Can ASEAN Benefit from the European Union’s Experience in the Field of Facilitating Corporate Collaboration?

Submitted by Soyeon Kim to the University of Exeter
as a thesis for the degree of
Doctor of Philosophy in Law
In July 2011

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I certify that all material in this thesis which is not my own work has been identified and that no material has previously been submitted and approved for the award of a degree by this or any other University.
ABSTRACT

Regional integration in the Association of Southeast Asian Nations (ASEAN) received a boost in 2007 when they explicitly announced their objective to build an ASEAN Economic Community (AEC), i.e. a single market and production base in the region. Pursuing the ASEAN single market means that ASEAN shares with the European Union (EU) the common interests of developing regional economic integration, taking action to combat the cost of market fragmentation.

The aim of this thesis is to put forward suggestions directed at the realisation of the ASEAN single market in the field of economic integration and cooperation in the business sector based upon the experience of the EU in developing its internal market. To achieve this objective, the thesis investigates current conditions for business cooperation and collaboration and analyses existing barriers to effective cooperation in ASEAN. In the framework of a comparative analysis of the two regional developments where it is relevant, the analysis is mainly based on library-based research complemented by the socio-legal research method of interviewing ASEAN experts and also, businesses within ASEAN.

The major barriers identified in cross-border business activities are based on ASEAN Member Countries’ protectionist techniques to control foreign inward investments. The ‘ASEAN Way’ of consensus-based decision-making and a lack of compliance and enforcement mechanisms and of working judicial institutions obstruct the development of efficient mechanisms for the purpose and also, the efficacy of the AEC initiatives and the ASEAN industrial economic cooperation schemes. Considering the limits of the related ASEAN instruments in facilitating corporate collaboration and promoting intra-ASEAN trade and investments, four different areas of mechanisms drawn from the EU’s experience are considered. After conducting an evaluation of the viability and the potential benefits of those mechanisms in ASEAN, the thesis proposes that the most useful area, promising practical benefits, would be the introduction of uniform and universally recognised business entities to facilitate collaboration and cooperation within ASEAN. Recognition of such entities as national entities within every Member Country will help to obviate these protectionist tendencies and improve the development of intra-ASEAN trade.
ACKNOWLEDGEMENTS

I am most sincerely and heartily grateful to my supervisors, Mr Robert Drury and Dr Amandine Garde. Without their help and guidance of knowledge, encouragement, and patience, this PhD thesis would not have been possible. I would like to express my gratitude to Professor Anne Barlow for her unselfish and unfailing support for my thesis. I would also like to thank to my mentor, Dr Frédéric Rolland and Professor Charlotte Waelde for their consistent support to complete my thesis. Professor Janet Dine, Dr Michael Addo, Professor James Devenney, Dr Anicée Van-Engeland and Dr Kate Harrington provided advice for my thesis. My gratitude also goes to the Exeter Law School staffs and colleagues who helped me going through the difficult times. Ms Sarah Roberts and the librarian, Mr Patrick Overy always offered me help whenever I needed. My thanks go to Dr Caoimhin MacMaolain as well. I would also like to thank the interviewees in Southeast Asia for providing me valuable information for the thesis.

I am most indebted to the late Professor John Usher and his wife Jean Usher for their parental care. To have Professor Usher as my former supervisor was one of the fortunate things which happened in my life. My sincere gratitude also goes to Professor Nohyung Park who has given me consistent support throughout my academic life and to Professor Niamh Nic Shuibhne who first guided me to the world of European law.

Last but not the least, my parents and their prayer groups, my husband, Markus Becker, Hoyoung Yang, friends in St Davids Hill, the Mint Church members and the Trinity Church members, and the one above all of us, God, for answering my prayers for giving me the strength throughout the journey of my PhD.
# Table of Contents

**List of Abbreviations** .................................................................................................................. 8

**Chapter 1 Introduction** ............................................................................................................... 11

1.1 Background: General Considerations on ASEAN and Intra-ASEAN Trade ............... 11

1.2 Objective and Research Questions ......................................................................................... 20

1.2.1 Objective and Scope of the Research ............................................................................... 20

1.2.2 Research Questions ............................................................................................................. 20

1.3 Methodology .......................................................................................................................... 22

1.3.1 Research Methods .............................................................................................................. 22

1.3.2 Interviews .......................................................................................................................... 23

1.4 Structure of the Thesis ............................................................................................................. 31

**Chapter 2 ASEAN and the EU** .................................................................................................. 35

2.1 Introduction ............................................................................................................................... 35

2.2 Aims of ASEAN and the Implementation Challenge ............................................................. 41

2.2.1 Establishment of ASEAN Economic Community .............................................................. 41

2.2.2 Evolution of the ASEAN Charter ...................................................................................... 53

2.3 Institutional Framework of ASEAN and the EU ................................................................. 64

2.3.1 Institutional Settings ........................................................................................................... 64

2.3.2 Enforcement Mechanism .................................................................................................. 78

2.4 Conclusion: What ASEAN Needs to Do ............................................................................... 84

**Chapter 3 Major Barriers for Foreign Business Activities in ASEAN** .................................. 90

3.1 Introduction ............................................................................................................................... 90

3.2 Barriers Affecting All Foreign Investors in ASEAN: Protectionist Techniques in ASEAN Member Countries ........................................................................................................... 93

3.2.1 Total or Sectoral Exclusion of Foreign Investors .............................................................. 96

3.2.2 Regulating Equity Joint Ventures between Foreign and Local Enterprises .......... 102

3.2.3 Restriction on Foreign Shareholdings and Foreign Ownership in Privatisation and Domination of Public Enterprises ......................................................................................... 113

3.2.4 Screening and Process-Related Restrictions .................................................................. 121

3.3 Conclusion: An Analysis of Barriers .................................................................................... 132

**Chapter 4 Cross-Border Business Cooperation Developments within ASEAN** ............ 140
4.1 Introduction .................................................................................................................................. 140
4.2 ASEAN Economic Community Instruments .............................................................................. 143
  4.2.1 From Preferential Trade Agreement to ASEAN Free Trade Area ........................................... 143
    (1) Preferential Trade Agreements ................................................................................................. 143
    (2) ASEAN Free Trade Area ........................................................................................................ 146
  4.2.2 ASEAN Framework Agreements on Services ....................................................................... 152
  4.2.3 Framework of ASEAN Investment Area .............................................................................. 162
    (1) ASEAN Agreement for the Promotion and Protection of Investments ................................. 162
    (2) Framework Agreement on the ASEAN Investment Area ..................................................... 164
    (3) ASEAN Comprehensive Investment Agreement ................................................................. 168
4.3 Industrial Economic Cooperation in ASEAN ........................................................................... 171
  4.3.1 From ASEAN Industrial Projects to ASEAN Industrial Joint Ventures .............................. 171
    (1) ASEAN Industrial Projects ..................................................................................................... 171
    (2) ASEAN Industrial Complementation .................................................................................... 173
    (3) ASEAN Industrial Joint Ventures ........................................................................................ 175
  4.3.2 ASEAN Industrial Cooperation Scheme ............................................................................ 176
4.4 Conclusion .................................................................................................................................... 184

Chapter 5 EU Corporate Mobility Mechanisms ............................................................................ 188

5.1 Introduction .................................................................................................................................. 188
5.2 Barriers for Corporate Collaboration and Cross-Border Mobility within the EU ................. 191
5.3 EU Mechanisms on Corporate Collaboration and Cross-border Mobility .............................. 207
  5.3.1 Removal of Tariff and Other Barriers to Trade .................................................................... 208
  5.3.2 Harmonisation of Company Laws ....................................................................................... 210
    (1) Harmonisation Approach ........................................................................................................ 210
    (2) EU Company Law Directives ................................................................................................. 214
    (3) Conclusion on European Company law harmonisation ...................................................... 223
  5.3.3 Promotion of Freedom of Establishment for Companies ................................................... 226
    (1) Free Movement of the Self-Employed ..................................................................................... 226
    (2) Development of Case-Law in the Court of Justice ................................................................. 232
  5.3.4 Introduction of Supranational Business Vehicles ................................................................. 255
    (1) European Company or Societas Europea .............................................................................. 255
5.3.5 Mutual Recognition of Foreign Companies in the EU ....................................................... 272

5.4 Conclusion ........................................................................................................................................ 274

Chapter 6 Implications from the European Experience for the Development of the ASEAN Economic Integration in Business Sector ............................................................................................................. 277

6.1 Introduction: Suggested Mechanisms .............................................................................................. 277

6.2 Evaluation of the Suggested Mechanisms ....................................................................................... 279

6.2.1 Mutual Recognition of Foreign Companies in ASEAN ................................................................. 279

6.2.2 Protection of Rights of Establishment through the ASEAN Institutions ..................................... 283

6.2.3 Harmonisation of ASEAN Company Laws and Business Regulations ........................................ 286

6.2.4 Creation of Supranational Corporate Entities ............................................................................. 289

6.2.5 Results of Evaluation .................................................................................................................... 295

6.3 ASEAN Business Cooperation Partnership ...................................................................................... 296

6.3.1 Benefits and Features ................................................................................................................... 296

(1) Advantages of ASEAN Business Cooperation Partnership ............................................................ 299

(2) Differences from European Economic Interest Grouping ............................................................... 303

6.3.2 Contents of the ABCP Agreement ................................................................................................. 307

(1) Regulatory Format .......................................................................................................................... 307

(2) Contents ........................................................................................................................................ 309

(3) Formation ..................................................................................................................................... 309

(4) Registration ................................................................................................................................... 311

(5) Legal personality and Taxation Status ............................................................................................ 311

(6) Membership .................................................................................................................................. 312

(7) Publicity ........................................................................................................................................ 313

6.3.3 Prospects and Challenges in Implementation .............................................................................. 314

6.4 ASEAN Private Company ................................................................................................................ 316

6.4.1 Benefits and Features .................................................................................................................. 316

6.4.2 Contents of the APC Agreement .................................................................................................. 322

(1) Regulatory Format ......................................................................................................................... 322

(2) Governing Law ............................................................................................................................... 323
(3) Formation and Cross-border Requirement ........................................ 326

(4) Registration and Transfer of the Registered Office ........................... 329

(5) Legal Capital .................................................................................. 332

(6) Articles of Association and Organisation ........................................ 339

6.4.3 Prospects and Implementation Challenges ................................... 343

6.5 Conclusion .................................................................................... 348

Chapter 7  Conclusion ........................................................................... 352

Bibliography ......................................................................................... 359

Books .................................................................................................... 359

Articles ................................................................................................. 371

Appendix A: Interview Questions for ASEAN Experts .......................... 382

Appendix B: Interview Questions for Businessmen ............................... 385

Appendix C: Interview Supplementary Note ........................................ 386

Appendix D: Example of Information Sheet ......................................... 391

