth Amendment)*, Section 65.

902 See Forum, 30.

903 See Suruhanjaya Sekuriti, "Disclosure-Based Regulation - What Directors Need to Know," (1999), 2.

904 See Singapore Stock Exchange, "Rulebooks," Chapter I-III. See *Securities and Futures Act (Cap. 289)*, Section 240.

905 As defined under the ASEAN Disclosure Standards

906 *Capital Markets and Services Act*, Section 212.

907 Sekuriti, "Disclosure-Based Regulation - What Directors Need to Know," 2.

to the general public in Malaysia (without listing and quotation of such securities on a stock exchange in Malaysia).[908]

However, Thailand has inherently relied on the merit-based regulatory system as set forth in the provision of SEA.[909] An offering of securities will be assessed by the SEC regarding the investment merits and pricing. Here, the SEC would assume a paternalistic role and interposes itself between those seeking to raise funds and those seeking to invest.[910] According to the SEA, a submission of an application for approval to make an offer of newly issued Equity Securities or Plain Debt Securities to the general public in Thailand is required.[911] Moreover, the fact sheet prepared in accordance with the Notification of the Office of the Securities and Exchange Commission No. SorJor. 43/2554, Re: Rules and Procedures for Preparation of a Summarised Substance of Instrument must be prepared and approved by the SEC prior to the offering of Plain Debt Securities in Thailand.[912]

To enable a deeper mutual recognition system, it is necessary that an in-depth comparison of the approval processes (including the standards concerning financial advisor and auditor) among the signatory countries be done in order to close the regulatory gaps. The requirement of having approval process of the host country under ASEAN Disclosure Standards reflects the reality that each signatory regulator is not at the comfort level to rely on the consideration of prospectus made by another

908 *Capital Markets and Services Act*, Section 212.

909 *Securities and Exchange Act (Fifth Amendment)*, Section 32-33.

910 ibid., See the Annexure attaced to the SEA.

911 ibid., Section 32-33.

912 See "Office of the Securities and Exchange Commission No. Sorjor. 43/2554, Re: Rules and Procedures for Preparation of a Summarized Substance of Instrument."

signatory regulator. At this stage, there is no multilateral cooperation (at the regional level) concerning the information-sharing and cooperation mechanisms between home and host regulators to enforce home country laws applying to ASEAN provider of cross-border products or services in the host country.

2.1.2. Implementation Problems of ASEAN CIS Framework

In comparison with ASEAN Disclosure Standards, the ASEAN CIS Framework is designed on a basis of stronger mutual recognition than ASEAN Disclosure.[913] A qualified CIS operator of a member state may take advantage of the process if its home regulator first approves the CIS prospectus for offer to the public in the home jurisdiction Once the home regulator issues the approval letter, the foreign qualifying CIS operator may submit the letter of approval to the host regulator, together with the prospectus that complies with the host requirements, for the host regulator to approve the prospectus under a streamlined authorisation process. Nevertheless, the host regulators still reserve the right to reject the application in circumstances such as where CIS Operator misrepresents to or has been found to have misrepresented to, defrauds or has been found to have defrauded, investors.[914]

ASEAN CIS Framework shows a successful outcome comparing with the ASEAN Disclosure Standards. As at 29 February 2016, thirteen funds have been authorised as Qualifying CIS. SS and MAS have each approved six funds as Qualifying CIS. In Thailand, the SEC has approved one fund application[915] in June 2015 which was One Stoxx

913 See Yee, 26.

914 See above ASEAN Capital Markets Fourm, 10.

915 See ASEAN Capital Markets Forum, "ACMF Action Plan 2016-2020," ed. ASEAN Capital Markets Forum (2016), 8.

ASEAN Select Dividend Index Fund operated by One Asset Management Limited as an outbound retail CIS. Moreover, in June 2016, the SEC approved Amundi Opportunities – Amundi Asian Silver Age Fund operated by Amundi Singapore Limited as the Qualifying CIS for the distribution in Thailand.[916]

The reality of an insufficient regulatory harmonisation yields the undesirable distress that CIS operators would require to get an approval from the host country regulator and consequently face a diversity of country-specific requirements such as specific currencies for fund offerings, languages for offering documents and diversity of local intermediaries and liabilities regulations. They would be required to comply with multiple monitoring and reporting procedures in accordance with both home and host jurisdictions as well as the different timeframes for the process in each signatory country.[917]

2.1.2.1. Multiplicity of Country-Specific Requirements

In order to be approved to conduct an offering, there are differences of the regulatory requirements on approval process, information to be disclosed and the qualification of local intermediary and representative. MAS only requires an application for a "recognition" of ASEAN CIS,[918] and the language of the application must be in English. [919] A full prospectus must be prepared for MAS's consideration in accordance with the Third Schedule to the Securities and Futures (Licensing and Conduct of

916 Securities and Exchange Commission, "List of ASEAN CIS," http://www.sec.or.th/TH/SECInfo/CIS/Pages/cis_main.aspx.

917 See BNP Paribas, "ASEAN Collective Investment Scheme Framework - Regulatory Memo," ed. BNP Paribas (2016).

918 *Securities and Futures Act (Cap. 289)*, Section 285(1).

919 Fourm, 38.

Business) Regulations.[920] Moreover, under section 296(1) of the SFA, an offer of units in a CIS may not be made unless a prospectus in respect of the offer has been lodged with, and registered by, MAS.[921] Product Highlights Sheet must also be provided by issuers and furnished to investors in accordance with the Guidelines on the Product Highlights Sheet. It is required that the local intermediary that distributes or market CIS must hold a financial advisor license.[922] There must be a representative for the recognised scheme in Singapore to act as a liaison. The representative must be an individual, a company incorporated in Singapore, or a foreign company registered in Singapore under the Companies Act.[923]

By contrast, official approval is required in the case of Malaysia and Thailand. Malaysia requires a submission of the documents to SS for an approval either in English or Bahasa Malaysia wherein both full prospectus and fund factsheet must be prepared in accordance with the Prospectus and Guidelines for Collective Investment Schemes and the Guidelines on Sales Practices of Unlisted Capital Market Products respectively. According to the Guidelines for the Offering, Marketing and Distribution of Foreign Funds, an appointment of Registered Distributors is required to act as the local intermediary along with an appointment of local representative (which could be, for instance, the registered distributors or audit firms) under the Guidelines for the Offering, Marketing and Distribution of Foreign Funds.

920 See *Securities and Futures (Licensing and Conduct of Business) Regulations (Rg.10)*.

921 *Securities and Futures Act (Cap. 289)*, Section 296(1).

922 See Fourm, 41.

923 *Securities and Futures Act (Cap. 289)*, Section 287.

Thailand imposes more stringent requirements on the admission of ASEAN CIS. An application in English for the approval from the SEC is required.[924] Moreover, the Notification No. SorOr. 6/2557 specifies that the fund fact sheet to be disclosed to Thai investors must be prepared in the Thai language by the appointed local intermediary and that it must be approved by the SEC prior to the offering of ASEAN CIS in Thailand.[925] The full prospectus must be in compliance with the rules specified under (i) Notification No. KorChor. 3/2557, by virtue of Section 117 of the SEA; and, (ii) Notification No. SorNor. 3/2556. The fund factsheet must be prepared in accordance with the Notification of the Office of the Securities and Exchange Commission, No. SorNor. 3/2556. The persons whom the SEC permits to be local intermediaries of an ASEAN CIS must be entities that have been granted a brokerage license under the SEA.[926] The local representative must be appointed for the purpose of coordination and facilitation and the local representative can be either (i) the entity that has been granted securities licenses from the Ministry of Finance; or, (ii) the entity that acts as a representative office according to Section 93 of the SEA.[927]

2.1.2.2. Reporting Requirements

There is a discrepancy of reporting requirements among signatory countries. Malaysia and Singapore largely rely on the home regulator of the fund, while Thailand imposes more add-on reporting requirements. In Malaysia, the SS will rely on the

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924 *Notification of the Office of the Securities and Exchange Commission, No. Soror.6/2557, Re: Verification of Foreign Collective Investment Scheme and Announcement of Qualifying Scheme;.*

925 Fourm, 45.

926 *Notification of the Office of the Securities and Exchange Commission, No. Soror.6/2557, Re: Verification of Foreign Collective Investment Scheme and Announcement of Qualifying Scheme;.*

927 ASEAN Capital Markets Fourm, 57.

requirements of the home regulator of the fund and expects such reports produced for the fund to be delivered to unitholders in Malaysia and in accordance with the Guidelines for the Offering, Marketing, and Distribution of Foreign Funds.[928] Differently, Singapore requires that the CIS Operator of a recognised scheme notify MAS of matters relating to (i) any conditions or restrictions imposed by the home regulator on the CIS and (ii) documentation of the CIS's risk management process (if applicable).[929] CIS Operator must provide the independent auditor's report to the trustee/fund supervisor of the relevant ASEAN CIS, the home regulator and the host regulator on an annual basis.[930] Conversely, Thailand imposes additional requirements pursuant to the SEC Notification, No. SorKhor/Nor. 23/2552, which includes the disclosure of information on a monthly, semi-annual and annual basis.[931]

In relation to the significant change disclosure, generally, there are no exhaustive lists used by the signatory countries while some details and conditions may differ among signatory countries. In Malaysia, the CIS Operator must notify as soon as practicable in compliance with the CMSA.[932] However, Singapore further requires that CIS Operator must inform existing unitholders of any significant changes to be made to the ASEAN CIS no later than one month before the change is to take effect; where the change cannot be determined in advance, unitholders must be informed as soon

928 ibid., 29; Suruhanjaya Sekuriti, "Guidelines for the Offering, Marketing and Distribution of Foreign Funds.," Paragraph 6.06.

929 See Monetary Authority of Singapore, "Code on Collective Investment Scheme," (2002 revised 2015), Chapter 9.2.

930 Fourm, 40.

931 See "Office of the Securities and Exchange Commission Notification, No. Sorkhor/Nor. 23/2552."

932 See Sekuriti, "Guidelines for the Offering, Marketing and Distribution of Foreign Funds.," Paragraph 6.06(h).

as practicable.[933] Thailand also requires that CIS Operator must notify the SEC and the investors in Thailand of significant changes that are related to both the CIS Operator and the ASEAN CIS.[934]

In relation to the NAV[935] disclosure, there is the concordance position that the disclosure of NAV must be done daily and the decimal places would be in accordance with the regulation of home regulation. To this extent, Malaysia requires that the NAV per unit of the fund be made publicly available daily in Malaysia. The SS will rely on the requirements of the home regulator of a foreign fund in relation to the decimal places as well as the channels of disclosure.[936] Singapore requires a prospectus to state how investors may obtain the buying and selling prices of units in a scheme and the dealing days to which the prices apply. Where prices are available from certain publications or media in Singapore, the prospectus must state the names of such publications or media.[937] In Thailand, NAV, the value of investment units, the selling price, the redemption price, and the number of units of ASEAN CIS must be announced at the end of every dealing day. The number of decimal places used in the announcement shall be in accordance with the rules specified by the home jurisdiction via the acceptable and appropriate channel.[938]

933 ASEAN Capital Markets Fourm, 40.

934 "Notification of the Capital Market Supervisory Board, No. Torthor. 7/2557, Re: Rules, Conditions and Procedures for Selling, Repurchasing and Redeeming Units of Foreign Collective Investment Scheme," (2014).

935 Net Asset Value.

936 See Sekuriti, "Guidelines for the Offering, Marketing and Distribution of Foreign Funds.," Paragraph 6.06(k).

937 *Securities and Futures (Licensing and Conduct of Business) Regulations (Rg.10)*, Third Schedule.