Appendix E: Example of Consent Form ............................................... 393
### List of Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>ABCP</td>
<td>ASEAN Business Cooperation Partnership</td>
</tr>
<tr>
<td>ACCSQ</td>
<td>ASEAN Consultative Committee on Standards and Quality</td>
</tr>
<tr>
<td>ACIA</td>
<td>ASEAN Comprehensive Investment Agreement</td>
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<td>AEC</td>
<td>ASEAN Economic Community</td>
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<td>AICO</td>
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<td>Aktiengesetz</td>
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<td>ASEAN Ministerial Meeting</td>
</tr>
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<td>AG</td>
<td>Aktiengesellschaften</td>
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<td>APBSD</td>
<td>ASEAN Policy Blueprint for SME Development</td>
</tr>
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<td>APC</td>
<td>ASEAN Private Company</td>
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<td>APEC</td>
<td>Asia Pacific Economic Cooperation</td>
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<td>ASEAN Security Community</td>
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<td>ASCC</td>
<td>ASEAN Socio-Cultural Community</td>
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<td>ASEAN</td>
<td>Association of Southeast Asian Nations</td>
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<td>ASEAN IGA</td>
<td>ASEAN Agreement for the Promotion and Protection of Investments</td>
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<td>ASEAN-6</td>
<td>Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Thailand</td>
</tr>
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<td>ATIGA</td>
<td>ASEAN Trade in Goods Agreement</td>
</tr>
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<td>ATWG</td>
<td>Air Transport Working Group</td>
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<tr>
<td>BBC</td>
<td>Brand-to-Brand Complementation</td>
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<td>BCC</td>
<td>Business Cooperation Contracts</td>
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<td>BIGS</td>
<td>Bandung Institute of Government Studies</td>
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<tr>
<td>BKPM</td>
<td>Badan Koordinasi Penanaman Modal (Indonesian Investment Coordinating Board)</td>
</tr>
<tr>
<td>BOT</td>
<td>Built-Operate-Transfer</td>
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<tr>
<td>CBU</td>
<td>Completely-Built-Ups</td>
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<td>CCA</td>
<td>Coordinating Committee for the Implementation of the ATIGA</td>
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<td>Coordinating Committee on Services</td>
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<td>CEPT</td>
<td>Common Effective Preferential Tariff</td>
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<td>Abbreviation</td>
<td>Description</td>
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</tr>
<tr>
<td>CLMV</td>
<td>Cambodia, Lao PDR, Myanmar and Vietnam</td>
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<td>COE</td>
<td>Certificate of Eligibility</td>
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<tr>
<td>CPR</td>
<td>Committee of Permanent Representatives</td>
</tr>
<tr>
<td>CRC</td>
<td>Change in Tariff Classification</td>
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<td>CU</td>
<td>Customs Union</td>
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<tr>
<td>e-ASEAN</td>
<td>Telecommunications and IT services</td>
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<td>European Community</td>
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<td>European Coal and Steel Community</td>
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<td>European Interest Grouping</td>
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<td>EFTA</td>
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</tr>
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<td>EPC</td>
<td>European Private Company (<em>Societas Privata Europea</em>)</td>
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<td>EU</td>
<td>European Union</td>
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<td>FDI</td>
<td>Foreign Direct Investment</td>
</tr>
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</tr>
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<td>GATS</td>
<td>General Agreement on Trade in Services</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>GDP</td>
<td>Gross Domestic Product</td>
</tr>
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<td>GEL</td>
<td>General Exception List</td>
</tr>
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<td><em>Gesellschaft mit beschränkter Haftung</em></td>
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<td>GmbHHG</td>
<td><em>Gesetz über die Gesellschaft mit beschränkter Haftung</em></td>
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<tr>
<td>HGB</td>
<td><em>Hak Guna Bangunan</em> (Right of Building on Land)</td>
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<tr>
<td>HGU</td>
<td><em>Hak Guna Usaha</em> (Land Cultivation Right)</td>
</tr>
<tr>
<td>HP</td>
<td><em>Hak Pakai</em> (Right of Use on Land)</td>
</tr>
<tr>
<td>IGSID</td>
<td>International Centre for Settlement of Investment Disputes</td>
</tr>
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<td>IL</td>
<td>Inclusion List</td>
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<tr>
<td>IMF</td>
<td>International Monetary Fund</td>
</tr>
<tr>
<td>ISEAS</td>
<td>Institute of Southeast Asian Studies</td>
</tr>
<tr>
<td>MERCOSUR</td>
<td><em>Mercado Comun del Sur</em></td>
</tr>
<tr>
<td>MFN</td>
<td>Most-Favoured Nation</td>
</tr>
<tr>
<td>MK</td>
<td><em>Mahkamah Konstitusi</em> (Indonesian Constitutional Court)</td>
</tr>
<tr>
<td>MNC</td>
<td>Multinational Corporations</td>
</tr>
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<td>MOP</td>
<td>Margin of Preference</td>
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<tr>
<td>MRA</td>
<td>Mutual Recognition Arrangements</td>
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<tr>
<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<tr>
<td>NT</td>
<td>National Treatment</td>
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<tr>
<td>NTB</td>
<td>Non-Tariff Barrier</td>
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<td>NTM</td>
<td>Non-Tariff Measure</td>
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<tr>
<td>PMA</td>
<td><em>Penamanan Modal Asing</em> (foreign investment or foreign investment licence)</td>
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<tr>
<td>Abbreviation</td>
<td>Full Form</td>
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<tr>
<td>PTA</td>
<td>Preferential Trading Arrangement</td>
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<td>PPP</td>
<td>Public-Private Partnership</td>
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<td>QMV</td>
<td>Qualified Majority Voting</td>
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<td>REDI</td>
<td>Regional Economic Development Institute</td>
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<td>REPSF</td>
<td>Regional Economic Policy Support Facility</td>
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<td>RVC</td>
<td>Regional Value Content</td>
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<tr>
<td>SADC</td>
<td>Southern African Development Community</td>
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<tr>
<td>SARL</td>
<td>Société à responsabilité limitée</td>
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<tr>
<td>SBA</td>
<td>Small Business Act</td>
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<tr>
<td>SCE</td>
<td>European Cooperative Society</td>
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<tr>
<td>SE</td>
<td>Societas Europea (European Company)</td>
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<tr>
<td>SEA</td>
<td>Single European Act</td>
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<td>SEOM</td>
<td>Senior Economic Official Meeting</td>
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<td>SIUP</td>
<td>Surat Izin Usaha Perdagangan (Business Trading License)</td>
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<td>SL</td>
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<td>SMEs</td>
<td>Small and Medium-Sized Enterprises</td>
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<td>SMEWG</td>
<td>Small and Medium Enterprise Agencies Working Group</td>
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<td>SOEs</td>
<td>State-Owned Enterprises</td>
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<td>SPE</td>
<td>Societas Privata Europea (European Company)</td>
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<td>TAC</td>
<td>Treaty of Amity and Cooperation in Southeast Asia</td>
</tr>
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<td>TDP</td>
<td>Tanda Daftar Perusahaan (Company Registration Certificate)</td>
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<td>TEL</td>
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<tr>
<td>UNCITRAL</td>
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<td>UNDP</td>
<td>United Nations Development Program</td>
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<tr>
<td>UNIDO</td>
<td>United Nations Industrial Development Organization</td>
</tr>
<tr>
<td>US</td>
<td>United States of America</td>
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<tr>
<td>VAP</td>
<td>Vientiane Action Programme</td>
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<tr>
<td>WTO</td>
<td>World Trade Organization</td>
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Chapter 1 Introduction

1.1 Background: General Considerations on ASEAN and Intra-ASEAN Trade

Market-driven economic integration through trade and investments has been a major driving force in the growth and economic development in East Asia. In particular, increased foreign direct investment (FDI) inflows into Southeast Asia over the past several decades have led to the economic expansion and the development of regional production networks.¹ As the economic development was largely driven by favouring FDIs from multinational corporations (MNCs) and promoting export-oriented industrial policies, intra-regional trade in Southeast Asia as a share of regional total trade has been always very low.²

ASEAN (Association of Southeast Asian Nations)³ is a regional grouping of ten Southeast Asian countries with almost 560 million people and has the longest history of any international organisation in Asia. ASEAN has sought to promote effective regional cooperation and collaboration to secure a prosperous and peaceful community since its foundation.⁴ At the beginning, it focused more on reducing intra-

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¹ Denis Hew (2006) ‘Economic Integration in East Asia: An ASEAN Perspective’ No. 11, UNISCI Discussion Papers, 49, pp. 49-50
² Although intra-ASEAN trade has grown much higher from about 18 per cent in the early 1990s, it still accounts for only about 25 per cent of ASEAN’s total trade. Intra-ASEAN investments account for around 11 per cent of total FDI inflows. Although the value of intra-ASEAN trade has more than doubled in the past decade, still, it has risen much slower as a proportion of Member Countries’ total trade; Walter Lohman and Anthony B. Kim, (2008) ‘Enabling ASEAN’s Economic Vision’, No. 2101 Backgrounder (published by the Heritage Foundation), 1, pp. 1-2; available at: <http://www.heritage.org/research/reports/2008/01/enabling-aseans-economic-vision>; see also United States International Trade Commission, ‘ASEAN: Regional Trends in Economic Integration, Export competitiveness, and Inbound Investment for Selected Industry,’ Investigation No. 332-511, USITC Publication 4176. August 2010, pp. 2-11 and 2-12; available at: <http://www.usitc.gov/publications/332/pub4176.pdf>; further details, see the tables provided by the ASEAN Secretariat: available at: <http://www.aseansec.org/18144.htm>
³ It was founded in 1967 by Indonesia, Malaysia, Philippines, Singapore and Thailand. The Association was first enlarged after Brunei Darussalam was admitted on 8 January 1984. Vietnam became a Member on 28 July 1995 and then, Lao PDR and Myanmar on 23 July 1997. Cambodia was the last to join on 30 April 1999. Cambodia, Lao PDR, Myanmar and Vietnam are collectively known as CLMV. The original six Member Countries (Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore and Thailand) are collectively known as ASEAN-6.
⁴ See the following aims and purposes of ASEAN in the ASEAN’s founding document in the ASEAN Declaration I (the 1967 Bangkok Declaration); available at: <http://www.aseansec.org/1212.htm>:
   1. To accelerate the economic growth, social progress and cultural development in the region
mural conflict within ASEAN Member Countries and facilitating regional stability within East Asia rather than on devoting time to regional economic cooperation and increasing intra-ASEAN trade.\(^5\) However, at the realisation of the necessities of cohesive and effective performance of intra-ASEAN economic cooperation, ASEAN started to respond to the resurgence of regional economic groupings.\(^6\) Particularly, in dealing with the 1997 Asian financial crisis, the ASEAN leaders proposed to promote intra-ASEAN trade and to be less dependent on trade outside of ASEAN. However, this effort did not take off and the statistics show that intra-ASEAN trade remained at a similarly low level before and after the crisis.\(^7\) Even though increasing intra-ASEAN trade was not successful, it is noteworthy that the ASEAN Member Countries became more serious in enhancing regional resilience in addition to their national resilience due to the 1997 Asian financial crisis.\(^8\)

In addition, in the search for a regional economic grouping model, ASEAN has paid particular attention to the integration process in Europe and its repercussions on the

---

6 This led to the signing of the Framework Agreement on Enhancing ASEAN Economic Cooperation, Singapore, 28 January 1992; at: <http://www.aseansec.org/12374.htm>; and establishment of the ASEAN Free Trade Area (AFTA); Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area, Singapore, 28 January, 1992; both available at: <http://www.aseansec.org/1164.htm>
7 The intra-ASEAN trade at an average of 23.7 per cent of total bloc trade before and after the crisis; Lay Hong Tan (2004) ‘Will ASEAN’s Economic Integration Progress Beyond a Free Trade Area’ 53 (4) *International and Comparative Law Quarterly*, 935, p. 952
European economy, which led to ASEAN Member Countries agreeing to embark on a project to integrate their economies and establish an ASEAN Economic Community (AEC). At the Eighth ASEAN Summit in 2002, it was clearly mentioned that the idea of building the AEC was inspired by the European Economic Community (EEC) of the 1950s under the Treaty of Rome. Additionally, the language used in the ASEAN documents relating to establishing the AEC, i.e. a single market and production base through the free flow of goods, services, investment and a free flow of capital, is similar to that in the EU legal order. After all, the term ‘economic community’ immediately summons up the European experience, and thus, ASEAN has always studied European economic integration carefully and has seen it as a sort of role model, though to be adapted to the Southeast Asian development context. At any rate, it has been believed that regional economic integration in Europe offered the solution if the existence of fragmented markets posed a serious threat to European competitiveness in a globalised economy. The existence of nationally fragmented markets generates an additional cost which represents an important burden for the economic actors, particularly those engaged in cross-border business activities. Since businesses tend to respond the fastest to market and trade barriers and are cognisant of their own needs and the potentials and opportunities in the region, giving more room to private entities in making trade and investment decisions based on market consideration would be more efficient to the

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9 When the Singaporean Prime Minister Goh Chock Tong first proposed the idea of the AEC at the Eighth ASEAN Summit in 2002, he envisaged that the AEC would be similar to the EEC of the 1950s; see at: <http://www.aseansec.org/12321.htm>

10 The ASEAN Economic Community (AEC) Blueprint (para. 9) lists the five core elements of an ASEAN single market and production base: (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. However, the AEC does not include free movement of workers in general as in the EU (para. 33); AEC Blueprint available at: <http://www.aseansec.org/21083.pdf>.


12 See particularly in Section 5.2. Barriers for Corporate Collaboration and Cross-border Mobility within the EU, for the removal of non-tariff barriers (NTBs) under the 1985 White Paper on Completing the Internal Market.
regional economic development. It has been recognised in ASEAN that facilitating business cooperation and collaboration among ASEAN-based companies and enhancing private sector mobility for the freedom of establishment of companies within the ASEAN region will increase intra-ASEAN trade and will provide an impetus to the overall economic development within the region.