938 See "Office of the Securities and Exchange Commission Notification, No. Sorkhor/Nor. 23/2552."

2.2. Market Standards

Chapter III has pointed out that there are no concrete regulatory harmonisation initiatives in relation to market standards. The development of ASEAN Corporate Governance Scorecard only reveals a "bottom-up" initiative focusing at the firm level with no legal effects. Such situations emphasise an influence of the sovereignty and flexibility principles under the ASEAN Way. Nonexistence a "top-down" regulatory harmonisation initiatives implies that ASEAN members are not ready to relinquish a high integration intensity, especially in the areas that would require a modification of domestic laws.[939]

The discrepancy of market regulations can be selectively considered through a discussion that focuses on insider trading and corporate governance, as follows.

2.2.1. Insider Trading

Insider trading is considered as one of the pillars of securities fraud.[940] Insider trading undermines investor confidence in the fairness and integrity of the securities markets.[941] ASEAN countries have enacted domestic legislation that links to variations of the regulatory regimes. Among the ASEAN Trading Link members, insider trading under Indonesia's law is defined as any trading in public securities that is done by an insider when in possession of non-public information that could have an impact on

939 The de Larosière Group, "Report of the High-Level Group on Financial Supervision on the Eu," (European Union, 2009), 23.

940 Philip R. Wood, *The Law and Practice of International Finance* (London, England: Sweet & Maxwell, 2010), 391.

941 THE EMERGING MARKETS COMMITTEE, "Insider Trading – How Jurisdictions Regulate It," (INTERNATIONAL ORGANIZATION OF SECURITIES COMMISSIONS, 2003), 1.

the price of securities or the decision of investors.[942] Insiders are defined as commissioner, director, employee and main shareholder of a company. It also includes those who have relationships with the company, either by virtue of their position, profession or business relationship that gives them access to material non-public information. In addition, those who within the last six months would have fallen into one of those categories are also considered to be an insider.[943]

The regulations governing insider trading in Singapore are contained in Division 3, Part XII of the SFA. The SFA's approach to insider trading is an "information connected approach[944]". This means that trading whilst in possession of inside information will constitute a violation, even if the person who provides the material, non-public information is not an insider. SFA prohibits possession of information concerning securities that is not generally available and materially price sensitive; and subscribing, purchasing or selling those securities or procuring another person to subscribe, purchase or sell those securities or communicating the information where the securities are listed on an exchange and the insider knows, or ought reasonably to know, that the tippee would be likely to subscribe, purchase or sell the securities or procure another person to do so.[945]

A similar approach was taken in Malaysia. With the passing of CMSA in 2007, the statutory provisions concerning insider trading under Malaysian laws can be found in Part V, Division 1, Subdivision 1 of the CMSA. Generally, an insider, who is a person

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942 "Law No. 8/1995 : Capital Market," (1995), Article 95-99.

943 ibid.

944 JPMorgan Chase & Co., "Singapore Investor Handbook," (2014), 9.

945 See *Securities and Futures Act (Cap. 289)*, Article 218-19.

in possession of certain information that is not generally available which on becoming generally available a reasonable person would expect to have a material effect on the price or the value of securities, and knowing or supposing to know that the information is not generally available, is prohibited, whether as principal or agent, to (i) acquire or dispose of, or enter into an agreement for or with a view to the acquisition or disposal of such securities; or (ii) to procure, directly or indirectly, an acquisition or disposal of, or the entering into an agreement for or with a view to the acquisition or disposal of such securities.[946] In this regard, Article 183 – 185 of CMSA define the scopes of information to constitute as an insider information.[947]

Thailand's SEA prohibits an insider who possesses inside information of the issuer from trading securities or derivatives either directly or indirectly, or disclosing such information either directly or indirectly with knowledge or a basis to know that the receiver of such information will use the information for the purpose of trading securities or derivatives, either for his own benefit or others.[948] The following persons are presumed as insiders: a director, manager or person controlling the company; officers of the issuers; persons responsible for the operation including auditors, financial advisors, legal counsels, appraisals or other person covering the officers of the person as such; personnel or directors, managers, officers, representatives, advisors of the state agencies, the securities exchange or an over-the-counter centre who holds

946 *Capital Markets and Services Act*, Article 188.

947 ibid., Article 183-85.

948 *Securities and Exchange Act (Fifth Amendment)*, Article 242.

an office or position with access to information; or any juristic persons that the aforementioned persons have controlled the business.[949]

Article 9 of Vietnam's Law on Securities prohibits persons from using inside information in order to purchase or sell securities for that person him/herself or for a third party; disclosing or giving inside information to another person; and advising another person to purchase or sell securities on the basis of inside information.[950] For purposes of the provisions of Article 9, the law defines inside information to include information about a public company or a public fund, which information has not yet been disclosed to the public and which, if disclosed, could have an impact on the price of the securities issued by such public company or public fund.[951] There is no requirement that an insider has a connection with the concerned issuer. It could be any person who can access inside information by any means. Therefore, a trade is prohibited if the investor has access to inside information, irrespective of the source of the information.[952]

From the comparison provided, it is obvious that insider trading rules in some of the selected ASEAN countries are regulated differently by adopting either one of two broad approaches; a person-connected regime or an information-connected regime. The conventional style of insider trading laws is based on "a person-connected regime", as adopted in Indonesia and Thailand, where the onus is on the prosecution to establish the accused's connection with the company where such affected persons

949 ibid., Article 243.

950 *Law on Securities*, Article 9.

951 ibid., Article 6.

952 ibid.

are prohibited from trading the company's stock based on the non-public and price-sensitive information.[953] In an "information-connected regime", insider trading is based on the possession of information that is material and non-public. The accused's relationship with the company concerned is, therefore, irrelevant.[954] Malaysia and Singapore (and even Vietnam) have adopted this approach. In addition, the amendment of Thai SEA has shown a significant movement toward the information-connected regime, whereby Article 243 sets a presumption of guilt on persons who possess or know the inside information[955]; therefore shifting the onus of proof to such persons. Nevertheless, Thai insider trading regulation still concerns the relationship of knowing or possessing the information of company as emphasised under the person-connected regime. [956]

Significantly, the information-connected approach results in a significantly greater number of investors being held accountable for trading on price-sensitive information that is unavailable to the general public, while convictions are also more easily secured under the information-connected approach. In fact, the information connected regime is considered a harsher insider trading regime.[957] Crucially, the diversities of insider trading rules impede investors' confidence and further outlook to develop a deeper mutual recognition system. To arrive at this determination, many regulators rely on the outcomes-based assessment as to whether and to what extent

953 Mak Yuen Teen et al., "Does the Adoption of an Information-Connected Approach Reduce Insider Trading?," *Journal of Banking and Finance* (2008): 3.

954 ibid.

955 See *Securities and Exchange Act (Fifth Amendment)*, Article 243.

956 See ibid., Article 242.

957 See .Teen et al., 3.

the foreign regulatory regime can achieve regulatory "outcomes" that are generally predetermined and comparable to those achieved by the domestic regulator.[958] The different approach to insider trading regulation demonstrates a diversity of such regulatory outcome, where the countries adopting the information-connected approach consider it as a more efficient way than the conventional approach to reducing insider trading in the markets and to enable a more level playing field for all investors.[959] Eventually, it would impair the trust among domestic regulators to further develop a deeper recognition system.

2.2.2. Corporate Governance

Instead of imposing stringent commitments based on the bottom-down approach, the ASEAN CG Scorecard is a "bottom-up" initiative that focuses at the firm level. It does not directly require member countries to modify their domestic laws under the regulatory harmonisation which implies that such initiative will not affect the member states' sovereignty. With the integration of ASEAN capital markets and the linking of its stock exchanges, raising the visibility of good corporate governance practices is a high priority as investors would have greater confidence in companies with good corporate governance. However, the reality of domestic practice shows a discrepancy of corporate governance regimes and implementation among ASEAN countries, especially the countries that have been assessed by the CG Scorecard.

The first group is the countries encountering corporate governance problems; even if there is a momentum to incorporate corporate governance into laws. The

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958a See IOSCO Task Force on Cross-Border Regulation, "Consultation Report," (International Organization of Securities Commissions, 2014), 18.

959 See further discussion Teen et al., 4.

countries include Indonesia, Philippines, and Vietnam. Critically, it has been widely recognised that bad corporate governance practices implemented by Indonesian corporations were a major cause of Indonesia's financial crisis in 1998.[960] Disclosure and transparency, board practices, and protection of minority shareholders were poorly implemented by some publicly listed companies.[961] Indonesia has done a lot of initiatives and efforts to implement good corporate governance, both from government side as well as private. The Capital Market and Financial Institutions Supervisory Body (currently has merged into OJK) has continued to introduce and amend its regulations and enforced them, which resulted in improved investors' protection.[962] However, the country faces the challenges concerning the protection of minority and foreign shareholders, quality of disclosures to ensure that all shareholders are well informed and protected, the disclosure of ownership structure, competencies and selection of the boards, empowerment of independent commissioners, and board appraisal.[963]

In the Philippines, PSEC has interposed no objection to the designation of the Institute of Corporate Directors as the domestic ranking body. The PSEC required all public limited company to issue an annual corporate governance report, which is intended to consolidate all of the governance policies and procedures of each public limited company into one report for easy reference.[964] Philippines have relatively low

960 Asian Development Bank, "ASEAN Corporate Governance Scorecard: Country Reports and Assessments 2013–2014," (Philippines: Asian Development Bank, 2014), 15.

961 ibid.

962 See IFC Advisory Services in Indonesia, *The Indonesia Corporate Governance Manual* (2014), 34-35.

963 Bank, "ASEAN Corporate Governance Scorecard: Country Reports and Assessments 2013–2014," 24.

964 ibid., 38.

scores of corporate governance due to the lack of adequate disclosures compared to their counterparts in other ASEAN countries, particularly on company websites. There is a perception that potential investors have difficulty navigating mainly due to the variety of formats and content employed from company to company.[965]

Corporate governance in Vietnam is under the framework of the following principal laws and regulations of Law on Enterprise of 2005, Law on Securities of 2006, Corporate Governance Code 2007 and Amendments 2012, Disclosure Rule 2012, and Listing rules of the Ho Chi Minh and Hanoi stock exchanges. There was a significant change in corporate governance regulations in 2012 when the Corporate Governance Code and the Disclosure Rule were substantially revised. The Corporate Governance Code, which was first issued in 2007, was revised through the issuance of Circular 121/2012/TT-BTC, which came into effect in September 2012.[966] However, the concept of corporate governance is still nascent to companies in Viet Nam and much assistance would be needed to inculcate a culture of good corporate governance. The low scores in their corporate governance assessment were attributed to a lack of understanding of how to apply and report good corporate governance practices. At the same time, many companies have good corporate governance practices but do not disclose.[967]

Thailand and Malaysia are in the second group of countries having high improvement of corporate governance. According to CG Watch 2016 conducted by Asian Corporate Governance Association, Thailand and Malaysia rank fourth and fifth respectively among eleven participating Asian countries; being the second and third

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965 ibid., 45.

966 ibid., 71.

967 ibid., 82.

ranks among assessed ASEAN countries.[968] The corporate governance compliance in Thailand operates on a comply-or-explain basis.[969] The Thai Government continues to give high priority to good corporate governance by puttting corporate governance as the national agenda in 2002. In this regard, SET introduced the Fifteen Principles of Good Corporate Governance in 2002 as preliminary implementation guidelines for listed companies in Thailand, which have later been modified to make them comply and compatible with OECD and ASEAN's standards.[970] Generally, Thai companies do well in the issues concerning the rights of shareholders and equitable treatment of shareholders. Specifically, the notice of the call to AGM and the AGM minutes are of high quality and have complete details. However, there is still significant room for improvement in the issues related to the role of stakeholders and responsibilities of the board. The boards of directors should give particular attention to these governance areas to meet international standards.[971]

Malaysia's corporate governance regulatory framework is differently governed by law, code as well as regulatory requirements instituted by the regulator, stock exchange, and statutory bodies, for example, the provisions of CMSA[972], listing requirements of Bursa Malaysia and Malaysia Code on Corporate Governance.[973] The country shows an improvement in the companies' corporate governance practice;

968 Jamie Allen, "Cg Watch 2016 – Ecosystems Matter," news release, 2016.

969 Bank, "ASEAN Corporate Governance Scorecard: Country Reports and Assessments 2013–2014," 59.

970 Australian-Thai Chamber of Commerce, "Corporate Governance in Thailand," ed. Australian-Thai Chamber of Commerce (2014).