Southeast Asia has an abundance of legal cultures stemming from an amalgamation of Islamic, Chinese, Hindu, indigenous customary and European legal norms. The diversity of legal cultures in the region originates from the heterogeneity of culture, religion, history, colonial experience and political development. During the colonial period and early twentieth century, both the customary, religious, indigenous local laws and the European colonial legal systems coexisted. Indonesia has the Dutch Civil Code as a result of nationalism and unification, Malaysia and Singapore the Anglo-Indian Contracts Act and the other Southeast Asian countries have been heavily influenced by civil or common law, even if, as in Thailand, this was in response to the threat against colonialism. The period of decolonisation and independence since the Second World War has been marked as ‘law-and-development’ and ‘law-and-

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14 See Art 1 (5) of the ASEAN Charter <http://www.aseansec.org/publications/ASEAN-Charter.pdf> and ASEAN Blueprint <http://www.aseansec.org/21083.pdf>, para.6 both include facilitating the movement of business persons in a single market and production base as one of the purposes of ASEAN; the role of the private sector is also increasingly being recognised in the ASEAN-EU dialogue as the ultimate objective of enhancing ASEAN-EU economic relations. The purpose of which is to achieve more rapid economic growth in order to increase employment and raise the standard of living of the peoples of the two regions, a task which cannot be undertaken by the respective public sectors alone; see the information on ASEAN-European Union Dialogue; available at: <http://www.aseansec.org/5612.htm>; further, in the interviews, all ASEAN experts believed that enabling cross-border corporate mobility within ASEAN would be beneficial to the Southeast Asian economies; see Question No. 6 in Appendix A
16 Ibid., pp.201-202 for various scholars in the research; see also, for local laws, Michael Barry Hooker (ed.) The Laws of South-east Asia, Volume I: The Pre-modern Texts (1986) (Singapore: Butterworths) which deals with indigenous laws, such as Burmese Dhammathat, Thai Thammasaat, the law in Angkorian Cambodia, the law texts of Java and Bali, the law of Malay-Muslim material, and the Chinese influence on Vietnamese law; and for European laws’ influence from the colonial period, Michael Barry Hooker (ed.) The Laws of South-east Asia, Volume II: European Law in South-east Asia (1986) (Singapore: Butterworths).
governance’ through legal borrowing or legal transplants. However, before the 1997 Asian financial crisis, during the East Asian Miracle from 1960 to 1990, for example, policy guidance announced and enforced by a highly regarded bureaucracy was dominant rather than legal enforcement. Some parts of the legal transplants were left unenforced for years after they had been enacted. Therefore, after the crisis, the demand for legislation and enforcement and the rule of law became higher. At any rate, it is notable that, in contemporary East Asia including Southeast Asian countries, studies show that commercial legislation has been drawn primarily from Western rather than indigenous legal sources. Gillespie discerns three basic patterns of legal transplantation in East Asia. Firstly, Brunei Darussalam, Myanmar, Malaysia and Singapore received British commercial legislation and company law during the period of British colonial rule. These former British colonies retained many transplanted

18 Harding, Ibid., pp.202-205; Pistor and Wellons, Ibid., pp.40-41
20 Pistor and Wellons, Ibid., pp.40-41
21 Veronica L. Taylor (2008) ‘Contract and Contract Enforcement in Indonesia: An Institutional Assessment’ in Tim Lindsey (2nd) Indonesia: Law and Society (Singapore: ISEAS), 568, p. 568; for example, in Indonesia, prior to the 1997 Asian financial crisis, the legal enforceability of contracts was not considered as a necessary precondition for macro-economic growth.
23 Ibid., pp.11-13
24 The legal system of Brunei Darussalam reflects many aspects of the English judicial model and is based on the English common law system. In addition, the customary law of the indigenous people is an important source of law and also, all matters concerning Islamic religion, marriage and divorce are governed by Sharia law. However, Companies Act of 1956, enacted on the advice of a British resident, was broadly modelled on the British Company Act of 1948; Bahrin (Kam) Kamarul (1999) ‘Company Law of Brunei Darussalam’ in Roman Tomasic (ed.) Company Law in East Asia (Dartmouth: Ashgate), 547, pp. 548-549
26 The Singapore legal system was modelled on the English system. The Companies Act also indirectly based on the Australian Uniform Companies Act of 1961 because of its link with Malaysian Companies Act of 1965. This was adopted in Singapore as Companies Act of 1965; Brendan Pentony (1999) ‘Company Law in Singapore’ in Roman Tomasic (ed.) Company Law in East Asia (Dartmouth: Ashgate), 417, pp. 417-419; see also Benny S Tabalujan and Valerie Du Toit-Low (2003) Singapore Business Law (3rd) (Singapore: Business Law Asia), pp. 41-44
27 Harding, supra note 15, pp.199-219
British law and legal institutions, although post-independence political and cultural imperatives have to varying degrees slowly changed both the substance and jurisprudential basis of law in these countries. Similarly, the Dutch in Indonesia, French in Indochina, and Spanish and Americans in the Philippines imported the Western law and jurisprudence although colonial transplants were amended and substantially revised following their independence. Secondly, in contrast to the colonial experience, legal transplantation elsewhere in East Asia was a matter of choice. Thailand was never entirely colonised, but nevertheless imported a continental civil law system. Thirdly, there are the Indochinese states of Vietnam, Cambodia and Lao PDR who followed a similar legal reform to China. After their independence from France, they replaced colonial laws and legal institutions with socialist laws and institutions. However, they are now adapting themselves to market conditions while still maintaining socialist command institutions. In Vietnam, the first wave of commercial laws were based on Chinese legal models but even then, in the areas where China

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29 The modern Indonesian legal system is complex and pluralistic due to its society and its colonial history. Essentially, there are three major strands of legal development which characterise the Indonesian legal system: (i) *Adat* law, (ii) Dutch law and (iii) the national law. *Adat* law refers to the customary law which applies to indigenous Indonesians in certain areas. *Adat* law is unwritten and uncodified and may vary among localities. Its significance has diminished since independence. However, *adat* law can still affect modern commercial transactions, especially in respect of property rights over land. The ‘national law’ refers to the laws which have been enacted by the Indonesian government after independence. The national laws either replace *adat* law or Dutch law or introduce a new regime such as the foreign investment law of 1967. However, Indonesian legal development has been influenced substantially by Dutch law, which can be classified as falling within the civil law tradition. The current civil code, commercial code and criminal code are all based on the Dutch legal system; Benny S. Tabalujan (1997) Indonesian Company Law: A Translation and Commentary (Hong Kong, Singapore: Sweet & Maxwell Asia), pp.5-6 and 18; Peter Little and Bahrain (Kam) Kamarul (1999) ‘Company Law in Indonesia’ in Roman Tomasic (ed.) *Company Law in East Asia* (Dartmouth: Ashgate), 475, p. 475
30 The corporations and securities law of the Philippines has been influenced by various political periods in history: pre-Spanish period (pre 1521), the Spanish regime (1521-1898), the Philippine Republic of 1898, the America regime (1898-1935), the Commonwealth era (1935-1946), the Japanese occupation (1941-1944), the period of Republic (1946-1972), the martial law period (1972-1986) and the continuation of the Republic: ‘The Code of Commerce of 1888 is derived from the Spanish code of Commerce of 1885. However, the influence of the Anglo-US common law system is evident in the corporations and securities law although the features of a codified civil law often appear; Geoffrey Nicoll (1999) ‘Company Law in Indonesia’ in Tomasic, Roman (ed.) *Company Law in East Asia* (Dartmouth: Ashgate), 507, pp. 507-509 and 538
32 Ibid.
lacked appropriate experience, laws were imported from the capitalist West. For example, the Law on Companies 1990 was based on French law. In the next reform of adopting a mixed-market regime in the 1992 Constitution, lawmakers in Vietnam began to borrow directly from Western legal sources. The extent and pace of the commercial legal borrowing and transplantation have increased after the ratification of the US-Vietnam Bilateral Trade Agreement in 2001.33

The laws that affect cross-border business activities are mostly commercial and company laws. As was discussed above, the legal development history of Southeast Asian countries reveals that, at least in the area of commercial legislation, either from the colonial experience or by their own choice, they all have been frequently involved in legal borrowing and transplantation from European civil legal systems and the Anglo-Saxon legal system, particularly in search for market-oriented laws. Focusing on the importing countries’ perspective, Miller identifies four different types of legal transplant. These are (i) the cost-saving transplant, (ii) the externally-dictated transplant, (iii) the entrepreneurial transplant, and (iv) the legitimacy-generating transplant.34 In many ways, the proposals in this thesis, in part, reflect the first of these, in the sense that many developing countries and smaller industrialised countries borrow legislation from large developed countries because it is too expensive to develop their own.35 However, while recognising the rarity of an entirely pure type of the cost-saving transplant, Miller points out that this is often linked to borrowing from a country with prestige in the relevant field, which brings in the legitimacy-generating transplant category.36 Borrowing from such a prestigious country confers legitimacy on the project, so they turn to a country with prestige in the legislative field. Miller refers to the work of Mattei who holds that

33 Ibid., pp.11-12
35 Ibid., p.846
36 Ibid.
examining prestige is really only an example of less developed economies looking at more developing economies and selecting what appears to be the most economically efficient rule.\textsuperscript{37} Taking Miller’s and Mattei’s arguments together, it seems natural for many ASEAN Member Countries to borrow rules from European jurisdictions in the field of commercial law rather than developing their own, which could have been too expensive. It would also be a legitimate and efficient choice for them to turn to European legal systems whose framework were already known to them considering their historical background.

In seeking for the legitimacy of the proposed transplant in the situation envisaged in this thesis, one can certainly point to the fact that many of the ASEAN Member Countries have already borrowed substantially from European jurisdictions.\textsuperscript{38} The example of Thailand, with its background of never having been subject to European colonisation, does confer a certain legitimacy on the proposal because it cannot be seen as merely a function of colonial domination, but more in the nature of a choice made freely by the countries concerned.\textsuperscript{39} If these nations have borrowed individually from European national examples, then it appears more legitimate for the ASEAN regional grouping to borrow from the European regional grouping in the same way. Furthermore, the practicality of a proposal can perhaps be understood in the context of the likelihood of the success of the proposed transplant. Berkowitz, Pistor and Richard have said that where a transplant is adapted to local conditions, needs and demands or where there is a population already familiar with its basic legal principles, there is a higher chance of success.\textsuperscript{40} In this thesis, the original EU models of cross-border corporate mechanisms


\textsuperscript{38} See supra note 24, 25, 26, 29, 30, and 33

\textsuperscript{39} Gillespie, Transplanting Commercial Law Reform: Developing a ‘Rule of Law’ in Vietnam, supra note 22, p.11

have been amended with local conditions very much in mind.\textsuperscript{41} For example, the existence of contractual models within ASEAN bodes well for the adoption of the contract based ABCP.\textsuperscript{42} In looking at an actual EU transplant, Gal, while discussing the conditions for successful legal transplant, cites the work of Watson who emphasised the importance of the idea behind the law.\textsuperscript{43} Watson holds that, if the idea was a good one, in terms of serving to provide a suitable solution for a legal problem, then the transplant will have a higher chance of success.\textsuperscript{44} It is hoped that the ideas presented in this thesis fall within this latter category and hence have a reasonable claim to practicality.

ASEAN as a regional institution aiming at building an economic community should not only work on removing intra-regional trade barriers but also initiate and provide means to improve cross-border business cooperation and collaboration in the region. The EU has developed several mechanisms for cross-border businesses to reduce their business costs under the premise of freedom of establishment for companies in the EU. The EU is a precedent of the most developed regional integration, which could provide some solutions to increase intra-ASEAN trade and enhance ASEAN’s global competitiveness. Thus, it will be worth looking at ways in which ASEAN may benefit from the experience gained in the EU in developing the internal market in the area of freedom of establishment for companies and considering whether any of the EU cross-border corporate mechanisms may be feasible in the ASEAN context. In addition, considering the fact of the ASEAN Member Countries’ commercial legislation historically borrowed from European corporate legal systems, the process and difficulties that the EU Member States experienced in developing the European

\textsuperscript{41} See in Section 6.2.4 Creation of Supranational Corporate Entities; Section 6.3 ASEAN Business Cooperation Partnership; Section 6.4 ASEAN Private Company
\textsuperscript{42} See the current contractual business models frequently used in ASEAN, e.g. business cooperation contracts (BCC) or built-operate-transfer (BOT) contracts; Section 6.3.1 Benefits and Features
\textsuperscript{44} Alan Watson (1978) ‘Comparative Law and Legal Change’, 37 (2) Cambridge Law Journal 313, p. 315
corporate mechanisms in order to facilitate cross-border business activities may well provide some guidance to ASEAN Member Countries in developing similar tools.

1.2 Objective and Research Questions

1.2.1 Objective and Scope of the Research

The objective of the thesis is to see if the EU’s experience can lead to suggestions for future developments in the field of economic integration and cooperation in the business sector to promote intra-ASEAN trade at the realisation of the ASEAN single market. In the light of the objective, the study will begin with clarifying the aims of ASEAN in achieving the AEC and the institutional setting as a regional grouping as compared to the EU. In order to lay the groundwork for developing viable suggestions for business cooperation and collaboration within ASEAN, it also focuses on identifying the major barriers to foreign business activities hindering region-wide business mobility and investment flows in Southeast Asian countries. After looking at the experience and limitations in dealing with such barriers under the ASEAN initiatives and the programmes of the ASEAN economic cooperation, the thesis aims to point out, at the end, which of the mechanisms drawn from the development of freedom of establishment for companies and corporate cross-border mobility in the EU can be applied in the context of the ASEAN economic cooperation and business collaboration. The suggested mechanisms are expected to be beneficial to the regional economic development and to increase intra-ASEAN trade.

1.2.2 Research Questions

The aim of the thesis is to see whether any of the mechanisms drawn from the EU’s experience on freedom of establishment for companies and corporate cross-border
mobility within the EU are feasible to work in order to facilitate ASEAN economic cooperation and business collaboration within the region and thus, to increase intra-ASEAN trade and investments. With a view to achieve this research objective, I pose the following research questions:

1. What does ASEAN aim to achieve through its regional economic development? What are similarities and differences between the process of building an ASEAN Economic Community (AEC) and the process of building an internal market in the EU? What are the differences between ASEAN and the EU in institutional settings and their influence on regional economic development?

2. What are the major barriers to foreign business activities in the ASEAN Member Countries? What kind of protectionist techniques of the ASEAN Member Countries’ governments are in use to control foreign investors, which place deleterious obstacles to cross-border business activities and intra-ASEAN trade?

3. How has ASEAN perceived and dealt with such barriers under the ASEAN initiatives? What have ASEAN Member Countries done so far to facilitate economic cooperation and business collaboration within ASEAN and to increase intra-ASEAN trade and investment? What are the problems and impediments in the ASEAN initiatives and the programmes for ASEAN economic and industrial cooperation?

4. What kinds of mechanisms have been developed to enhance freedom of establishment for companies and corporate cross-border mobility within the EU which may be considered for economic cooperation and business collaboration within ASEAN in order to promote intra-ASEAN trade and investments?

5. Are the selected mechanisms drawn from the EU’s experience on freedom of establishment for companies and corporate cross-border corporate mobility viable to deal with the major cross-border business barriers existing in ASEAN? Are they useful to reduce the business cost and to enhance cross-border business
activities within the region?

Those five categories of questions will be dealt with throughout the thesis under each main chapter.

1.3 Methodology

1.3.1 Research Methods

Throughout the thesis, a comparative analysis has been carried out of the two regional developments where it is relevant in order to find out which of the mechanisms developed for freedom of establishment for companies in the EU can be applied in the context of the ASEAN economic cooperation and business collaboration in order to increase intra-ASEAN trade.

The analysis in the thesis is mainly based on library-based research including both a paper-based analysis of legislation and policy, case-law, existing secondary literature, and a practical analysis of the implementation of those policies. However, compared to the library-based research on the EU’s experience in developing the internal market including freedom of establishment for companies and corporate cross-border mobility mechanisms, despite the similar language used in the ASEAN initiatives as in the EU, it was extremely difficult to understand the end goal of the establishment of an economic community under ASEAN. That is to discover what the ASEAN Member Countries are interested in pursuing through the establishment of the AEC and the ASEAN economic cooperation schemes, how they perceive the meaning of the ASEAN single market and the obstacles regarding the implementation of those ASEAN policies in the relevant area. In particular, through the library-based research, it was impossible to clarify whether developing viable suggestions for cross-border business cooperation and collaboration within ASEAN from the EU’s experience of the
development of the internal market is actually necessary or beneficial to the regional economies. For example, it was unclear whether there is any possibility of growth in regional cross-border business collaboration in the private sector in the future or whether enabling corporate cross-border mobility within ASEAN would be beneficial to Southeast Asian economies and increase intra-ASEAN trade.

Therefore, in March 2009, a research trip was organised to Singapore and Jakarta, Indonesia to find crucial information providing the bases of the research questions including statistical data on growth of regional cross-border businesses and relevant secondary literature. However, essential statistical data were never available and secondary literature found during the trip was not sufficient. Certain difficulties in relation to access to data meant that different techniques had to be used. Facing the limitations of library-based research and the lack of statistical data regarding the ASEAN situation in the relevant area, it was decided to undertake a small number of qualitative semi-structured interviews with key actors who were experts in the regional economic development in ASEAN in order to obtain a range of views on the AEC and the ASEAN economic cooperation schemes and on the necessities for the increase of corporate cross-border mobility within ASEAN.45 This also has the additional benefit of collecting supporting data on challenges and obstacles to foreign businesses to perform cross-border activities within the region or to the existing ASEAN initiatives in the relevant area.

This thesis reflects the law as at 30 April, 2011.

1.3.2 Interviews

Given the lack of other data, particularly statistical data, in the relevant area and the

45 See the concept and the nature of the qualitative research; Alan Bryman (2008) Social Research Methods (3rd) (Oxford: OUP), pp. 21-23, 98 and 366, et seq
small size of available samples, a small scale set of semi-structured qualitative interviews with fourteen experts was conducted.\textsuperscript{46} After reviewing the available literature relating to the area extensively, a number of important points in relation to the research questions of the thesis were selected that needed to be investigated through interviews with a purposive sample of experts. This empirical method and analysing the interviews in order to draw communications enabled me to test the views of some of those working in the field on the feasibility of my proposition. However, this method cannot provide a representative view but could provide some basis against which to further consider my proposals and the need for active research on this. Therefore, the emphasis of the research was placed on opinions and attitudes as expressed in the words of the interviewees among the experts commonly to identify themes that embody a range of views on the reality of the regional economic integration in ASEAN in the business sector.\textsuperscript{47} Accordingly, a purposive sample of experts for the interviews was carefully selected to establish a good correspondence with the research questions of the thesis. This purposive sampling\textsuperscript{48} led to contacting scholars, lawyers, economists, research centres and the ASEAN Secretariat. Altogether, interviews with fourteen people were conducted between March and May 2009. Most of the interviewees were based in Singapore except for one who was based in Jakarta, Indonesia. Singapore is a crucial location not only as international and regional headquarters for businesses in East Asia but also as centre of the ASEAN studies due to its particular strong interests originated from its special position in Southeast Asia. A research trip was also made to Jakarta, Indonesia because of its accommodation of the ASEAN Secretariat.

Two lists of interview questions were produced reflecting the important points drawn from the research questions; one for businesses\textsuperscript{49} and the other for the rest

\textsuperscript{46} See the definition of the semi-structured interview; \textit{ibid.}, pp. 196 and 699

\textsuperscript{47} See the thematic analysis; \textit{ibid.}, pp. 281-282 and 700; it is a rather diffuse approach with few generally agreed principles for defining core themes in data.

\textsuperscript{48} See the concept of purposive sampling; \textit{ibid.}, pp. 414 and 458

\textsuperscript{49} Interview questions for businessmen in ASEAN in Appendix B
including the ASEAN experts. All the respondents were given a list of questions by email with a supplementary explanatory note regarding the conflict of laws problem in European company law and European corporate cross-border mobility mechanisms several days before the interviews. The supplementary note was provided to inform the respondents to help them to speculate on the viability of the European mechanisms in the context of ASEAN. An information sheet on the researcher and the research questions was also provided before the interview. Consents to participation in the interviews were given by the interviewees to the researcher either by signing the consent form or by email where personal contact was not available.

Among the interviewees, seven of the ASEAN experts, were purposively selected for semi-structured interviewing on the basis of their relevant expertise. The ASEAN experts have either actively produced relevant secondary literature or been formerly or currently involved in ASEAN activities relating to the AEC building initiatives or the ASEAN industrial economic cooperation programmes. Some of them also used to work in the ASEAN Secretariat while others have been working in the relevant area for a long time. Consequently, the knowledge they provided during the interviews could shed light on the main issues of this thesis and was a valuable source of insight into the practical perspective for this thesis even though it may not be representative of the whole ASEAN community. They consented to being named in the thesis. Contemporaneous notes were made for all those interviews and most of them were recorded and transcribed.

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50 Interview questions for ASEAN experts in Appendix A
51 Interview Supplementary Note in Appendix C
52 See an example of the information sheet Appendix D; note that these documents refer to the provisional title for this thesis which was subsequently changed.
53 See an example of the consent form in Appendix E
54 See the definition of semi-structured interviews; Bryman, supra note 45, pp. 196 and 699; see further on the structured interview in qualitative research, ibid., pp.196 and 437
55 The two interviews with Mr Edmund W. Sim and Mr Rodolfo C. Severino could not be electronically recorded due to the malfunction of the recording facilities on the day. However, contemporaneous notes were carefully taken during those interviews. The other interviews with the ASEAN experts were electronically recorded and transcribed.
is as follows:

- Mr. Edmund W. Sim: a trade lawyer who is particularly interested in the role of the private sector in the AEC development. During the interview, he provided specific information on the ASEAN Industrial Cooperation (AICO) Scheme application cases.

- Mr. Rodolfo C. Severino: a visiting senior research fellow at the Institute of Southeast Asian Studies (ISEAS), who is a former ASEAN Secretary-General and former Philippine diplomat. He was also the first head of the ASEAN Studies Centre.

- Mr. Jørgen Ørstrøm Møller: a visiting senior research fellow at the ISEAS, who is a former Danish ambassador to Singapore, and an adjunct professor at the Copenhagen Business School. He has extensive knowledge both of the EU and ASEAN.

- Mr. Yoong-Yoong Lee: a research fellow at the Institute of Policy Studies in the Lee Kuan Yew School of Public Policy at the National University of Singapore, who formerly worked at the ASEAN Secretariat and at Singapore’s Economic Development Board. He specifically indicated that he was working with Mr. Ong Keng Yong, a former ASEAN Secretary-General and acting on his behalf for the interview.

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56 The Basic Agreement on the ASEAN Industrial Cooperation Scheme (AICO Agreement) is available at: <http://www.asean.org/1948.htm>; see further details on the AICO scheme in Section 4.3.2 ASEAN Industrial Cooperation Scheme.

57 Interview on 26 March, 2009; he was a partner at Hunton & Williams LLP-Singapore when the interview was conducted and now at Appleton Luff: <http://www.appletonluff.com/42?language=es> He is also currently an adjunct associate professor at National University of Singapore Law School, Law and Policy of the ASEAN Economic Community seminar since 2010; <http://www.appletonluff.com/45/Trade%20Matters%20Handled>

58 He was the ASEAN Secretary-General from January 1998 to January 2003; interview on 2 April 2009; <http://www.iseas.edu.sg/aseanstudiescentre/>

59 Interview on 3 April, 2009; <http://www.oerstroemmoeller.com/cv.htm>; <http://web1.iseas.edu.sg/?page_id=137>

60 Interview on 7 April, 2009; <http://www.spp.nus.edu.sg/ips/Lee_Yoong_Yoong.aspx>

61 Mr. Ong Keng Yong is the director of the Institute of Policy Studies (IPS) in the Lee Kuan Yew School of Public Policy at the National University of Singapore. He was the ASEAN Secretary-General from January 2003 to January 2008; <http://www.spp.nus.edu.sg/ips/ONG_Keng_Yong.aspx>
• Professor Michael Ewing-Chow: an associate professor in the faculty of law at the National University of Singapore and the head of the trade and investment policy programme at the Centre for International Law at the National University of Singapore.62

• Dr. Denis (Wei-Yen) Hew: a regional cooperation specialist in Southeast Asia Department of the Asian Development Bank.63 He was a senior fellow and coordinator in regional economic studies at the ISEAS when the interview was conducted.