971 Bank, "ASEAN Corporate Governance Scorecard: Country Reports and Assessments 2013–2014," 69.

972 See *Capital Markets and Services Act*, Article 318-20.

973 Suruhanjaya Sekuriti, "Corporate Governance Regulatory Framework " https://www.sc.com.my/corporate-governance-regulatory-framework/.

however, there are areas that warrant further improvement. This includes publishing of AGM minutes on the company's website and the policies, procedures, and insights on the conduct of the meeting as well as the voting results; disclosure of more information on Environment, Social, Governance policies and activities, information on corporate objectives, key risks areas (other than financial risks), dividend policy, remuneration of individual directors, and board assessment including the process and criteria used; and publishing of directors' profile with clear separation of directorships.[974]

The third group is the countries having developed corporate governance. According to CG Watch 2016, Singapore ranks first among the eleven participating countries in Asia.[975] Singapore's corporate governance practices are guided by the local frameworks based on the Companies Act (Chapter 50), SFA, the SGX's Listing Rules as well as the Code of Corporate Governance.[976] The MAS and the SGX are the two main bodies overseeing corporate governance practices of Singapore's publicly listed companies.[977] The country has an effective enforcement strategy and pushes its overall corporate governance regime to be more up to date. AGM documents are well prepared and disseminated in a timely manner. However, the disclosure of the AGM process, questions by shareholders, answers by the board and management, and meeting details are not sufficiently communicated. There is little disclosure on evaluations of management and individual board members as well as the transparency

974 Bank, "ASEAN Corporate Governance Scorecard: Country Reports and Assessments 2013–2014," 36.

975 See Allen. above

976 Monetary Authority of Singapore, "Corporate Governance," http://www.mas.gov.sg/regulations-and-financial-stability/regulatory-and-supervisory-framework/corporate-governance.aspx.

977 ibid.

in the area of remuneration for management and board members and details of succession planning for the management.[978]

The comparisons across the six ASEAN markets under the CG Scorecard show significant asymmetry of governance standards and practices. There is a similar split between the top performers (Singapore, Thailand, and Malaysia) and those on the bottom (Indonesia, the Philippines, and Vietnam). This clearly implies that there is a huge gap of the development of corporate governance. Differences of domestic institutional structures also reflect the fact that there is no regional body to deal with the issue; and therefore results in a divert development direction among member countries on corporate governance.

2.3. Foreign Exchange Restrictions

Unlike the EU countries, ASEAN countries witness a diversity of exchange rate regimes. Based on IMF's report, Indonesia, Philippines, and Thailand use the floating arrangement approach while Malaysia, Cambodia, and Myanmar implement other managed arrangement approaches to the exchange rate regime. Apart from that, the stabilised arrangements are used in Singapore and Vietnam, although Brunei and Lao PDR's exchange rate regimes are differently based on currency board with the Singapore dollar and crawl-like arrangement respectively.[979]

Even though ASEAN has put the capital movement liberalisation under the legal frameworks, capital flows are still treated distinctly by adopting the flexibility principle.

978 Bank, "ASEAN Corporate Governance Scorecard: Country Reports and Assessments 2013–2014," 57.

979 See Geert Almekinders et al., "ASEAN Financial Integration," in *IMF Working Paper* (International Monetary Fund, 2015), 17.

As the liberalisation capital movement is based on member's readiness, the exact timeframe of capital movement liberalisation has not been determined yet. This means that by the end of 2025 there may be no real completion of the strategic action plan because the implementation is subject to domestic conditions and appropriate safeguards. Critically, the existence of safeguard clauses results in many ASEAN members' requiring permission, ex-ante reporting requirements, or quantity restrictions even if permission is generally granted. The consequence of the restrictions substantially impairs the ASEAN's pathway toward the creation of single market and prevents an optimal allocation of resources and the integration of open, competitive and efficient financial markets and services. In the light of this, there is a diversity of regulatory control over securities investment inflows and outflows.

By looking at the members of ASEAN Trading Link, the countries generally have no restrictions and limitation on the capital inflows investing in equities and bonds while some countries impose certain requirements.[980] However, some countries may specify additional conditions. The Philippines requires a registration of equities and bonds purchased by non-residents where the foreign exchanged needed for capital repatriation and remittance of profits.[981] Vietnam also requires non-resident to open a Vietnamese Dong -denominated securities trading account to undertake the transaction.[982] Similarly, Thailand requires that the capital inflow must be deposited or exchange into local currency within 360 days as of the date of remittance.[983]

980 See AsainBondsOnline, "Cross-Border Portfolio Investment Regulation in Select Emerging East Asian Markets," (Asian Development Bank).

981 See Clearstream, "Investment Regulation - Philippines".

982 See AsainBondsOnline.

983 See Bank of Thailand, "ข้อควรทราบเกี่ยวกับระเบียบควบคุมการแลกเปลี่ยนเงิน."

In terms of the capital outflows made by residents, Indonesia and Singapore have no exchange control restrictions on the residents to purchase securities abroad (but there must be a report foreign exchange activity to the central bank in the case of Indonesia). Some countries set the conditions on the outflows. In this regard, Malaysia requires that residents with domestic borrowing and that have funded the investment through conversion of ringgit into foreign currency may invest abroad subject to certain conditions. Similarly, Vietnamese residents may invest in shares and bonds abroad subject to regulations set by the State Bank of Vietnam.[984] Nevertheless, some countries impose a quantitative control on the outflows. The Philippines requires prior approval for any resident's offshore investments totaling more than USD 6 million annually. For offshore investments under USD 6 million annually, the resident must submit supporting documents describing the nature and place of investment to the bank selling the foreign exchange.[985] In the same manner, Thailand requires that retail resident investors must invest offshore through private funds or authorised securities companies in accordance with the allocated investment limited prescribed by the SEC, while institutional investors (according to the Bank of Thailand's regulation) may invest freely in foreign securities issued abroad.[986]

For the repatriation of investments, there are no restrictions applied to the repatriation of capital or remittance of dividends and profits. However, some countries may impose some additional procedural requirements, for instance, non-resident financial entities must convert Singapore Dollar proceeds from securities into foreign

984 See AsainBondsOnline.

985 ibid.

986 See Bank of Thailand.

currency before using such funds to finance activities outside Singapore[987] or foreign investors are eligible to execute an outward remittance equivalent to the excess Philippine Peso funded via inward remittance of foreign funds but not exceeding the amount of foreign exchange purchased.[988]

Generally, the wide divergence among ASEAN economies observed in the area of financial sector development extends to capital account openness, where ASEAN capital account integration agenda is properly gradualist in nature, emphasising the correct sequencing of liberalisation and the putting in place of regulatory safeguards to protect individual countries from capital flow volatility.[989] From the comparison, ASEAN exchange control deregulation (in particular the capital outflow of investing aboard) will be an ongoing process over the coming years with the end goal of achieving a high degree of capital account openness while preserving adequate financial stability; meaning that an end result of having a single currency is unlikely. Some of these restrictions may have to be phased out as the region moves along the path to regional financial integration[990] as the interest rates, the exchange rate, a financial asset and property prices, and even production costs in the domestic economy were affected by the comprehensive exchange controls; otherwise, it would prevent the important price mechanism of the market economy from functioning properly. This led to the mal-distribution of scarce resources and the functioning of the economy at levels below its optimum capacity.[991]

987 See AsainBondsOnline.

988 See Clearstream, "Investment Regulation - Philippines".

989 See Almekinders et al., 20.

990 See ibid., 23.

991 ibid., 22-23.

Notwithstanding the risks associated with the capital movement, removal of capital control would eventually enable members to conduct many operations abroad, such as buying shares in non-domestic companies. It further allows to companies to invest in, and own, other overseas companies and take an active part in their management as well as raising money where it is cheapest. The removal of restrictions could also contribute to reducing the round-tripping of regional savings through financial centres in advanced economies. For instance, owing to the fungibility of capital, some of the funds invested abroad by ASEAN central banks as they greatly expanded their holdings of official reserves after 1997–98 may have returned to the region in the form of interregional portfolio investments. The gradual relaxation of restrictions on capital outflows from ASEAN countries would likely lead to increased intra-regional capital flows, in part by virtue of the commonly observed "home bias" whereby investors invest a relatively large share of their portfolio in their home country and home region because of familiarity and information advantages.[992]

992 ibid., 19.

3. A COMPARISON OF MARKET INTERMEDIARIES AND INVESTOR PROTECTION MECHANISMS

This part will identify the extent of discrepancy of the ASEAN Way in terms of the domestic regulatory arrangement of market participants. In doing so, the issues of national regulatory frameworks concerning an establishment of the local presence of foreign securities firms and services providers will be investigated. It will further discuss the topic of implementation gaps on investor protections; covering the areas of dispute settlement, enforcement actions concerning false or misleading statement and cybersecurity.

3.1. Market Entry of Securities Intermediaries

ASEAN financial services liberalisation is treated differently from other service sectors. The flexibility principle, in particular, the ASEAN Minus X formula[993], is applied in the liberalisation plan due to the sensitivities to other economic sectors and the differences in the financial development of members[994] wherein members that are ready to liberalise can proceed first and can be joined by others members at a later stage. Moreover, although the process requires a progressive liberalisation of the remaining by 2020; the members are still allowed to maintain the restrictions as negotiated and agree in the list of pre-agreed flexibility, which eventually means that the end of the regional financial liberalisation has not been determined yet.[995] Thus,

993 ASEAN Secretariat, "ASEAN Economic Community Blueprint 2008," ed. ASEAN (2008), 12.

994 See Pariwat Kanithasen, Vacharakoon Jivakanont, and Charnon Boonnuch, "Aec 2015: Ambitions, Expectations and Challenges ASEAN's Path Towards Greater Economic and Financial Integration," in *Bank of Thailand Discussion Paper* (Bangkok, Thailand: Bank of Thailand, 2011), 27.

995 ibid.

according to Annex I of the AEC Blueprint 2008 (Table 8), the lists of agreed sub-sectors to be liberalised by 2015 demonstrate uneven liberalisation commitments.

Table 8 – **Commitments of Financial Services Liberalisation according to Annex I of the AEC Blueprint 2008**

Sub-sectors	B	C	I	L	MY	MR	P	S	T	V
Capital Market										
Trading for own account	•		•		•		•	•	•	
Participation in issue of all kind of securities			•				•			
Money banking										
Asset management			•				•	•	•	
Settlement and clearing services for financial asset			•				•	•	•	
Other										
Provision and transfer of financial information						•	•			
Advisory, intermediation and other auxiliary financial services							•	•	•	•

By focusing on the market access of foreign entities to establish a local presence to provide securities services, the Protocol to Implement the Seventh Package of Commitment on Financial Services under the AFAS has generally enabled the local establishment, subject to certain regulatory conditions. In the normal case, permitting foreign firms to enter the market is often accompanied by the lowering of entry requirements and clarification of their content or vice versa. The entry could be either by establishing a new commercial presence or by purchasing a local business. Either way, clear entry and/or takeover requirements must be disclosed, so that the appropriate form of market participation can be determined on an economically viable basis.[996]

996 Masamichi Kono and Mamiko Yokoi-Arai, "Dissecting Regional Integration in Financial Services from the Competition Policy and Trade Policy Perspectives1," *BIS Papar* 42 (2008): 92.