• Dr. Hank Giokhay Lim: a senior research fellow and the director of research at the Singapore Institute of International Affairs.64

For the same reasons of a lack of the available information, further semi-structured interviews were conducted in Singapore, and one in Jakarta, Indonesia, the interviewee being in a prime policy making position in the ASEAN Secretariat. Among the respondents, the interviewees who consented to being named in the thesis are as follows:

• Professor Muthucumaraswamy Sornarajah: CJ Koh Professor in the faculty of law at the National University of Singapore.65 The interview mostly contained the information and knowledge relating to the initiatives of the ASEAN Investment Area (AIA).66 It was conducted as a narrative interview67 regarding the case Yaung Chi Oo Ltd v. Myanmar,68 the first and only ASEAN investment treaty arbitration award between the ASEAN Member Countries so far, which he

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63 Interview on 13 April, 2009 (subsequent email on 18 February, 2010); <http://www.adb.org/publications/author.asp?id=1834>.
64 Interview on 28 April 2009; <http://www.siiaonline.org/?q=node/4379>
65 Interview on 7 April, 2009; <http://law.nus.edu.sg/about_us/faculty/staff/profileview.asp?UserID=lawsorna>
66 See further details on the AIA initiatives in Chapter 2 and Chapter 4 below.
67 See further on narrative interviews; Bryman, supra note 45, 441 and 560.
was involved in.\textsuperscript{69}

- Professor Darryl S.L. Jarvis: Vice Dean (Academic Affairs) and Associate Professor at Lee Kuan Yew School of Public Policy at the National University of Singapore.\textsuperscript{70} It was a short interview mainly discussing the foreign investment barriers in ASEAN and the AIA initiatives. He explained the process of the formation of the tables of the ASEAN Foreign Direct Investment Temporary Exclusion List and Sensitive List, 2008 in his paper.\textsuperscript{71}

Among the interviewees who would like to remain as anonymous, there was a Singaporean solicitor working in the banking sector.\textsuperscript{72} He gave information of the background regarding the big legal system development gap among the ASEAN Member Countries through a lawsuit he was involved in and pointed out that in Southeast Asia, there is no conflict of laws problem as in Europe because laws in some Southeast Asian countries are not sophisticated enough to create such problem. He also mentioned that Southeast Asian countries, such as Malaysia, Thailand, Indonesia and Cambodia, are learning from Singapore in developing foreign investment initiatives and referred to the ASEAN governments’ adoption of licensing systems in their sensitive sectors, such as mining industry in Indonesia or natural resource industries in Cambodia as a barrier for foreign businesses and investments.

An interview with an investment consultant working for a foreign (outside ASEAN) promotion agency based in Singapore was also conducted.\textsuperscript{73} He pointed out

\textsuperscript{69} The case is often mentioned in Muthucumaraswamy Sornarajah (2010) \textit{The International Law on Foreign Investment, 3rd}. (Cambridge: Cambridge University Press) and also in M. Sornarajah and Rajenthram Arumugam (2007) ‘An Overview of the Foreign Direct Investment Jurisprudence’ in Denis Hew (ed.) \textit{Brick by Brick} (Singapore: ISEAS), pp. 144-174
\textsuperscript{70} Interview on 3 April, 2009; <http://www.spp.nus.edu.sg/Faculty_Darryl_Jarvis.aspx>; a longer structured interview was planned for later, which could not be realised due to the limitation of time.
\textsuperscript{72} Interview on 13 April, 2009
\textsuperscript{73} Interview on 13 April, 2009
that foreign investors outside ASEAN were becoming more interested in establishing local companies or subsidiaries rather than branches or agencies within ASEAN and that their cross-border business activities were becoming more mobile within the region in some sectors such as the apparel and petroleum industries.\textsuperscript{74}

During the research visit to the ASEAN Secretariat, an interview was conducted with an official of the ASEAN Secretariat who was in a prime policy making position in the relevant area.\textsuperscript{75} The interviewee was very interested in getting more ideas on European economic integration and its cross-border mobility mechanism during the interview. She also confirmed that businesses and investments were becoming more mobile within ASEAN and showed a lot of interest by making a considerable amount of enquiries on the European corporate cross-border mechanisms mentioned in the list of interview questions sent before the interview. From the observation of the participant, the researcher gathered that ASEAN could be open to any mechanism if its benefits to regional economic development were clearly foreseen.

Towards the end of the research trip, the need, if possible, for triangulation\textsuperscript{76} of the results from the semi-structured interviews of the ASEAN experts with responses from businessmen was identified by the researcher. Because the suggested mechanisms were to be used by businesses in the region, the responses from businesses will enhance greater confidence in the overall findings from the conducted interviews. Therefore, two interviews were conducted with members of foreign companies which were based in Singapore and performing cross-border business activities within the region despite facing research obstacles in accessing businesses within a short period of time. However,

\textsuperscript{74} For example, he mentioned that in the apparel industry, a group of foreign investors have expanded their businesses from Vietnam to Indonesia, and that a foreign multinational petroleum business established a local company in Singapore to invest in Indonesia; according to the USITC Publication, trade and investment representatives reported increases in integration of ASEAN cross-border production of the textile and apparel products sector; United States International Trade Commission, supra note 2, p. 4-7

\textsuperscript{75} Interview on 21 April, 2009

\textsuperscript{76} See the concept and purpose of triangulation; Sotirios Sarantakos (2004) \textit{Social Research} (3\textsuperscript{rd}) (Basingstoke, New York: Palgrave Macmillan), pp. 145-147; see also Bryman, supra note 45, pp. 370 and 700
these two businesses represented good samples for the research purpose because they are placed at both ends of the spectrum of company size and business experience within the region, one being a small to medium-sized foreign subsidiary who started business in Southeast Asia in 2007 and the other being the regional headquarters of a multinational foreign company operating in East Asia since 1998. The two interviewees themselves also made a good contrast: the former being a regional director who moved to Singapore recently\(^ \text{77} \) and the latter being a CEO with about 15 year residence in Singapore.\(^ \text{78} \) Compared to the list of interview questions for the ASEAN experts, some technical questions relating to the ASEAN institutional settings were omitted from the list of interview questions for business but some other modified questions were included, such as whether an ASEAN single market would be beneficial for them to perform businesses within the region, whether enabling corporate cross-border mobility from one ASEAN country to another would be beneficial for them, and whether they would consider using the mechanisms developed under the AEC initiatives.\(^ \text{79} \) They all answered affirmatively to those questions. In addition, it is noteworthy that, among the four corporate cross-border mechanisms, both business interviewees were more positive to option (iv) of creating a supranational ASEAN Private Company similar to the European Private Company.\(^ \text{80} \) The former interviewee mentioned that it could be a

\(^ {77} \) Interview on 30 April 2009

\(^ {78} \) Telephone interview on 5 May 2009; he had extremely extensive knowledge on the initiatives of ASEAN as well as business barriers in Southeast Asian countries such as Malaysia, Indonesia, Vietnam and Singapore.

\(^ {79} \) See Question 2 and 5 of the interview questions for businessmen in Appendix B

\(^ {80} \) The question regarding the four mechanisms was also asked to the other interviewees. Unlike the options explored under chapter 6, the ASEAN Business Cooperation Partnership (ABCP) was not provided as an option for interviewees due to the difficulty in explaining the technical aspects of it. There were considerable amounts of difficulty in making each interviewee including the ASEAN experts understand the concept of the ASEAN Private Company (APC), despite the supplementary note provided in advance. Question No. 7 for business in Appendix B (Question No. 9 for ASEAN experts in Appendix A) is as follows:

7. Among these four mechanisms to enhance corporate mobility, which one would you prefer?
(Either comment on each of the options or just name the most appropriate.)
(i) Adopting an agreement/convention on the mutual recognition of foreign companies
(ii) Protecting rights of establishment (primary/secondary) through ASEAN institutions
(iii) Harmonisation of ASEAN company laws
(iv) Creating a supranational ASEAN Private Company similar to the European Private Company
useful option for businesses targeting the whole ASEAN market. The latter interviewee highlighted the importance of the development and promotion of the benefits of that option. He was sceptical about options (ii) and (iii) in line with the ASEAN experts. However, whereas some of the ASEAN experts were positive to option (i), he indicated the possible continuing existence of many barriers for foreign businesses imposed by the ASEAN Member Countries even with option (i) working in place.

To sum up, several different methods were adopted for obtaining data and information relevant to the research objectives: analysis of official material particularly produced by the ASEAN Secretariat; semi-structured interviewing of the ASEAN experts and business community members which were recorded electronically or using contemporaneous notes of the interviews. The analysis and findings answering further information and discussions during the interviews will be dealt with in the subsequent chapters of the thesis where relevant. However, only a broad thematic analysis approach was taken to identify key themes of relevance in the answers in these interviews to my research questions. This empirical method and analysing the interviews were taken not to establish a representative view but to support the lack of available data.

1.4 Structure of the Thesis

The thesis is composed of five parts dealing with each group of the research questions mentioned above, which are integrated into each main chapter. Therefore, the thesis is structured with seven chapters: five main chapters and the current Chapter 1 Introduction and Chapter 7 Conclusion.

With a view to making suggestions to improve business cooperation and collaboration within ASEAN, research on analysing the situations and obstacles in relevant areas had to be conducted. Accordingly, Chapter 2 begins with the institutional
limitations originating from ASEAN’s framework and its organisational features which obstruct the progress of the overall regional economic integration and industrial economic cooperation developments. The basic framework built into this chapter will help in understanding the inherent institutional restraints in ASEAN as a regional integration organisation in the process of developing the ASEAN economic cooperation instruments for cross-border business activities to increase intra-ASEAN trade dealt with in Chapter 4. When facing the implementation challenge originating from the institutional weakness in achieving its economic agenda in building the ASEAN single market, special attention needs to be paid to the lessons that can be learnt from the EU’s experience in completing its internal market.

Chapter 3 deals with the major barriers for foreign business activities within ASEAN Member Countries which stand in the way of enabling cross-border business activities within ASEAN, particularly regarding their regulatory business environments. It particularly focuses on the ASEAN Member Countries’ protectionist measures and practices to control foreign inward investments as they place major barriers in the path of all entrepreneurs seeking to do business across borders within Southeast Asia including those from other ASEAN countries. These protectionist methods are categorised into four types with a view to help evaluation of the mechanisms suggested in Chapter 6.

Before making suggestions drawn from the EU’s experience for future developments in the field of economic integration and cooperation in the business sector to promote intra-ASEAN trade, it has to be examined what has been done in ASEAN in the relevant area. Accordingly, Chapter 4 deals with the ASEAN economic cooperation instruments for cross-border business activities: the AEC initiatives and the ASEAN industrial economic cooperation programmes. The development of those instruments will show how ASEAN has perceived the barriers for cross-border business activities referred to in Chapter 3. The main focus will be on why these developments have not
been so successful at dealing with such barriers and where the difficulties of implementing those arrangements lie in.

Bearing in mind that the ASEAN economic cooperation instruments for cross-border business activities have not been successful in increasing intra-ASEAN trade and investments, Chapter 5 will explore the European mechanisms in the area of freedom of establishment for companies and corporate cross-border mobility within the EU. It will be worth looking at the process that the EU has experienced in developing the internal market in the relevant area.

In Chapter 6, the evaluation of viability of the selected mechanisms to enhance corporate mobility within ASEAN drawn from the EU’s experience will be performed. The criteria of assessment of the viability of the suggested mechanisms lie in their ability to overcome the major barriers for foreign businesses existing in the ASEAN Member Countries dealt with under Chapter 3. After the evaluation of viability and potential benefits of suggested mechanisms, the later part of Chapter 6 will deal with the most preferable mechanism in depth which serves to best satisfy the objective of overcoming the barriers so as to increase intra-ASEAN trade and to contribute to achieving the AEC. In case ASEAN would like to realise the mechanism in the future, its concrete features and benefits, its possible regulatory format and the summary of the contents will be provided in the chapter as well.