In the light of this, Malaysia and Singapore have more relaxed regulatory requirements. Trades on Bursa Malaysia must be transacted through locally incorporated companies which are participating organisations of the stock exchange.[997] Offshore investment banks and offshore companies are permitted to provide asset management services but confined to non-resident customers and foreign currency assets. Asset management by offshore banks, offshore investment banks and offshore companies in Malaysian equities or equity-linked investments are confined to non-residents which are not offshore companies registered in Labuan.[998] For investment advisory services, entry as a non-bank is only permitted under certain conditions. Offshore banks, offshore investment banks and offshore companies in Labuan and international Islamic banks can only provide services to non-resident customers.[999]

As a financial centre, Singapore set lesser requirements for operating securities trading, where banks and merchant banks are required to set up separate subsidiaries to trade financial futures for customers. Financial futures brokers can establish as branches or subsidiaries.[1000] Asset management companies, custodial depositories, and trust services companies can establish as branches, subsidiaries or joint ventures; only the Central Depositary Pte Ltd is authorized to provide securities custodial depository services under the scriptless trading system; and for activities relating to the use, including via investment, of monies from any social security, public retirement or

997 *Protocol to Implement the Seventh Package of Commitment on Financial Services under the ASEAN Framework Agreement on Services*, Malaysia, page 14-16.

998 ibid., Malaysia, page 20-22.

999 ibid., Malaysia, page 22-24.

1000 ibid., Singapore, page 15-17.

statutory saving scheme.[1001] Financial advisers can establish as branches, subsidiaries or representative offices. Representative offices cannot conduct business or act as agents.[1002]

Domestic regulatory frameworks of Brunei require that the provision of securities trading services, asset management, and advisory services must be subject to the approval of AMBD, involving setting up in the form of a locally incorporated company, foreign branch or pursuant to the local laws.[1003] In the same way, Indonesia allows the provision of securities trading services, asset management, and advisory services by foreign securities intermediaries through an establishment of securities broker/dealer, asset management or investment advisory companies pursuant to the domestic laws.[1004] The Philippines imposes a little different regulatory requirement that provisions of the provision of securities trading services, asset management, and advisory services must be performed by an investment house or securities broker/dealer organised as a stock corporation. Investment houses are stock corporations; subject to foreign equity limitation of the voting stock and reciprocity requirement where foreign nationals may become members of the board of directors to the extent of the foreign participation in the equity of the enterprise. Resident foreign directors or officers of an investment house, if any, must register with the Bureau of Immigration and Deportation.[1005] The similar shareholding requirement is also imposed in Thailand. For securities trading services, an establishment of licensed

1001 ibid., Singapore, page 18-19.

1002 ibid., Singapore, page 19.

1003 See ibid., Brunei, page 13-15.

1004 ibid., Indonesia, 17-21.

1005 See ibid., Philippines, page 15-18.

securities company allows foreign equity participation to be allowed up to one hundred per cent of paid-up capital.[1006] Foreign asset manager can provide services in Thailand only through an establishment of licensed asset management company where the foreign equity participation can be allowed up to one hundred per cent of paid-up capital; subject to the condition that during the first five years after the license has been granted, at least fifty per cent of the paid-up capital of the asset management company must be held by financial institutions established under Thai law.[1007]

With different conditions, CLMV countries have liberalised financial services sector. Cambodia permits a provision of securities trading services through an establishment of securities firms receiving a license to operate securities underwriting and dealing business, and brokerage businesses (for the account of the customer only) from the national regulators according to laws and regulations of securities sector, other related regulations.[1008] Approval from the Central Bank of Myanmar is required and subject to Union of Myanmar Foreign Investment Law, Myanmar Companies Act and existing domestic Laws for a provision of advisory services in Myanmar.[1009] Some countries impose a different requirement of having a joint venture arrangement with local partners. Foreign security companies are allowed to establish a joint venture security company with a commercial bank registered in Lao PDR. Financial investment advisory related to security investments are allowed to operate through joint venture

1006 "Ministerial Regulation Re: Premission to Operate Securities Business B.E. 2551."

1007 "Ministerial Regulation Prescribing Service Businesses Not Subject to Application for Foreign Business Permission, B.E. 2556," (2013); *Protocol to Implement the Seventh Package of Commitment on Financial Services under the ASEAN Framework Agreement on Services*, Thailand, page 15-18.

1008 *Protocol to Implement the Seventh Package of Commitment on Financial Services under the ASEAN Framework Agreement on Services*, Cambodia page 11.

1009 ibid., Myanmar, page 11.

security companies between foreign security company and commercial bank registered in Lao PDR.[1010] Similarly, in Vietnam, foreign securities service suppliers are permitted to establish representative offices and joint ventures with Vietnamese partners in which foreign capital contribution not exceeding forty-nine per cent. Securities service suppliers with one hundred per cent foreign-invested capital are permitted. Some types of securities services, such as asset management, can be operated through branches of foreign securities services suppliers.[1011]

According to the comparison, AFAS is successful in opening up the financial services sector of all ASEAN countries as the provision of such services was previously prohibited in some ASEAN countries; for instance SEC used to require that Thai licensed securities intermediaries must be Thai company and the provision of such services was also prohibited under Foreign Business Act B.E. 2542 for all foreign companies.

Ultimately, ASEAN-wide integration requires a substantial degree of regulatory harmonisation among the member states, but instituting a uniform regulatory structure across a region with many sovereign states at different stages of development is a daunting task as it infringes on national sovereignty. Even if the clarity of the overall AFAS drafting proves a success to improve the GATS schedules (in which the intentions of the member countries were not always clear), whether there has been a significant improvement compared to the GATS in terms of actual commitments is not obvious, and in some cases it appears that, due to the clearer language, the number or content of limitations may have increased.[1012] However, the liberalisation under AFAS has been

1010 ibid., Lao PDR, page 10-13.

1011 ibid., Vietnam, page 15.

1012 See Kono and Yokoi-Arai, 92-93.

relatively limited where it differs little from specific GATS's financial sector commitments.[1013] Commitments in banking are limited mainly to deposit-taking and lending, and securities to trading, dealing, issuance and provisions of asset management and financial advisory services.[1014] By compared to the GATS commitments, while there has been some progress in nonbanking, the academic study has looked into how far the AFAS has achieved GATS "plus", and it was revealed that while some progress had been made, it was considered to be "weak".[1015]

3.2. Investor Protections

ASEAN has succeeded in developing a regional comprehensive investment protection regime that covers the portfolio investment. An achievement of ACIA demonstrates a dynamic relationship between the ASEAN Way and the regional integration where the elasticity of the ASEAN Way is capable of dealing with the rising concern of ASEAN members to promote the economic development so as to attract the investment flows in the region.

However, the ASEAN Way raises a question concerning an effectiveness of the implementation of ACIA as it still depends on members' willingness to undertake regulatory reforms in accordance with the provisions of ACIA. By having ASEAN Trading Link along with ASEAN Disclosure Standards and ASEAN CIS Framework, there is no consensus to create regulatory harmonisation in relation to the sanctions against

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1013 Douglas Arner, Paul Lejot, and Wei Wang, "Assessing East Asian Financial Cooperation and Integration," in *Asian Institute of International Financial Law Working Paper* (2009), 22-23.

1014 See *Protocol to Implement the Seventh Package of Commitment on Financial Services under the ASEAN Framework Agreement on Services*.

1015 See Kono and Yokoi-Arai, 93.

specified categories of participants in order to provide some assurance for the investors. Moreover, a lack of regulatory harmonisation regarding investor protection results in a diversity of regulatory regimes that impairs trusts among ASEAN members in order to rely on the home country's regulatory framework – as a part of mutual recognition mechanism. The impediments as a result of the regulatory divergence can be considered as follows.

3.2.1. Enforcement Actions (Focusing on False or Misleading Statement)

One of the goals of the Implementation Plan 2009 is to create bilateral relationships to ensure investor protection for mutual recognition arrangements for cross-border provisions of products and that to strengthen investor protection, whereby ACMF members consider ensuring the existence of a home country liability regime for compensating investors.[1016]

ASEAN Disclosure Standards do not harmonise public or private enforcement framework in connection with prospectuses. Issuers have to familiarise themselves with the different prospectus liability regimes in the different states (including administrative and civil liabilities). Also, investors investing outside their home state will need to be wary that liability regimes in host states differ. To this extent, there is no question that enforcement of securities laws plays an important role in protecting investors. The process of investor protection is driven by public enforcement undertaken by the regulator or criminal authorities and civil liability to investors who have suffered losses. From the investors' perspectives, while there is ongoing debate in the law and finance

1016 See ASEAN Capital Market Forum, "Implementation Plan to Promote the Development of an Integrated Capital Market to Achieve the Objectives of the Aec Blueprint 2015," ed. ASEAN Finance Ministers Meeting (ASEAN, 2009), 24-25.

scholarship as to whether private enforcement of securities laws leads to strong securities markets than public enforcement, there is no reason to doubt that a combination of private and public enforcement will boost investor confidence and are important aspects toward the building of strong securities markets.[1017]

By looking at the signatory countries of ASEAN Disclosure Standards and ASEAN CIS Framework, Malaysia and Singapore have long legislated the statutory provisions in their securities laws which explicitly provide for the ability of investors to bring civil actions for the redress; particularly against the issuers and their directors and advisers for false or misleading statements or non-disclosures in the prospectuses.[1018] However, there is no reported cased case of investors looking to the Malaysian or Singapore courts for redress. This fact indicates that private enforcement is not as significant as public enforcement.[1019]

According to the SEA, the prosecution of offenses false or misleading statement in Thailand is undertaken by way of public enforcement.[1020] However, the country has recently, according to the fifth amendment of SEA, launched provisions enabling civil actions of investors. According to the Article 317/1, the civil claim can be brought by the investors against offenders of unfair trading, false statements or disclosures, negligence to conduct a duty as director or management, and accepting other persons to use his own securities account, through a specific method.[1021] By undertaking different approach from Malaysia and Singapore, Thai SEA has set up the Civil Liability

1017 See Yee, 28.

1018 See *Securities and Futures Act (Cap. 289)*, Article 254; *Capital Markets and Services Act*, Article 248.

1019 See Yee, 28.

1020 *Securities and Exchange Act (Fifth Amendment)*, Article 305.

1021 ibid., Article 317/1.

Committee to consider the civil liability incurred to the offenders.[1022] The result of civil liability settlement between parties will terminate the right initiate further criminal proceeding.[1023] In the case where the offenders do not accept the civil liability settlement as such, the public enforcement by SEC will be taken place to prescribe the civil liability through the court.[1024] As a result of setting up the Civil Liability Committee, it is expected that civil enforcement in Thailand would be more active by supplementing the criminal prosecution.[1025]

An ability to undertake enforceable sanctions against those who breach disclosure requirements is crucial as it impacts investors' confidence in the market fairness. A lack of regional initiative on this issue reflects the impact of the ASEAN Way that ASEAN members have no consensus to undertake regulatory harmonisation which could eventually impact their sovereignty. Therefore, the harmonising of civil liability in connection with breaches of prospectuses is not realistic at this stage of ASEAN development, not least in part due to the different stages of development.[1026] Taken into account the lesson from the EU Prospectus Directive, creating a uniform administrative sanctions against specified categories of participants (the issuer, director, and the issue manager) will give the investors some assurance of the consequences in relation to a breach of the disclosure standards. Nonetheless, the current initiatives show that ASEAN lacks in pushing the regional efforts.

1022 ibid., Article 317/3.

1023 ibid., Article 317/7.

1024 ibid.

1025 Securities and Exchange Commission, "สรุปสาระสาคัญการแก้ไขพระราชบัญญัติหลักทรัพย์และตลาดหลักทรัพย์ฯ เพื่อเพิ่มประสิทธิภาพการบังคับใช้กฎหมาย," (Thailand: Securities and Exchange Commission, 2016), 3.