In Chapter 7, the overall conclusion of the thesis will be presented. I conclude with several points that ASEAN should keep in mind for future developments in the field of economic integration and cooperation in the business sector to promote intra-ASEAN trade at the realisation of the ASEAN single market. The suggested mechanism in Chapter 6, in my opinion, is most suitable and effective in validating those points, which may contribute to promoting the regional competitiveness and resilience, supporting the next stage of economic growth of the ASEAN Member Countries, and thus, leading to prosperity, poverty alleviation and the establishment of the ASEAN
identity.
Chapter 2  ASEAN and the EU

2.1 Introduction

ASEAN has been working successfully at attaining political stability and regional security in Southeast Asia.\(^1\) This contributed to the economic success of the ASEAN Member Countries to some degree. This is a particular achievement considering that they are highly heterogeneous in terms of colonial experience and political development. With political stability secured and regional security concerns manageable by the mid-1970s, ASEAN turned increasingly to strengthening economic cooperation among its Member Countries.\(^2\) In addition, with benefits accruing to the economies of the ASEAN Member Countries, particularly through substantial foreign investments and the corresponding transfer of technology, ASEAN’s economic linkages with the world economy have constantly increased. Thus, ASEAN responded to the emergence of regional economic groupings, such as the European Union, the North American Free Trade Agreement (NAFTA) and the Asia Pacific Economic Cooperation (APEC).\(^3\) At the ASEAN Economic Ministers Meeting in December 1989, a vision of tighter ASEAN economic relations was highlighted as a reaction to the perceived impending shift from a European Economic Community (EEC) to a European Union (EU).\(^4\) This led to the

\(^1\) Ponciano S. Intal Jr. (1997) ‘ASEAN and the Challenge of Closer Economic Integration’, Philippines Institute for Development Studies Discussion Paper Series No. 97-14, pp. 1-2; Rodolfo C. Severino also highlighted ASEAN’s contributions towards enhancing the political security and stability in the region during the interview on 2 April 2009.

\(^2\) Ibid., p.2; accordingly, the ASEAN Industrial Projects (AIP) in 1976, the ASEAN Preferential Trading Arrangements (PTA) in 1977, the ASEAN Industrial Complementation (AIC) scheme in 1981 and the ASEAN Industrial Joint Ventures (AIJV) scheme in 1983 were introduced; see the details of these developments in Section 4.3 Industrial Economic Cooperation in ASEAN

\(^3\) The attempts of institutional strengthening of economic liberalisation through AFTA are similar to those of NAFTA and the Maastricht Treaty on European political and monetary union; Rodolfo C. Severino (2006) Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-General (Singapore: ISEAS), pp. 222-223; relevant documents on AFTA can be found at:<http://www.aseansec.org/12025.htm>

\(^4\) The Maastricht Treaty (the Treaty on European Union (TEU) signed in Maastricht in 1992) established the three-pillar structure for what was to be the European Union, with the Communities as the first of
signing of the Framework Agreement on Enhancing ASEAN Economic Cooperation (the Framework Agreement) during the Fourth ASEAN Summit in Singapore in 1992,\textsuperscript{5} which recognised the necessities of cohesive and effective performance of intra-ASEAN economic cooperation and suggested removing tariff and non-tariff barriers which constituted impediments to intra-ASEAN trade and investment flows. Notably, the Framework Agreement embedded the establishment of the ASEAN Free Trade Area (AFTA) within fifteen years.\textsuperscript{6} Through the elimination of tariffs and non-tariff barriers within ASEAN under the AFTA, ASEAN Member Countries were interested in supporting the business community in the region because lower cost of inputs would allow the local businesses a wider choice of goods, and in the process, they would move towards becoming more competitive globally.\textsuperscript{7} This would act as a stimulus to the strengthening of national and ASEAN Economic resilience, and the development of the national economies of ASEAN Member Countries by expanding investment and production opportunities, trade, and foreign exchange earnings, which would eventually increase ASEAN's competitive edge as a production base in the world market and attract more foreign direct investment (FDIs) to ASEAN.\textsuperscript{8} AFTA itself was a bold move forward compared to earlier arrangements designed to increase intra-ASEAN trade.\textsuperscript{9} AFTA itself was a bold move forward compared to earlier arrangements designed to increase intra-ASEAN trade. Moreover, the setting of a deadline for the establishment of the AFTA was politically significant indicating a stronger political will to enhance ASEAN economic integration.\textsuperscript{10} Finally, after being severely affected by the 1997

\begin{footnotes}
\footnote{5}{Framework Agreement on Enhancing ASEAN Economic Cooperation, Singapore, 28 January 1992; available at: <http://www.aseansec.org/12374.htm>}
\footnote{6}{Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, Singapore, 28 January, 1992; available at: <http://www.aseansec.org/1164.htm>; in the subsequent Fifth ASEAN Summit in Bangkok in 1995, the deadline was shortened to ten years.}
\footnote{7}{See, in particular, the comment of the current Secretary-General of ASEAN, Dr. Surin Pitsuwan on the benefits from tariff reductions under the AFTA; available at:< http://www.aseansec.org/24146.htm>}
\footnote{8}{The preamble of the ASEAN CEPT Agreement, supra note 6}
\footnote{9}{Ibid., the AFTA aimed to effect improvements on the earlier arrangements of ASEAN Preferential Trade Agreements (PTAs); see Section 4.2.1 (1) Preferential Trade Agreements.}
\footnote{10}{Intal Jr. supra note 1, p. 5}
\end{footnotes}
Asian financial crisis, ASEAN leaders agreed to embark on a project to integrate their economies and establish an ASEAN Economic Community (AEC).\textsuperscript{11} Establishing a single market and production base in ASEAN was forced because the rising economic powers of China and India had become strong competitors for FDI inflow against the ASEAN Member Countries.\textsuperscript{12} In order to compete against China and India each with national laws and regulations which apply throughout their countries, it was increasingly difficult for ASEAN to stay as a loose association of diverse economies with different tariff regimes, customs procedures, product standards and various other non-tariff measures and with the ASEAN market fragmented by different regulations in services sectors and for investments.\textsuperscript{13}

ASEAN has explicitly identified its effort to establish a single market and production base through the free flow of goods, services, investments, capital and a free flow of skilled labour.\textsuperscript{14} The idea of an AEC was first proposed at the Eighth ASEAN Summit in Phnom Penh, Cambodia in 2002 by the then Singaporean Prime Minister Goh Chock Tong, who envisaged that the AEC would be similar to the EEC of the 1950s.\textsuperscript{15} The following year, at the Ninth Summit in Bali, Indonesia, the ASEAN leaders signed the Declaration of ASEAN Concord II (Bali Concord II), which invoked the ASEAN vision of building the ASEAN Economic Region by 2020 (now 2015)\textsuperscript{16}

\textsuperscript{11} ASEAN Vision 2020, 15.12.1997 and ‘Declaration of ASEAN Concord II (Bali Concord II)’, 5.12.2003. The timetable for completion of the AEC was later accelerated from 2020 to 2015 in Cebu Declaration, 13.01.2007; all of these documents are available at <www.aseansec.org>


\textsuperscript{13} Gita Nandan (2006), ASEAN: Building an Economic Community (Canberra: Australian Government, Aus AID), p. v

\textsuperscript{14} ASEAN does not have free movement of workers as in the EU and only emphasises the free movement of selected persons. The AEC Blueprint (para.9 and 33) only mentions free flow of skilled labour. Art.1 (5) of the ASEAN Charter also states to create a single market and production base which facilitated movements of business persons, professionals, talents and labour; see further in Section 2.2.1 Establishment of ASEAN Economic Community

\textsuperscript{15} See at: <http://www.aseansec.org/12321.htm>

\textsuperscript{16} At the Twelfth ASEAN Summit in Cebu, Philippines, the deadline to realise the AEC was brought forward by 5 years from 2020 to 2015, following the recommendation of the High Level Task Force (HLTF) on Economic Integration.
with a particular mention of the need to integrate the newer Member Countries into the ASEAN economy.\textsuperscript{17} This agreement established the ASEAN Economic Community (AEC), the ASEAN Security Community (ASC) and the ASEAN Socio-Cultural Community (ASCC) as the three pillars of an ASEAN Community.\textsuperscript{18} ASEAN’s focus on establishing the AEC will form a strong base for the other pillars to be built on. Finally, ASEAN leaders signed the AEC Blueprint\textsuperscript{19} and the ASEAN Charter at the Thirteenth Summit in Singapore in 2007.\textsuperscript{20}

In forming the AEC, ASEAN was inspired by the development of the EEC in the 1950s in establishing a common market.\textsuperscript{21} As ‘economic community’ immediately summons up the European experience, ASEAN has always studied European economic integration carefully and has seen it as a sort of role model, though to be adapted to the Southeast Asian development context.\textsuperscript{22} Whereas ASEAN only became serious about building an internal market after the 1997 Asian financial crisis,\textsuperscript{23} building the internal market with the Community method was already the main focus of the European integration in the 1957 Treaty of Rome establishing the EEC, as interpreted by the Court of Justice of the European Union (the Court of Justice). In 1963 with the judgment of \textit{Van Gend en Loos}, the Court of Justice announced that the EEC constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals.\textsuperscript{24} Relying on supranationalism, the EU has innovative

\textsuperscript{17} Severino, \textit{Southeast Asia in Search of an ASEAN Community: Insights from the former ASEAN Secretary-General}, supra note 3, p. 346

\textsuperscript{18} See Bali Concord II available at :<http://www.aseansec.org/15159.htm>; Severino, \textit{ibid.}, pp. 342-344;

\textsuperscript{19} Declaration of the ASEAN Economic Community (AEC) Blueprint, supra note 12

\textsuperscript{20} ASEAN Charter <http://www.aseansec.org/publications/ASEAN-Charter.pdf>

\textsuperscript{21} See Art. 2 of the Treaty of Rome.


\textsuperscript{23} See the ASEAN Vision 2020 and the following developments; see footnote 28.

\textsuperscript{24} Case 26/62, \textit{Van Gend en Loos v. Nederlandse Administratie der Berastingen} [1963] ECR 1; see Art. 5
institutions independent from its Member States such as the European Commission and the Court of Justice. In stark contrast, ASEAN follows the traditional model of intergovernmental cooperation adhering to the principle of non-interference and consensus, also known as the ‘ASEAN Way’, and runs by agreements of ASEAN Member Countries adopted under the ASEAN Summit. There are two fundamental and conceptual differences between intergovernmental cooperation and international integration based upon supranationalism. Firstly, supranationalism means governments pool and share specific aspects of sovereignty to exercise in common through institutions, while intergovernmental cooperation leaves governments to continue to exert their full sovereignty. Secondly, the legal decisions under the supranational institutions are legally binding with enforceability towards individuals in member states, taking precedence over relevant national legislations, while this is not the case for intergovernmental cooperation. The institutional setting in ASEAN evolved differently from the EU in its regional integration history, based on its adherence to the intergovernmental cooperation and avoidance of any of the supranational characteristics of the EU. Indeed, the loose arrangements in the institutional framework of ASEAN have struggled to keep up with the nature and pace of regional integration, particularly in implementing its economic agenda and enforcing the ASEAN obligations. Reflecting the fear that supranational institutions in ASEAN would erode the sovereignty of ASEAN Member Countries, it has been argued that the model of ASEAN

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25 The principle of non-interference is specifically outlined in the list of six fundamental principles that guide interstate relations under Art. 2 (c) of the Treaty of Amity and Cooperation (TAC) of 1976; at: http://www.aseansec.org/1217.htm

26 See further in Section 2.2.2


28 Ibid., Jørgen Ørstrøm Møller, p. 40

29 Daniel Seah, (2009) ‘Current Developments, I. ASEAN Charter’ 58 (1) International and Comparative Law Quarterly, 197, p. 201; see further for abuses and backtracking of ASEAN Member Countries from the commitments of the AEC initiatives in Section 4.2. ASEAN Economic Community Instruments
was never based on the regional organisation in the EU.\textsuperscript{30} However, it is still commonly acknowledged that ASEAN has learnt a lot from the EU.\textsuperscript{31}

Therefore, in the first part of this chapter, I will determine the aims of ASEAN on the basis of the ASEAN Charter and the AEC Blueprint and see how the EU has inspired the aim of establishment of the AEC, i.e. the ASEAN single market. I particularly discuss three key issues and challenges in the way of achieving the AEC. It is noteworthy that these issues indeed not only affect overall regional integration in ASEAN but also matter in developing the mechanisms for cross-border corporate mechanisms. Further focus will be given to the evolution of the ASEAN Charter which tried to put rule-based systems to realise the AEC. The second part of this chapter will mainly focus on the institutional framework designed to fulfil the aims of ASEAN, point out its structural weakness and its lack of major elements as a working regional institution compared to those in the EU, and discuss what needs to be done and can be learnt from the EU for the realisation of the ASEAN in the future. One must pay attention how the fear towards subscribing to ASEAN supranationalism and the measured pace of institutional building under consensus-based decision-making based on intragovernmentalism have led to broad general agreements without any clear mechanisms of commitments and caused delays and inefficiencies in achieving the AEC initiatives and the ASEAN industrial economic cooperation programmes.\textsuperscript{32}

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\textsuperscript{31} See, for example, the EU’s assistance contributed significantly to progress made in regional economic integration in ASEAN according to the final report of the Evaluation of EC Co-operation with ASEAN, vol. 2, June 2009; available at: <http://ec.europa.eu/europeaid/how/evaluation/evaluation_reports/reports/2009/1262_vol2_en.pdf>; see also the history of the EU’s technical assistance to enhance ASEAN’s self-reliance and to promote wider regional development and cooperation. The ASEAN Secretariat has also benefited from the EU’s technical assistance through the Institutional Development Programme for the ASEAN Secretariat; Overview of ASEAN-EU Dialogue; at: <http://www.aseansec.org/5612.htm>.
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\textsuperscript{32} See the AEC initiatives and the ASEAN industrial economic cooperation programmes in Chapter 4 Cross-Border Business Cooperation Developments within ASEAN
\end{flushright}
2.2 Aims of ASEAN and the Implementation Challenge

2.2.1 Establishment of ASEAN Economic Community

At the beginning, ASEAN was only a political organisation, midway between a diplomatic conference and an international organisation. Its purpose fundamentally lay in its ability to reduce intra-mural conflict within Southeast Asian countries and to facilitate regional stability within East Asia in its strategic role, particularly through adopting the Treaty of Amity and Cooperation in Southeast Asia (TAC) as a code of conduct governing relations between states and a diplomatic instrument for the promotion of peace and stability in the region.⁴³ Despite the avowed purpose for the establishment of ASEAN in the 1967 Bangkok Declaration⁴⁴ that the organisation is to be devoted primarily to economic cooperation among ASEAN Member Countries, this aim received only scant attention in the early days of the organisation.⁴⁵ This is firstly because the structure of the Association revolved around the annual meeting of foreign ministers who are primarily interested in the external affairs and political dimensions of ASEAN, and secondly because ASEAN Member Countries were more in search for markets and for sources from outside rather than inside the region where intra-ASEAN economic cooperation had atrophied in comparison to the foreign ministers’ activities outside the region.⁴⁶ Accordingly, economic cooperation was only one of many reasons for the organisation, and political and security concerns were at least as important.⁴⁷ In the first three decades of ASEAN, there was no special mention of economic integration.

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⁴⁴ Although the Bangkok Declaration is ASEAN’s founding document, it is a non-binding document; ASEAN Declaration I (the 1967 Bangkok Declaration); available at: <http://www.aseansec.org/1212.htm>
⁴⁵ Indorf, supra note 33, p. 6
⁴⁶ Later, the economic ministers of the ASEAN Member Countries were given a more significant role in regional deliberations including joint economic projects; *ibid.*, Indorf, p. 8
⁴⁷ Seah, supra note 29, p. 198
However, a new era began with the 1997 Asian financial crisis. The crisis highlighted the failings of economic integration and the structural weakness of ASEAN and showed that ASEAN was incapable of responding on its own. The landmark ASEAN Vision 2020 statement, which was agreed by the ASEAN leaders on the Thirtieth Anniversary of ASEAN in 1997, declared that the ASEAN Member Countries will commit themselves towards ‘closer cohesion and economic integration.’ It noted ASEAN’s new directions as an ASEAN Economic Region for the first time which was later followed by the idea of establishment of the AEC.\(^{38}\) After discussing the proposal of the idea of building an AEC similar to the EEC of the 1950s at the Eighth ASEAN Summit in 2002,\(^{39}\) the Declaration of ASEAN Concord II (Bali Concord II) in 2003 declared that ‘the AEC shall establish ASEAN as a single market and production base’, and presented the broad outlines for economic integration among the ASEAN Member Countries.\(^{40}\)

Laying the groundwork for greater intra-regional cooperation, ASEAN aims to increase its Member Countries’ ability to compete in the global economy by removing both tariff and non-tariff barriers to the flows of goods, services and investments among ASEAN member nations. At the Thirteenth Summit in Singapore in 2007, ASEAN leaders signed the ASEAN Charter\(^{41}\) and the AEC Blueprint.\(^{42}\) Both of these documents set a clear departure from ASEAN’s tradition towards economic cooperation among its Member Countries. Particularly under the AEC Blueprint, a master plan to realise the AEC, the AEC envisages the following objectives: building (a) a single market and

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\(^{38}\) ASEAN Vision 2020; available at: <http://www.aseansec.org/1814.htm>; in the following year, the First Plan of Action, the Hanoi Plan of Action reaffirmed the goal of ‘closer economic integration’ and declared an intention ‘to create a stable, prosperous and highly competitive ASEAN Economic Region in which there is a free flow of goods, services and investments, a freer flow of capital, equitable economic development and reduced poverty and socio-economic disparities.’; available at: <http://www.aseansec.org/8754.htm>; later, the Vientiane Action Programme (VAP) replaces the Hanoi Plan of Action; available at: <http://www.aseansec.org/VAP-10th%20ASEAN%20Summit.pdf>.

\(^{39}\) See at: <http://www.aseansec.org/12321.htm>

\(^{40}\) Declaration of ASEAN Concord II (Bali Concord II); available at: <http://www.aseansec.org/15159.htm>

\(^{41}\) It was signed at the Thirteenth Summit in Singapore in 20 November 2007; Singapore Declaration on the ASEAN Charter; all documents can be found at: <http://www.aseansec.org/21861.htm>.

\(^{42}\) Declaration of the AEC Blueprint; supra note 12
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.\textsuperscript{43} It is particularly noteworthy that the idea of a single market comes from the EEC.\textsuperscript{44} The Single European Act (SEA) described the internal market as ‘an area without internal frontier in which the free movement of goods, persons, services and capital shall be ensured.’\textsuperscript{45} The AEC Blueprint states that building a single market and production base in ASEAN means making ASEAN more dynamic and competitive with new mechanisms and measures to strengthen the implementation of its existing economic initiatives; accelerating regional integration in the priority sectors; facilitating movement of business persons, skilled labour and talents; and strengthening the institutional mechanisms of ASEAN.\textsuperscript{46}

However, there are differences in the development of the ASEAN single market to the one in the EU. Whereas free movement of workers in the EU, since the Treaty of Rome, has been treated as a prerequisite to the achievement of economic integration, this is not the case in ASEAN. The AEC Blueprint lists five core elements for the ASEAN single market and production base: (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.\textsuperscript{47} The ASEAN Charter also aims to create a single market and production base which facilitates movements of business persons, professionals, talents and labour.\textsuperscript{48} Reading further the AEC Blueprint for the action that ASEAN is working on for free flow of skilled labour, ASEAN seems to be only interested in enhancing free movement of selected persons, such as professionals and business persons, who are

\textsuperscript{43} Ibid., para. 8.
\textsuperscript{45} Art. 8a EEC; now Art. 26 TFEU (ex. Art. 14 EC).
\textsuperscript{46} AEC Blueprint, supra note 12, para.6
\textsuperscript{47} Ibid., para.9
\textsuperscript{48} Art. 1 (5) of the ASEAN Charter, supra note 20
engaged in trade in goods, services and investments.\(^49\) The mobility of those persons is still under the control of the host country according its prevailing regulations.\(^50\) Free movement of workers does not exist in the development of the ASEAN single market. The AEC Blueprint only suggests for the ASEAN Member Countries to cooperate in facilitating the issuance of visas and employment passes for the skilled labour in cross-border trade. In fact, free movement of workers as in the EU does not exist in other regional grouping either. For example, NAFTA only mentions about enhancing the scope of trade in goods, services, and investment between its Members, but remained silent as to the free movement of workers.\(^51\)

In addition, it is not clear exactly what the end objective of an ASEAN single market is.\(^52\) It is not explicit whether the ASEAN Member Countries are willing to develop the AEC beyond a free trade area (FTA) or beyond a customs union (CU).\(^53\) In relation to this point, there are debates such as the FTA Plus approach or the CU Plus approach.\(^54\) The introduction of a complete customs union in ASEAN is complicated

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\(^{49}\) AEC Blueprint, *supra* note 12, para.33; there was no mention of free movement of persons at all in Bali Concord II; Denis Hew, ‘Towards an ASEAN Economic Community by 2020: Vision or Reality?’, ISEAS Viewpoints, 16.6. 2003

\(^{50}\) AEC Blueprint, *Ibid.*; domestic regulation on the practice of selected professions involve educational experience and licensing requirements, requirements for recognition of foreign professionals (Thailand), scope and limitation of practice, labour market test requirements (Indonesia and the Philippines) and reciprocity requirements (Brunei Darussalam and Thailand); Tereso S. Tullao, Jr. and Michael Angelo A. Cortez ‘Enhancing the Movement of Natural Persons in the ASEAN Region: Opportunities and Constraints’ 2 (2) Asia-Pacific Trade and Investment Review, 71, p.82


\(^{52}\) Lloyd, *supra* note 44, p. 32

\(^{53}\) Commonly, four different levels of economic integration are distinguished: the simplest level is the free trade area, which implies the abolition of tariffs and quotas for imports from the area members, but members of the area keeping their own quotas and tariffs against third countries; a more advanced stage of economic integration is the customs union, where the eradication of internal tariffs and quotas is accompanied by the harmonisation of external tariffs and quotas; next stage of economic integration is the common market, which accompanies the removal of all non-tariff barriers to free movements of goods, capital, labour and services across the territory of the common market; when members of a common market begin to harmonise their economic policy, the common market starts to be an economic union; Andrés Rodríguez-Pose (2002) *The European Union: Economy, Society and Polity* (Oxford: OUP), p. 8

\(^{54}\) The meaning of ‘Plus’ is to allow conditions in addition to the concept of the FTA or the CU with the possibility of a longer transition period. The FTA Plus arrangement is to have certain common market elements in addition to the formation of an FTA and to formulate ‘negative lists’ that can be brought under the umbrella of the integration project. The CU Plus arrangement is to create an arrangement of a customs union like the EEC but accepting a zero or very low common external tariff with the possibility of
due to the special status of Singapore. Singapore will refuse to raise tariff rates to accept any ASEAN Common External Tariff above zero but other ASEAN Member Countries may not accept this at least in the near future. Singapore is highly developed with no tariffs, working as an entrepôt of foreign business and investment faced with a lack of physical resources and a relatively small domestic market, all of which is very different from other ASEAN Member Countries. Therefore, options include a complete free trade zone in ASEAN, perhaps with some external tariff harmonisation, or a customs union with ‘ASEAN Minus X formula’, in which the common external tariff would be determined by negotiations but without necessitating all ASEAN members joining.