1026 See Yee, 45.

3.2.2. Dispute Settlement of Retail Investors

Generally, domestic regulator would categorise two layers of investor protection measures: institutional investors who are capable of financial knowledge and undertaking legal prosecution in relation to their investments; and retail investors who have limited knowledge and financial resources to procuring their rights, especially in the circumstance of cross broader prosecution that involves a diversity of foreign regulatory regimes. Table 9 compares dispute settlement mechanism applicable to retail investors among signatory countries of ASEAN Disclosure Standards and ASEAN CIS Framework. The comparison also includes Indonesia where it is considered as one of the regional major markets.

Table 9 – **Dispute Settlement Mechanism Applicable to Retail Investors**

Countries	Institutions	Mediation	Adjudication	Arbitration	Binding Opinion
Indonesia	Capital Market Arbitration Board	●	●	●	●
Malaysia	Securities Industry Dispute Resolution Center	●	●		●
Singapore	Financial Industry Disputes Resolution Centre Ltd	●	●		
Thailand	SEC	●		●	●

Source: adapted from SEC's database

It is obvious, according to the Table 9, that the institutional arrangements of dispute settlement services for retail investors differ among the compared countries. Indonesia, Malaysia, and Singapore set up separate out-of-court dispute settlement institutions[1027] to handle disputes involving monetary claims relating to capital market products and services while the function as such rests with SEC.[1028] In terms of the mechanisms, there is diversity dispute settlement services available among the countries subject to certain conditions such as the ceiling of claim amounts. Mediation is available among the four countries where the process involves a mediator who is an independent third party. The mediator's role is to help the parties communicate and reach an agreement and outcome that both parties are happy to accept. Where mediation fails, Indonesia, Malaysia, and Singapore provide an adjudication that involves a hearing of a dispute resulting in a decision on the dispute. Differently, Thailand only offers an arbitration (which is also optional in Indonesia). Indonesia, Malaysia, and Thailand recognise that the decision of dispute resolution will be binding upon the parties (therefore it is impossible for the parties to file a new claim to the court) while, in Singapore, the decision of the adjudicator is final and only binding on

1027 See Financial Industry Disputes Resolution Centre Ltd, "Background," http://www.fidrec.com.sg/website/background.html; Badan Arbitrase Pasar Modal Indonesia, "Scope of Services," http://www.bapmi.org/en/about_scopeofservices.php; Securities Industry Dispute Resolution Center, "Who We Are," https://sidrec.com.my/who-we-are/.

1028 Securities and Exchange Commission, "Arbitration " http://www.sec.or.th/EN/SECInfo/LawsRegulation/Pages/Arbitration1.aspx.

the financial institution[1029] - not on the investors (therefore, investors are free to reject the decision and pursue your complaint through other avenues).[1030]

In addition, ASEAN has entered into neither multilateral nor bilateral arrangements on the recognition and enforcement of foreign judgements. ASEAN members are not members of the international conventions related to the recognition and enforcement of foreign judgements, except for recognition and enforcement existing between ASEAN members that were previously in the British Commonwealth.[1031] This circumstance reflects the reality that ASEAN countries are not ready to establish a formal arrangement of recognition and enforcement of foreign judgements which ultimately impact each member's judicial sovereignty. Consequently, the judgement made by any of ASEAN members against the intermediaries would not be enforceable in other ASEAN countries (except in some circumstances as discussed above). An inability to enforce the foreign judgement in the home country places a burden to investors in the host country as the assets of issuers are normally located in the home country. Therefore, a judgement of the host country court would have a very limited application. Some ASEAN members have domestic legislation specifying the application of foreign judgements where all of the legislation is a form of either procedural law or special law. Apart from that, some of

1029 See Securities Industry Dispute Resolution Center, "General, Mediation and Adjudication," https://sidrec.com.my/frequently-asked-questions-faqs/; Badan Arbitrase Pasar Modal Indonesia, "Frequently Asked Questions," http://www.bapmi.org/en/faq.php. Securities and Exchange Commission, "Arbitration " http://www.sec.or.th/EN/SECInfo/LawsRegulation/Pages/Arbitration1.aspx.

1030 See Financial Industry Disputes Resolution Centre Ltd, "Having a Dispute with Your Finanical Institution? We Can Help.," ed. Financial Industry Disputes Resolution Centre Ltd (2016).

1031 See further Arnon Sriboonroj, "Recognition and Enforcement of Foreign Judgement in ASEAN" (Thammasat University, 2011), 180.

the members who are a common law system also apply the case law for a recognition and enforcement of foreign judgement such as Malaysia and Singapore. However, the scope of the foreign judgement to be recognised by each ASEAN members' domestic courts significantly differs from country to country. By focusing on Indonesia, Malaysia, Singapore and Thailand, a foreign court judgment cannot be enforced in Indonesia and Thailand directly.[1032] To enforce one, a new lawsuit must be filed in a domestic court. The foreign court judgment may be introduced as evidence in the new proceedings, although in principle the Indonesian court will not be bound by the findings of the foreign court.[1033] For common law countries such as Malaysia and Singapore, foreign judgments may be enforced by action under the common law on the debt due under the foreign judgment. A foreign judgment is treated as having created an implied obligation on the part of the judgment debtor to pay the judgment sum.[1034]

The above comparisons demonstrate differences of dispute resolution mechanisms and the lack of convergence on the recognition and enforcement of foreign judgements. Such differences impairs an effectiveness of investor protection of cross-broader transaction, resulting in a crucial challenge for a creation of an interconnected regional capital market as investor protection will build-up investor confidence and will gradually lead more and more investors to consider ASEAN capital

1032 ibid., 182; Vichai Ariyanuntaka, "Jurisdiction and Recognition and Enforcement of Foreign Judgements and Arbitrial Awards: A Thai Perspective," in *Singapore Conference on International Business Law* (Singapore: Thailand Court of Justice, 1996), 9.

1033 Alexandra Gerungan and Raditya Anugerah Titus, "Indonesia-Enforcement of Foreign Judgments 2016," International Comparative Legal Guide, https://www.iclg.co.uk/practice-areas/enforcement-of-foreign-judgments/enforcement-of-foreign-judgments-2016/indonesia; Sriboonroj, 182-83.

1034 See Francis Xavier and Tan Hai Song, "Singapore - Enforcement of Foreign Judgments 2016," International Comparative Legal Guides, https://www.iclg.co.uk/practice-areas/enforcement-of-foreign-judgments/enforcement-of-foreign-judgments-2016/singapore; Sriboonroj, 182-83.

markets as a sound alternative to the solutions offered by the banking sector and a valuable option to diversify their portfolio. The diversity also impacts a success of implementing a mutual recognition mechanism as the domestic regulators would require the equalised regulatory standards to create trust among each other; in particular to the extent that the home country's investor protection and domestic dispute settlement mechanism standards are sufficiently effective in the similar standard of the host country.

3.2.3. Cybersecurity

Even though ASEAN has been more successful in promoting trade integration and creating regional forums for discussing security issues than it has been in promoting more concrete security or economic integration, the diversity of cybersecurity development demonstrates that ASEAN faces obstacles of its own. Frequently cited limitations resulted by the ASEAN Way have included structural and organisational limitations, enforcement power of ASEAN, decision-making by consensus, divisions within member states, an aversion to intervening in the affairs of other member states, and little capability in handling traditional or non-traditional security challenges.[1035]

At present, ASEAN members generally have cybersecurity laws in place. The legislation contains similar offenses but differs in the detail of criminal intent of committing an offense, unauthorised modification of computer material and implementation measures. The legislation also prescribes a provision criminalising a disclosure of computer access codes without authorisation.[1036] Based on the academic

1035 Zeinab Karake-Shalhoub and Lubna Al Qasimi, *Cyber Law and Cyber Security in Developing and Emerging Economies* (Edward Elgar Publishing, 2010), 142-43.

1036 ibid., 142.

study, the development levels of cybersecurity laws across ASEAN can be categorised into three groups. By comparing ASEAN Trading Link signatories, the first group consists of countries having sound regulatory and governance arrangements where Singapore and Malaysia are pioneers in this respect. Singapore has a very strong cyber governance structure with capable computer emergency response teams and is very active in international cyber forums and has a very capable computer emergency response teams.[1037] Cybersecurity Agency of Singapore provides dedicated and centralised oversight of national cyber security function taking over the works of Infocomm Development Authority and Singapore Infocomm Technology Authority.[1038] Singapore has successfully implemented legislation, such as the Computer Misuse and Cybersecurity Act, to prevent and respond to cyber issues, including cybercrime and hacking.[1039] The government has also signed information-sharing agreements with government organisations in other advanced economies. The agreements also allow joint training and development opportunities.[1040]

Apart from Singapore, Malaysia has sound organisational cyber architecture. The country's very active in the technical elements of international cyber diplomacy and is showing increased interest in the policy aspects. The Malaysian Government appears to be actively building a structure to manage cybersecurity risks in a coordinated manner through the establishment of CyberSecurity Malaysia and an active critical

1037 See TOBIAS FEAKIN, JESSICA WOODALL, and KLÉE AIKEN, "Cyber Maturity in the Asia–Pacific Region," (Australia: Australian Strategic Policy Institute, 2014), 48.

1038 Teo Chin Hock, "Cybersecurity in Singapore" (paper presented at the ASEAN Cyber Security and Cyber Crime Center: Possibility and Way Forward, Thailand, 2016), 3.

1039 See ibid., 3-7.

1040 FEAKIN, WOODALL, and AIKEN, 48.

national infrastructure protection program. CyberSecurity Malaysia has responsibility for emergency response, security capability, capacity development, outreach, risk assessment and cybersecurity evaluation and certification. The agency also penned the country's National Cyber Security Policy. However, the legislation is generally vague contributing to a dramatic increase in the rates of cybercrime.[1041] The Computer Crimes Act 1997 does not cover many areas of computer-related activities, whereas, the criminal laws of Malaysia, in particular, the Penal Code, do not specifically provide for any computer-related crimes. Therefore, the legal standing of these cybercrime protections must be determined in the context of the existing laws. The main constraint is that the existing laws were not drafted with computer technology in mind and in most cases are not sufficiently broad to encompass the various types of computer-related activities.[1042]

The second group is the countries having moderate development on cybersecurity.[1043] Among ASEAN countries, Thailand has a moderately developed organisational structure for cyber issues and is pursuing positive legislative agendas.[1044] Thailand's organisational structure for cyber issues is reasonably developed, with several institutions in place and improving clarity about roles and responsibilities. The cyber policy is primarily owned by the Ministry of Information and Communications Technology. However, the government has recently raised the profile of cyber issues

1041 ibid., 33.

1042 Roos Niza Mohd Shariff, "Regulatory Framework in Cyber Crime Laws" (paper presented at the International Conference on E-Commerce, 2005), 195.

1043 FEAKIN, WOODALL, and AIKEN, 54.

1044 Chaiyos Lilitwong, "Cybersecurities and Cybercrime in Thailand: Laws and Policies" (paper presented at the ASEAN Cyber Security and Cyber Crime Center: Possibility and Way Forward, Thailand, 2016), 2-3.

by launching the National Cyber Security Committee, chaired by the Prime Minister. The Electronic Transactions Development Agency is charged with coordinating the implementation of cyber strategies and measures and is working with international partners to improve national cyber capacity.[1045] Thailand's cyber legislation and regulation are largely a work in progress. The country is now preparing the national strategy on cybersecurity along with the cybersecurity act. Currently, the key legislations dealing with the issue are Computer Crime Act B.E 2550 and the Royal Decree Prescribing Criterion and Procedure of Electronic Transaction by Governmental Bodies B.E. 2549.

In the same peer, Indonesia has achieved middle-of-the-range scores for governance structures, legislation, and international engagement.[1046] There are three government organizations involved in cyber security in Indonesia, which are Information Security Coordination Team, Directorate of Information Security, and Indonesia Security Incident Response Team on Internet Infrastructure. Indonesia has a policy concerning the implementation of cyber security in its legislation based on the Law No. 11 of 2008 on Electronic Information and Transaction but it's not clear that those laws are systematically enforced, especially the absence of a law that specifically addresses and regulates attacks in the cyber world.[1047]

The third group represents countries having a limited cybersecurity development. Among the countries, Philippine shows a lack of sufficient legislation

1045 ibid.

1046 FEAKIN, WOODALL, and AIKEN, 27.

1047 See Muhamad Rizal and Yanyan M. Yani, "Cybersecurity Policy and Its Implementation in Indonesia," *Journal of ASEAN Studies* 4, no. 1 (2016): 67-68.

and capabilities.[1048] Office of Cybercrime Designated as the central authority in all matter relating to international mutual assistance and extradition for cybercrimes and cyber-related matters but National Cybersecurity Plan and National Cybersecurity Incident Response Team has not been yet to be established.[1049] The country's assessment shows that those efforts are generally ineffectively implemented or not implemented at all.[1050] In addition, Vietnam's computer networks are among the most targeted for attack in the world, courtesy of rampant cybercrime and legions of Chinese hackers.[1051] To deal with the issue, the country has a new cybersecurity law on November 19, 2015, and it will take effect this year on July 1. This is the first comprehensive law ever issued in Vietnam on the security of "cyber-information," which is information exchanged in a telecommunications or computer network environment.[1052] However, the country still faces many obstacles and challenges in order to be able to make the most of its resources in this area and achieve its ambitious goals.

The comparison shows that ASEAN member states' efforts to adopt a regional comprehensive framework for cyber security are so far piecemeal and fragmented (as are national level efforts). This lack of region-wide cohesiveness detracts from the security of the region and a proper functioning market as cyberspace threats are closely

1048 FEAKIN, WOODALL, and AIKEN, 45.

1049 See Jed Sherwin Uy, "Peace and Order in Cyberspace: Status and Challenges" (paper presented at the ASEAN Cyber Security and Cyber Crime Center: Possibility and Way Forward, Thailand, 2016), 11-12.

1050 FEAKIN, WOODALL, and AIKEN, 45.

1051 Michael L. Gray, "The Trouble with Vietnam's Cyber Security Law," *The Diplomat*2016.

1052 Jim Dao, "New Law on Cyber Security in Vietnam," http://www.tilleke.com/resources/new-law-cyber-security-vietnam.

related to the financial transaction wherein causing increasingly serious risks to the economy.

4. CONCLUSION: THE ASEAN WAY AND THE IMPLEMENTATION FRAGMENTATION

Chapter IV has argued that ASEAN regional cooperation encounters a separation of ASEAN markets. The development gap existing between ASEAN financial markets defines and divides the monetary and fiscal policy goals of each member state. This, in turn, means that integration efforts are often retarded by national restrictions and regulations, which is exacerbated by the ASEAN Way of respecting sovereignty, non-intervention, consensus and flexibility principles. There remains significant disparity in the regulatory, normative, and cognitive institutions in the financial markets among the ASEAN countries. The disparity as such is critical for ASEAN to achieve the integration process.

This research has identified the implementation gaps in several areas. In relation to the domestic capital market governance and market infrastructure connectivity, the discrepancies can be identified as follows:

1. It is manifest that ASEAN consists of a vast disparity in development, socio-economic and financial stability.[1053] These huge development gaps within and across countries are the major weakness of ASEAN[1054] as it results in the disparities in governance system and effective implementation of the rule of law. Some countries are still at the stage of opening up their

1053 See Singh, 36.

1054 See Institute, 48.

economies while others are already established players in the global financial markets.

2. In terms of the domestic governance system, ASEAN members are moving, in the same direction, toward establishing or internationalising their domestic markets. By having the ASEAN Way as the integration cornerstone, the notion of respecting members' national sovereignty causes the regulatory practices of each country to be diverted according to the domestic institutional characteristics. The members undertake different approaches to construct their domestic institutional arrangements of financial supervision. The difference as such reflects the complexity of financial markets. Moreover, multiple regulatory bodies increase the complexity of reviewing, monitoring processes as well as enforcing the legal rules due to a hardship to achieve regulatory compliance.
3. To complete market integration, it is a challenge for the regulators and regulatory institutions to meet the requirements for coordination to reach equivalence or mutual recognition as the different participating member ASEAN jurisdictions are in different stages of economic development with very different legal traditions; in particular the diversities of regulatory supervision. It also impacts ASEAN members' trusts on other countries' regulatory regimes.[1055] Currently, ASEAN currently does not come out with the regional modality on a multilateral information sharing but relying on

1055 See Thawaramorn, 71.

the IOSCO MMoU participation (or another bilateral arrangement) that operates on a bilateral basis rather than a parallel basis.

4. In relation to the divergence of domestic market infrastructures, ASEAN exchanges are increasingly moving toward standardised trading platforms to increase their competitiveness. Nevertheless, their trading practices are still inconsistent as the introduction of ASEAN Trading Link did not accompany with a standardised trading practice. The comparison of ASEAN Trading Link signatories' settlement timing has found that it would cause a trading or settlement delays. ASEAN securities trading and post-trade infrastructure developments, so far, have limited in geographical boundaries.

5. A diversity of stock exchange ownership among ASEAN Trading Link members causes a difference of commercial orientation which eventually impacts an outlook to develop a deeper trading connectivity.

6. ASEAN countries have implemented different foreign investment restrictions on the share ownership of key industries in their countries. Foreign shareholding exceeding the limited will be either mandatorily sold (in some countries) or be ranked pari passu with non-restricted shares (but do not bear any voting rights).

7. ASEAN does not have regional cooperation concerning credit rating. There is no mutual recognition of domestic credit rating agencies and the diversity of domestic regulatory arrangement exists.

8. The settlement systems of the corporate bond also have no regional linkage. Each country has its own settlement arrangements for different

types of instruments and the participation in these systems is generally limited to locally regulated participants. This limitation results in intra-ASEAN bond investment remaining relatively small.

Although the creation of ASEAN Charter has marked as a significant step of the regional legalisation process; the existing institutional structure demonstrates neither an aspiration nor readiness to move toward "community laws" for deeper integration. ASEAN CIS Framework and ASEAN CIS reflects the ASEAN-Way direction of respecting national sovereignty and the fact that the signatory members are not ready to implement the automatic mutual recognition system which requires a higher degree of regulatory harmonisation. It also demonstrates the reality that the domestic regulators do not trust the supervision and regulatory arrangements among other members. This research has found the discrepancies in relation to the regulatory harmonisation, as follows:

1. ASEAN Disclosure Standards has not been used as a result of the fragmentation of supervision regimes and insufficient regulatory harmonisation, in particular, the differences of underlying theories concerning financial supervision of the signatory countries.

2. Contrastingly, comparing with the ASEAN Disclosure Standards, ASEAN CIS Framework shows a successful outcome as it more relies on a stronger mutual recognition. However, there are differences of the regulatory requirements on approval process, information to be disclosed and the qualification of local intermediary, representative, and reporting requirements among signatory countries.

3. There are no concrete regulatory harmonisation initiatives in relation to market standards. The clear example of a lack of regulatory harmonisation on market regulation is the case of insider trading rule where ASEAN Trading Link members implements different theoretical policies: a person-connected regime and information-connected regime, resulting in different levels of restriction.

4. As the "bottom-up" initiative merely focuses at the firm level with no legal effects, CG Scorecard portraits a significant asymmetry of governance standards and practices on corporate governance. There is a similar split between the top performers and the bottom.

5. Even ASEAN has put the capital movement liberalisation under the legal frameworks, capital flows are still treated distinctly by adopting the ASEAN Way of flexibility principle. Based on the comparison, this research has found that ASEAN exchange control deregulation (in particular the capital outflow of investing aboard) will be an ongoing process over the coming years with the end goal of achieving a high degree of capital account openness while preserving adequate financial stability; meaning that an end result of having single currency is unlikely.

In terms of market participants, this research has found several outcomes as follow:

1. ASEAN members have uneven liberalisation commitments. AFAS is successful in opening up the financial services sector of all ASEAN countries as the provision of such services was previously prohibited in some ASEAN

countries, such as the case of Thailand. Nevertheless, by compared to the GATS commitments while there has been some progress in nonbanking, the achievements that AFAS has accomplished as GATS "plus" are considered to be "weak".[1056]

2. With regard to investor protection in cross-broader transactions, there are no uniform administrative sanctions against specified categories of participants (the issuer, director, and the issue manager) to provide the investors some assurance of the consequences in relation to a breach of the disclosure standards. Moreover, there are differences of dispute resolution mechanisms and the lack of convergence on the recognition and enforcement of foreign judgements across the region.

3. ASEAN member states' efforts to adopt a regional comprehensive framework for cyber security are so far piecemeal and fragmented.

1056 See Kono and Yokoi-Arai, 93.

CHAPTER V CONCLUSION AND RECOMMENDATIONS

This chapter will address the advantages and disadvantages of the ASEAN Way in respect of the ASEAN capital market integration, and will subsequently make a judgement based on such comparison. It will further propose that an application of the ASEAN Way should be supplemented with SEP. This is because both the ASEAN Way and SEP share the similar foundation, focusing on the "middle path" philosophy.

The discussions concerning the aforementioned issues are as follows.

1. A CONCLUSION: THE ADVANTAGES AND DISADVANTAGES OF THE ASEAN WAY IN THE LIGHT OF ASEAN CAPITAL MARKET INTEGRATION

This research argues that the ASEAN Way of respecting sovereignty, non-interference, consensus and flexibility causes only partial success of ASEAN capital market integration. The ASEAN Way is vital to the existence of ASEAN in that it helps regional cooperation to move forward among a diversity of members' development levels, and there are several innovations that were built on the basis of the ASEAN Way. Nevertheless, the ASEAN Way has significantly influenced the intensity level of institutionalisation and legalisation processes of ASEAN's regionalisation. Critically, there remain significant disparities in the regulatory, normative, and cognitive institutions in the financial markets among the ASEAN countries. Despite the impediments the ASEAN Way has created, this research shows that the benefits of the ASEAN Way to the regional capital market integration outweigh the drawbacks.

In terms of the benefits of the ASEAN Way, the flexibility of ASEAN's mentality made ASEAN cooperation as a combination between a rule-based organisation and loose cooperation. The ASEAN Way is considered to the strong point of ASEAN, whose elasticity prevents the institution from falling apart. By comparison with the pre-ASEAN Charter period, the ASEAN Way has facilitated regional cooperation by creating a comfort level of each member to reach the next phase of cooperation that relies on a more legalistic framework and institution. The signing of ASEAN Charter demonstrates an achievement of ASEAN that it has evolved from a soft legalisation to be more formally legalised and increasingly to enter into under terms with an intention to be bound by the rules and commitments set out.

This research views that the importance of the ASEAN Way in accommodating the regional cooperation is the most important contribution that the ASEAN Way has made. This is because ASEAN consists of a vast disparity in development, socio-economic and financial stability[1057] levels, where some countries are still at the stage of opening up their economies while others are already established players in the global financial markets. Therefore, the ASEAN Way has established a cooperation approach for the ten members where the flexibility principle allows members to move together amidst enormous development gaps. Significantly, the regional market infrastructures were successfully constructed. This includes ASEAN Trading Link which was put up on a coordination and flexible process. Moreover, the ABFs demonstrate a unique regional innovation which cannot be seen in other regions. The formation of

1057 See Datuk Ranjit Ajit Singh, "ASEAN: Perspectives on Economic Integration: ASEAN Capital Market Integration: Issues and Challenges," in *LSE IDEAS special report* (London School of Economics and Political Science, 2009), 36.

regional infrastructures as such results in the trend that ASEAN members are moving toward establishing or internationalising their domestic markets. Crucially, members' domestic exchanges are increasingly developing toward standardised trading platforms to increase their competitiveness. Moreover, the ASEAN Way not only dominates the behavioural interaction among the ASEAN member states but also interpenetrates to other actors beyond the institutional frameworks of ASEAN. For example, it brought China, Japan, and South Korea to cooperate with ASEAN in a particular dialogue, namely ASEAN+3.

To date, ASEAN has successfully issued a series of regulatory initiatives on capital market integration, covering financial services liberalisation, capital movement, cybersecurity and investor protections. An explicit achievement of those initiatives is the introduction of disclosure and product distribution standards – ASEAN Disclosure Standards and ASEAN CIS Framework, where ASEAN has meaningfully implemented a harmonisation of prospectus requirements. These two frameworks are considered to be a very positive step towards a harmonisation of regulations among members in the future. Moreover, ASEAN has established the capital movement liberalisation under the legal frameworks – the ACE Blueprint and ASEAN Capital Account Liberalisation Blueprint, in order to create accountability for implementation. In terms of investor protection, ASEAN has succeeded in the development of a regional comprehensive investment protection regime that covers the portfolio investment. The comprehensive investment agreement is more advanced by comparison with the existing ASEAN IGA, AIA and some FTAs. Moreover, the achievement of ACIA demonstrates a dynamic relationship between the ASEAN Way and the regional

integration where the flexibility of the ASEAN Way is capable of dealing with the rising concerns of ASEAN members to promote economic development so as to attract the investment flows in the region.

Nevertheless, the ASEAN Way has critically influenced the intensity level of the institutionalisation and legalisation processes of ASEAN, resulting in several implementation gaps across ASEAN member countries. The regional cooperation architecture is structured in the form of "multi-cooperating bodies", enabling a deliberate choice of the consensual adoption of member states. Critically, the ASEAN Charter assigns neither any coercive authority nor a supranational style of having rule-making organs. ASEAN allows regional economic cooperation to develop flexibly, which undermines the rule of law and ASEAN's seriousness to integrate. To complete market integration, it is a challenge for the regulators and regulatory institutions to meet the requirements for coordination to reach equivalent standards in order to enable an operation of mutual recognition system. The difference is due to the facts that the participating ASEAN jurisdictions are in different stages of economic development and possess various legal traditions; in particular the diversities of regulatory supervision models.

A lesser degree of institutionalisation is obvious in the case of the implementation of the ASEAN Trading Link, which depends on the level to which members are comfortable to connect with "plug and play" infrastructure. ASEAN exchanges have increasingly been moving toward standardised trading platforms to increase their competitiveness; however, the comparative study of this research shows that trading practices are still inconsistent since the ASEAN Trading Link was not

accompanied by a standardised trading practice. Apart from that, the implementation of bond market integration initiatives still depends on the members' willingness to commit to such initiatives. There are regulatory diversities of regulations and settlement systems of the corporate bond.

Even though the creation of the ASEAN Charter has marked a significant step in the regional legalisation process, the existing institutional structure demonstrates neither an aspiration nor a readiness to move toward "community laws" for deeper integration. This research has found that regional integration is still based on a lesser degree of legalisation compared with the EU. ASEAN Disclosure Standards and the ASEAN CIS Framework reflect the ASEAN Way direction of respecting national sovereignty and the fact that the signatory members are not ready to implement an automatic mutual recognition system, which requires a higher degree of regulatory harmonisation. It also demonstrates the reality that the domestic regulators do not trust the supervision and regulatory arrangements employed by other members. This research has found that the issuers have to encounter differences of the regulatory requirements in relation to the approval process, information to be disclosed and the qualification of local intermediary and representative, and reporting requirements among signatory countries. This research has further found that there is no concrete "top-down" regulatory harmonisation initiatives concerning market standards. With regard to investor protection in cross-broader transactions, this research has found that there are no uniform administrative sanctions against specified categories of participants (namely, the issuer, director, and the issue manager) to provide investors with some assurance of the consequences in relation to a breach of the disclosure

standards. Moreover, there are differences in dispute resolution mechanisms, the lack of convergence on the recognition and enforcement of foreign judgements, and fragmented framework on cybersecurity across the region.

The ASEAN Way has had an impact on the intensity level of commitments of ASEAN initiatives. Although ASEAN has successfully put capital movement liberalisation under legal frameworks, capital flows are still treated distinctly, as ASEAN has adopted the flexibility principle under the ASEAN Way. Based on the comparative study, this research has found that ASEAN exchange control deregulation (in particular the capital outflows of investing aboard) will be an ongoing process over the coming years with the end goal of achieving a higher degree of capital account openness while preserving adequate financial stability; meaning that the end result of having a single currency is unlikely. In a similar vein, the ASEAN Minus X formula is also applied to the financial liberalisation plan due to the sensitivities to other economic sectors and the differences in the financial development of members. This research has compared the commitments with GATS. The result is that AFAS's commitments are not considerably different from GATS.[1058]

Taking into account both the benefits and the drawbacks resulted from the ASEAN Way, this research opines that the benefits of the ASEAN Way to regional capital market integration are still overshadowed by the drawbacks. As discussed, ASEAN would not have come this far without the ASEAN Way. Although it has taken more than fifty years for the development of regional cooperation, the existing cooperation

1058 See Masamichi Kono and Mamiko Yokoi-Arai, "Dissecting Regional Integration in Financial Services from the Competition Policy and Trade Policy Perspectives1," *BIS Papar* 42 (2008): 93.

is the essential foundation to develop a deeper integration in the future. By considering this way, this research concludes that the ASEAN Way should not be seen as a deterrence to regional cooperation.

2. RECOMMENDATIONS: THE SUFFICIENCY ECONOMY PRINCIPLE AND THE ASEAN WAY

Provided that the ASEAN Way will continue to exist, this research proposes that the SEP should supplement the operation of the ASEAN Way as a means to enable ASEAN effectively to develop a deeper regional cooperation. The application of SEP to the ASEAN Way is due to the reason that both principles are similarly constructed on the "middle path" ideology.

The discussion concerning the concept of SEP and recommendations pursuant to an adoption of SEP as a guiding principle for ASEAN's cooperation can be considered as follows.

2.1.The Sufficiency Economy Principle

The late H.M. King Bhumibol Adulyadej of Thailand proposed SEP on 4 December 1997. The philosophy guides people in living their lives according to the middle path – a path of moderation, between the extremes of sensual indulgence and self-mortification.[1059] The goal of implementing SEP is to create a balanced and stable

1059 Prasopchoke Mongsawad, "The Philosophy of the Sufficiency Economy: A Contribution to the Theory of Development," *Asia-Pacific Development Journal* 17, no. 1 (2010): 127.

development[1060], at all levels, from the individual, family and community to society at large, by developing the ability to cope appropriately with the critical challenges arising from extensive and rapid changes, especially globalisation, in the material, social, environmental, and cultural conditions of the world.[1061]

The following is a synthesis of the philosophy: "*sufficiency economy is a philosophy that stresses the middle path as the overriding principle for appropriate conduct by the populace at all levels. This applies to conduct at the level of the individual, families, and communities, as well as to the choice of a balanced development strategy for the nation so as to modernise in line with the forces of globalisation while shielding against inevitable shocks and excesses that arise. "Sufficiency" means moderation and due consideration in all modes of conduct, as well as the need for sufficient protection from internal and external shocks. To achieve this, the application of knowledge with prudence is essential. In particular, great care is needed in the utilisation of untested theories and methodologies for planning and implementation. At the same time, it is essential to strengthen the moral fibre of the nation, so that everyone, particularly political and public officials, technocrats, businessmen and financiers, adhere first and foremost to the principles*

1060 Harald Bergsteiner and Priyanut Dharmapiya, "The Sufficiency Economy Philosophy Process," in *Sufficiency Thinking : Thailand's Gift to an Unsustainable World*, ed. Gayle C. Avery and Harald Bergsteiner (Allen & Unwin, 2016), 32.

1061 Ministry of Foreign Affiars, "Philosophy of "Sufficiency Economy"," Royal Thai Consulate-General, Chennai, India, http://www.thaiembassy.org/chennai/th/news/4112/53868-%E0%B8%9B%E0%B8%A3%E0%B8%B1%E0%B8%8A%E0%B8%8D%E0%B8%B2%E0%B9%80%E0%B8%A8%E0%B8%A3%E0%B8%A9%E0%B8%90%E0%B8%81%E0%B8%B4%E0%B8%88%E0%B8%9E%E0%B8%AD%E0%B9%80%E0%B8%9E%E0%B8%B5%E0%B8%A2%E0%B8%87-(Philosophy-of-Sufficiency-E.html.

of honesty and integrity. In addition, a balanced approach combining patience, perseverance, diligence, wisdom and prudence is indispensable to cope appropriately with the critical challenges arising from extensive and rapid socio-economic, environmental and cultural changes occurring as a result of globalisation".[1062] SEP focuses on the importance of following/adopting the middle path for appropriate conduct by the population at all levels of society in terms of development and administration in order to modernise in line with the forces of globalisation.[1063] In this regard, the three interlocking elements represent the three underlying principles of SEP: moderation, reasonableness and immunity. These three principles are interconnected and interdependent; with two accompanying conditions: appropriate knowledge and ethics & virtues.[1064]

Moderation – taking action within reason, in the sense of not too much or not too little -- is an Eastern concept. As the late H.M. King Bhumibol Adulyadej stated: "*being moderate does not mean being too strictly frugal; consumption of luxury items is permitted... but should be moderate according to one's means"*.[1065] Reasonableness requires that the choices we make be justifiable by using academic approaches, legal principles, moral values or social norms. Resilience to external shock emphasises the need for built-in resilience against the risks which arise from internal and external changes by having good risk management; SEP recognises that the

1062 Mongsawad, 127-28.

1063 See above Ministry of Foreign Affiars, "Philosophy of "Sufficiency Economy".

1064 Mongsawad, 128.

1065 Royal Speech by H.M. King Bhumibol Adulyadej, given at Dusit Dalai Pavilion, Dusit Palace, 4 December 1998

circumstances and situations that influence our lives are dynamic and fluid.[1066] Immunity is a built-in resilience against the risks arising from internal and external changes by having good risk management. Creating an immunity to changes in material circumstances implies having enough savings, being insured against financial risks, and making a long-term future plan. Creating an immunity to social changes signifies unity among the people, along with their contentment and feeling at peace, while immunity to environmental changes prompts individuals and their communities to be aware of the impacts their actions may have on the environment, and subsequently their livelihoods, an awareness which leads them to live in harmony with nature. In addition, creating immunity to cultural changes means that the people appreciate and value their culture and heritage and do not waver in their determination to uphold them. They also understand and have a positive attitude toward the cultures of others.[1067] Apart from these three components, two other conditions are needed to make SEP operate effectively: knowledge and morality. Knowledge encompasses accumulating information with insight to understand its meaning and the prudence needed to put it to use. Morality refers to integrity, trustworthiness, ethical behaviour, honesty, perseverance, and a readiness to work hard.[1068]

Significantly, an implication of SEP could be applied to different parts of society – both domestic and international. At the domestic level, SEP encourages corporate pursuance of sustainable profit via ethical approaches, including good corporate

1066 Chaipattana Foundation, "Philosophy of Sufficiency Economy," http://www.chaipat.or.th/chaipat_english/index.php?option=com_content&view=article&id=4103&Itemid=293.

1067 See above the Ministry of Foreign Affairs, "Philosophy of “Sufficiency Economy”.

1068 Mongsawad, 128.

governance, social responsibility, mindfulness of all stakeholders, and business prudence with risk management. At the national or international level, SEP can be applied to the policy-making process. The concept helps shape policy through managing factors of production: physical capital, human capital, natural capital and social capital toward achieving quality growth. Such growth stresses people's well-being, sustainable environment, a steady growth rate, global risk management, and good governance.[1069]

2.2.Adopting the Sufficiency Economy Principle to ASEAN

Achievement of ASEAN financial cooperation needs a balance among the national financial policies, regional aspiration to integration, and concern about financial stability. As the regional integration progresses, the policy domain of nation states has to be exercised over a much narrower domain, and regional federalism will increase. The alternative is to keep the nation state fully alive at the expense of further integration, however, and ASEAN is tentatively pursuing this direction through the ASEAN Way.

SEP has significantly conveyed new ideas in dealing with the problem of balancing the ASEAN Way in the process of regional integration and offers a new paradigm of regional development. In order to allow the ASEAN Way effectively to develop a deeper regional cooperation, this research proposes that the SEP should complement the operation of the ASEAN Way because both the ASEAN Way and SEP are constructed on the "middle path" philosophy. Using SEP as the guiding principle

1069 ibid., 129-30.

of the ASEAN Way would not change the core elements of the ASEAN Way, but it would work as a supplement to ensure an effective function by creating systematic paradigms of regional development.

SEP would help by creating systematic paradigms of regional development. With the concepts of moderation, reasonableness, self-immunity, together with the conditions of morality and knowledge, the regional policy-makers and national governments should be able to achieve an optimal role. Regional policymaking should be based on the middle path and conducted with prudence and vigilance, subject to experience and knowledge assimilation. Therefore, the outlook for regional integration, national sovereignty and economic stability should be collectively considered for the sake of the region. No policies and laws should be launched without careful evaluation, in particular, the regulatory impact assessment, in order to avoid detrimental impacts.

The details of the recommendation can be illustrated as follows.

2.2.1. Institutions and Infrastructures

This research considers that imposing, at this stage, a single authority for ASEAN capital market integration and a single exchange along with centralised securities settlement system are not realistic for ASEAN due to the fact that the ASEAN Way still dominates as the habit of regional cooperation.

In order to improve the regional institutions and infrastructures, it is recommended that the following actions should be undertaken.

(i) In connection with the regional institutions, reasonableness under the SEP implies that there are benefits in utilising and expanding the mandate of existing ASEAN institutions rather than establishing a new institution, particularly in view of various factors such as resource constraints and the proliferation of existing bodies. The supporting reasons are the fact that there is a lack of clarity as to how the various programmes and activities at the ASEAN level are being and should be coordinated institutionally, however, and how to coordinate and sequence the measures for domestic financial market development with regional integration programmes and priorities. To overcome this issue, ACMF should expand its mandate to serve as a regional coordinator for financial sector regulation, such as ASEAN-wide licensing rules and reciprocity of recognition; enable cross-border documentation to enable movement of industry professionals. ACMF should be empowered to be a responsible body to implement regional mutual recognition agreement.

(ii) ASEAN should continue to monitor the state of development of domestic capital markets and their readiness for and the extent of their regional and global integration. ASEAN should flexibly redefine the strategy for the further development of national capital markets as needed in order to align the strategy with regional integration objectives and policies. As experienced in the EU, the ESMA has published a survey on the different enforcement strategies in the various member states.

It has been argued that such survey creates a form of peer influence to attempt to get the member states to reach convergence eventually[1070] as there is a need to adopt a flexible approach that takes into account different levels of development while it allows different markets to progress along a multi-track approach. Such approach would enable more developed countries to progress toward regional integration at a faster rate while less developed countries implement reforms as and when they have the capacity.

(iii) Each participating member should continue to strengthen and coordinate its exchange governance arrangements, SRO functions, listing rules and corporate governance framework. ASEAN members should consider further progress in completing the de-mutualisation as it would be needed in countries that are yet to de-mutualise. The de-mutualisation process should be based on the reasonableness and knowledge, however, meaning that an impact study of de-mutualising should be undertaken to consider whether it is appropriate and suits the domestic context. In addition, SROs' functions should be further strengthened to ensure adequate market surveillance and other developmental roles of exchanges; they should not result in a conflict of interest with the commercial objectives of de-mutualised exchanges.

1070 Wan Wai Yee, "Using Law and Regulation to Foster Capital Markets Integration in ASEAN: The Experiences of the Asean Disclosure Standards in Singapore, Malaysia and Thailand," in *Finance in Asia – Integration and Regional Coordination* (Singpore Management University, Singapore: Melbourne Law School, 2016), 45.

(iv) In terms of promoting ASEAN exchanges' cooperation, ASEAN should encourage exchanges to agree on a vision for an exchange alliance framework for the medium and long term and to initiate work towards building a deeper trading network and joint operations which would involve consolidated or integrated trading platforms and integrated clearing and settlement facilities. The resilience to external shock principle of SEP implies that the frameworks should be based on internationally accepted practices and standards to create market stability.

(v) In order to increase the attractiveness of investment in the member states, ASEAN should promote new equity and debt products along with new regionally active intermediaries to foster regional integration and continue to build awareness of ASEAN as an asset class. The action would involve actions at both the regional and national levels to intensify dialogue with market players, particularly major investors and traders. Countries differ considerably in the range of products being offered in the national markets, and this difference creates significant disparities in the extent to which risks can be managed in individual markets. To overcome such problem, an exchange alliance framework can facilitate technical cooperation in product development to help fill gaps in missing markets nationally and to design regionally focused products. The experience with the ASEAN Index ETF already shows how

differences in regulatory regimes and the incentives for cross-border trading and marketing can affect the prospects for the product.

2.2.2. Regulatory Harmonisation and Mutual Recognition

The pre-requisite element to enable an effective mutual recognition in ASEAN is the harmonisation of regulatory standards. The development of the sound regulatory standards in ASEAN is, therefore, the lifeblood of AEC that drives towards a common goal of integration and development of the economic potential of ASEAN.

In achieving the goal, there should be launched regional and national legal, institutional and regulatory reform initiatives to reduce both institutional and regulatory gaps encountered by each member. Seamless and coherent regulatory standards, supported by a convergence of regional market infrastructures, hold tremendous potential for all market stakeholders. Undertaking regulatory harmonisation efforts will also help to create more integrated ASEAN corporate governance and investor protections.

In this regard, the recommended actions include.

(i) Undertaking a deeper harmonisation of regulatory requirements across ASEAN, aligning them with internationally harmonised standards, in particular IOSCO and OECD's guidelines. The harmonisation, in fact, is in accordance with the reasonableness principle under the SEP, which suggests that the rule of law should be the guide as the milestone of the regional operation.

(ii) In furtherance of (i), resilience against the risks principle under the SEP also suggests that the harmonisation should particularly emphasise

improvements to the quality and transparency of markets. Regulatory harmonisation of market standards should be given high priority, specifically those concerning market fraud regulations. Moreover, the ASEAN countries should be encouraged to adopt global standards for KYC (know your customer) and anti-money laundering issues.

(iii) The moderation principle further implies that regulatory harmonisation should be completed step-by-step and take into account the different contexts of each member. Regulatory harmonisation should be undertaken in a phased and gradual manner, taking into account the degree of intra-regional exchange stability. Imposing a single model of regulatory harmonisation would therefore not be practicable but would require consideration of the country-specific requirements. Therefore, the task that ASEAN could commence to strengthen regulatory harmonisation, taking into account the lessons of EMSA, is that the regional institutions should initially promulgate guidelines operating as soft laws. These soft laws would subsequently become strictly binding on the parties once the members are ready to undertake a formal harmonisation process. This approach also has a greater likelihood of being accepted by the participating member states.[1071]

1071 ibid., 43-44.

(iv) Financial market integration can only occur if there is a critical mass of support and consensus on both exchange rate regime and exchange control policies in the integrating economies. With the concepts of SEP, management and liberalisation of exchange regime and exchange systems would need a proper sequencing of policies to ease cross-border restrictions. In particular, measures to adopt a mutual recognition framework in support of equity market development, both nationally and regionally, will have specific implications for changes in the capital account and exchange control regimes. Such sequencing of capital account opening will need to balance the benefits in terms of market development and regional cooperation with the possible costs due to higher volatility and the likelihood of currency and maturity mismatches that could lead to financial instability. Building up risk management capability of market participants to manage risk that might arise from capital account opening is a key consideration in sequencing.[1072]

(v) The implementation of a mutual recognition framework should be expanded to cover a range of financial products and services, on a bilateral basis initially, and thereafter on a multilateral basis. In this regard, the moderation principle under the SEP suggests that the implementation process should gradually extend the reach of products

1072 Jaseem Ahmed and V. Sundararajan, "Regional Integration of Capital Markets in ASEAN: Recent Developments, Issues, and Strategies," *Global Journal of Emerging Market Economies* 1:87 (2009): 99-100.

and services and the country coverage of the frameworks. To accomplish this goal, the first step is to identify and implement the legal and regulatory actions needed in implementing mutual recognition; ASEAN should issue broad principles and regulatory requirements to govern mutual recognition policies. The second step involves identifying priority areas (for example, fund raising, cross-border trading in specified securities, licensing mutual funds or CIS, broker capital requirements, and qualification of investment professionals) where mutual recognition can enhance market development. While mutual recognition will facilitate regional integration without detailed harmonisation, it would, in practice, require that countries be comfortable with each other's regulatory principles and practices. For this purpose, there should also be a regional mechanism to help assess periodically the progress in the observance of agreed common standards, core principles and market practices and arrangements for the transparency of these assessments (either expert–assisted self-assessments or independent assessments by a third party) in order to facilitate the mutual recognition process.[1073]

2.2.3. Capacity Development

If financial integration is to succeed, the ASEAN financial regulatory agencies must be adequately equipped with relevant software and hardware. By software is meant the human resource capacity to monitor and manage domestic financial market

1073 ibid., 100.

deregulation under the new environment of an integrated ASEAN financial market. By hardware is meant the legal, tax, and regulatory systems that are required to support the financial market infrastructure. Unfortunately, the reality of ASEAN is that developments regarding both software and hardware are uneven. The capacity development is thus necessary as the process through which individuals, organisations and societies obtain, strengthen and maintain the experience and knowledge[1074] in order to close the development gaps.

Capacity development fits well with the principles of knowledge and morality under the SEP, as knowledge and morality bring about a transformation from within that is generated and sustained over time. Therefore, such transformation goes beyond performing tasks as it is a matter of changing mind-sets and attitudes.

The following actions should be undertaken for the purpose of enhancing the capacity development:

(i) ASEAN, with technical support from ADB and ASEAN+3, should work with ASEAN members' government institutions, such as finance ministries and central banks, through hands-on advice, peer-learning workshops, and policy-oriented training in order to modernise domestic financial systems, develop strong legal frameworks, enhance the reporting of macroeconomic and financial statistics, and improve economic analysis and forecasting. By way of implementation, the moderation principle of SEP suggest that capacity development support

1074 See Kanni Wignaraja, "Capacity Development: A UNDP Primer," (New York: United Nations Development Programme Bureau for Development Policy, 2009), 10-13.

should be delivered to countries in various ways, taking into account specific needs and contexts of each member country, including through tailored-made country programmes, short-term staff missions from ASEAN and ADB headquarters, long-term in-country placements of resident advisors, regional capacity and development centers.

(ii) ASEAN should offer process-related organisational advice and foster the exchange and transfer of best practices among the ASEAN members' financial regulators. One approach is networking among the members' regulator organisational units at an international level. The networking may include, for example, communications departments or research services. One of the primary types of support is the provision and sharing of consultancy services by international and regional experts with an in-depth knowledge. Another comprises co-training among the ASEAN regulators staffs to enable a sharing of experience and knowledge. These include activities such as moderated technical or policy dialogues.

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APPENDIX

VITA

Mr. Tir Srinopnikom graduated Master of Public and International Law from the University of Melbourne, Australia with Second Degree Honours Division A under Australian Government Scholarship programme. Mr. Srinopnikom have also obtained Bachelor of Laws from Chulalongkorn University, Thailand with First Class Honours. He is a member of Thai Bar Association, Thailand.