The FTA Plus arrangement is politically practical but from an economic perspective, the CU Plus arrangement seems the better option. Establishing a customs union and beyond does not necessarily imply the completion of an internal market. However, considering that ASEAN declared to establish a single market, ASEAN must opt for a consistent development that best suits the region. Regardless of whether ASEAN takes a CU Plus arrangement or a FTA Plus arrangement on the AEC, the central criterion is that, in order to maintain preferential character, a regional grouping is allowed on the premise that its members have agreed to eliminate substantially all tariffs and other restrictive regulations of commerce on trade between its members, which leads to a wider and deeper level of trade liberalisation than that under the World Trade Organization (WTO). Anyhow, there is currently no definite approach on the AEC taken under ASEAN. At this stage, the overall strategy for realising the AEC involves deepening and temporarily excluding sensitive sectors based on open regionalism. There is another interesting idea called ‘Common Market Minus’ approach, which is the creation of a fully integrated market by 2015 but takes into account areas where Member Countries reserve deeper integration for a later stage beyond then; Plummer, ‘The ASEAN Economic community and the European Experience’, supra note 22, pp. 12-13

‘ASEAN Minus X’ formula means flexible participation on economic matters instead of taking a vote, which means the slowest Member should not impede the ASEAN’s overall economic goals and would be allowed to opt out of any economic agreement as long as there is ‘a consensus to do so’; Art 21(2) of the ASEAN Charter; see further in note 143 and 145

Plummer, ‘The ASEAN Economic community and the European Experience’, supra note 22, p. 13

See GATT Art. XXIV and GATS V; Joseph H.H. Weiler (2000), The EU, the WTO and the NAFTA (Oxford: OUP), p. 175
broadening economic integration in the product and factor markets and accelerating the integration process towards a single market and production base. The language that ASEAN uses on the AEC connotes a European-style common market but in reality, the ASEAN economic region looks more like an FTA Plus arrangement with some characteristics of a common market but without the imposition of a common external tariff under a customs union.

While different approaches in the direction of the AEC are still being discussed, ASEAN sets its aims on accomplishing a single market similar to the EEC under the 1957 Treaty of Rome. The fact that ASEAN is more culturally heterogeneous than the Europe of more than fifty years ago does not mean that the European model is inappropriate for the regional context of the economic integration. The 1957 Treaty of Rome that the EEC espoused aimed at achieving integration via trade by creating a common market and a customs union and by developing common policies. Article 2 of the Treaty specifies its aim as the creation of the common market to promote throughout the community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between its Member States. This common market is founded upon four fundamental freedoms, i.e. the free movement of natural and legal persons, services, goods and capital. It requires the abolition of all border restrictions relating

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58 Lloyd, supra note 44, p. 32
59 Interview with Denis Hew on 13 April, 2009 (also supported by his email on 18 February, 2010); see also Denis Hew (2006) ‘Economic Integration in East Asia: An ASEAN Perspective’ No. 11,UNISCI Discussion Papers, 49, p. 52; Intal Jr., supra note 1; see also ASEAN Member Countries provide their sensitive sector excluded from foreign investments under their legislation. This trend is reflected in the ASEAN initiatives.
60 The Singaporean Prime Minister Goh Chock Tong first proposed the idea of the AEC similar to the EEC of the 1950s at the Eighth ASEAN Summit in 2002; see at: <http://www.aseansec.org/12321.htm>
62 Art. 3 and Art. 48 et seq of the Treaty of Rome; Part Two of the Treaty consists of Title I. Goods, Title II. Agriculture and Title III. Free Movement of Persons, Services and Capital of the Treaty. Title III of Part Two of the Treaty consists of chapter 1 Workers, chapter 2 Freedom of Establishment and chapter 3 Services; in ASEAN, free movement of natural persons, in particular, the free movement of workers has not been generally endorsed; see supra note 46, 47 and 48
to the four freedoms and thus creates a single economic area reducing the transactional cost to trade. The central idea of a single market also means that there should be no discrimination according to sources in the regional markets, which leads to free competition between the undertakings within the region. Removal of obstacles to trade and abolition of protectionism to trade within the EU Member States was a clear rule from the beginning by setting up institutions independent from its Member States. The European experience shows that establishing a common market goes well beyond mere national treatment (NT) or most-favoured-nation (MFN) treatment in the regional marketplace.\textsuperscript{63} The principle of national treatment’s dependence upon the principle of non-discrimination does not necessarily mean that nationals of other Member States are on an equal footing with home nationals in reality.\textsuperscript{64} In terms of internal market regulation, the main problem lies with the ordinary exercise by the Member States of their regulatory powers over the market for quite legitimate objectives unrelated to protectionist purposes.\textsuperscript{65} Therefore, the Court of Justice expanded the notion of restrictions to be abolished in the area of free movement of goods by laying down the definition of a measure having equivalent effect to quantitative restrictions in \textit{Dassonville}, stating all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-EU trade are to be considered as measures having an effect equivalent to quantitative restrictions.\textsuperscript{66} Further, in \textit{Cassis de Dijon},\textsuperscript{67} indistinctly applicable rules were also capable of being a measure having equivalent effect to quantitative restrictions to be challenged.\textsuperscript{68}

[63] Plummer, ‘The ASEAN Economic community and the European Experience’, \textit{supra} note 22, p. 10
derived from the case-law of the free movement of goods, the Court of Justices, in the area of free movement of persons, also focused on whether the national measures are ‘liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by Treaty’. Those measures are to be abolished if they cannot be justified by the European law criteria. Each Treaty freedom in the area of the free movement of persons was put on the same footing by using this broad concept of restrictions under the relevant freedoms, e.g. Säger in the freedom of services, Bosman in the free movement of workers, and Gebhard concerning the freedom of establishment. It was established in the EU that removing all unjustified obstacles to trade, not merely discriminatory and protectionist measures, is the real hallmark of a true common or single market.

Compared to the EEC of the 1950s, ASEAN Member Countries are closely integrated with global markets and more open in line with the AEC Blueprint’s objectives. The economic characteristics of the ASEAN Member Countries suggest that their most important trade and investment partners are from outside the region. Hence, any view of the regional economic integration in ASEAN must be appreciated in this context. To date, the intra-regional trade and investment in ASEAN are much less

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70 The measures can be justified by public policy requirements or mandatory (or imperative) requirements. The Court of Justice reserved itself a possibility to uphold restrictions by weighing interests, and allowed Member States to establish objective justifications in terms of ‘mandatory (or imperative) requirements’ in order to compensate for its expansion on the concept of restrictions, which only ended up on the overriding principle of proportionality; Niamh Nic Shuibhne (2002) ‘The Free Movement of Goods and Article 28 EC: An Evolving Framework’ 27(4) European Law Review, 408, pp. 408-409.
76 Plummer ‘The ASEAN Economic community and the European Experience’, supra note 22, p. 9.
than in the EU whereas the share of intra-regional EU trade and investment, even in its early stage, was far higher than in ASEAN today.\textsuperscript{77} In 1958, the first year of the implementation of the European customs union, intra-EU trade was about 37 per cent of total trade. By the time the customs union was completed, it was over 50 per cent. It accounts for about 66 per cent of its total trade in these days.\textsuperscript{78} Although intra-ASEAN trade has grown much higher from about 18 per cent in the early 1990s, it still accounts for only about 25 per cent of ASEAN’s global trade. Intra-ASEAN investments account for around 11 per cent of total FDI inflows. Although the value of intra-ASEAN trade has more than doubled in the past decade, still, it has risen much slower as a proportion of Member Countries’ total trade.\textsuperscript{79} Intra-ASEAN trade has never essentially been the result of policy-driven discrimination in favour of intra-regional economic interaction.\textsuperscript{80}

However, this does not mean that ASEAN was never interested in increasing intra-ASEAN trade. On the contrary, the existing low level of intra-ASEAN trade has always been the rallying point for the ASEAN regionalists who advocated a rapid growth of intra-regional trade in order to diversify the region’s market base and to reduce its over-dependence on non-ASEAN countries.\textsuperscript{81} ASEAN economic cooperation must reduce a large number of transaction costs associated with FDI, including those related to the labour market, mutual recognition of product standards, and the like. The AEC will have to focus per force on many of these areas.\textsuperscript{82} An integrated market and production base

\textsuperscript{77} Ibid., p.2
\textsuperscript{80} Plummer, ‘The ASEAN Economic community and the European Experience’, supra note 22, p. 2
\textsuperscript{81} United Nations Industrial Development Organization (1986) Regional Industrial Cooperation: Experience and Perspectives of ASEAN and the Andean Pact (Vienna: UNIDO), p. 17; Severino, Southeast Asia in Search of an ASEAN Community: Insights from the former ASEAN Secretary-General, supra note 3, p. 216
\textsuperscript{82} Plummer, ‘The ASEAN Economic community and the European Experience’, supra note 22, p. 10
would clearly boost intra-regional trade and investment flows across the region while ASEAN’s consumer market would be a lucrative place for companies to set up businesses.\textsuperscript{83}

One could say that the AEC is still at an embryonic stage of economic integration.\textsuperscript{84} There are three key issues and challenges that are not emphasised in the ASEAN documents but actually stand in the way of building an AEC: (i) sustaining the political will of the ASEAN Member Countries to integrate their economies; (ii) the disparate economic development levels of the ASEAN Member Countries; and (iii) the ASEAN’s traditional approach in adapting its processes and institutions.\textsuperscript{85}

Firstly, at a fundamental level, the ASEAN Member Countries face the challenge of sustaining the political will to integrate their economies. They have sometimes focused more on economic competition with each other rather than cooperation, in part due to rivalry in exports.\textsuperscript{86} The level of political will to achieve greater integration could also be influenced by the development gap between ASEAN Member Countries, particularly since the inclusion of the CLMV (Cambodia, Lao PDR, Myanmar and Vietnam) countries.\textsuperscript{87} The degree of political will that ASEAN Member Countries can muster will be driven by their assessment of the benefits of the AEC. This may depend on the extent to which they perceive the rise of China and India and other globalising countries as an economic threat and the extent to which they see an economic community as an answer to that threat. It depends also on the extent to which they see an economic community as increasing ASEAN’s regional influence and

\textsuperscript{85} Nandan, supra note 13, pp. vii–ix
\textsuperscript{86} Ibid., p.viii; see the examples of the rivalry in experts in manufacturing sector, such as in automotive and electronics industries; see Section 4.2 ASEAN Economic Community Instruments
\textsuperscript{87} Ibid.; at one end of the spectrum, Singapore is an advanced economy with a per capita income of USD 24,220 in 2004, while at the other end, Lao PDR, Myanmar and Cambodia are among the United Nations’ least developed countries; see, further, in supra note 91 for the GDP differences of the ASEAN Member Countries
promoting regional stability. From the beginning, embarking on the AEC was due to the perception of China and India as competitors in attracting FDI. In these emerging economies, FDI inflows have been steadily growing in the past few years.\textsuperscript{88} Their strong performance was not much influenced by the impact of the current global financial crisis whereas FDI inflows declined sharply in Singapore influenced by the current crisis.\textsuperscript{89} Confronting its longer-term challenges in continuing to position itself as a centre for global investment, ASEAN has now perceived that sustaining the goal of ASEAN integration is imperative.\textsuperscript{90} As the political will of the ASEAN Member Countries on the AEC has no other way but to grow, it remains to be seen to what degree regional integration can be achieved without the national sovereignty of ASEAN Member Countries being encroached on at all.

Secondly, in integrating its economies, ASEAN faces a major challenge in the disparate economic development levels of its Member Countries.\textsuperscript{91} While the complementarities introduced by the CLMV countries provide a greater incentive to integrate and encourage the development of regional production networks,\textsuperscript{92} it is true that they also make the integrating process more difficult.\textsuperscript{93} Not only does this impact the political will of the AEC but it also has technical implications for the ability of full participation of some ASEAN Member Countries.\textsuperscript{94} The big economic development

\textsuperscript{88} FDI flows to those countries in 2008 surged, continuing the trend of the previous two years, to reach a record USD 108 billion in China and USD 42 billion in India respectively; 2009 UNCTAD World Investment Report: Transnational Corporations, Agricultural Production and Development, pp. 50-51; available at: <http://www.unctad.org/en/docs/wir2009pt1_en.pdf>
\textsuperscript{89} Ibid.; Singapore has the largest intra-ASEAN FDI share; see also the tables provided by the ASEAN Secretariat: available at: <http://www.aseansec.org/18144.htm>
\textsuperscript{91} The GDP of the ASEAN Member Countries indicates the economic development gap among them. According to the data produced by the International Monetary Fund (IMF) as of April 2010, per capita GDP figures are as follows: Singapore (USD 57,238), Brunei Darussalam (USD 51,800), Malaysia (USD 14,603), Thailand (USD 8,643), Indonesia (USD 4,394), the Philippines (USD 3,725), Vietnam (USD 2,793) and Lao PDR (USD 2,435), Cambodia (USD 2,345), Cambodia (USD 2,000), Myanmar (USD 1,197); see the IMF World Economic Database Outlook by countries, October 2010 edition; available at: <http://www.imf.org/external/pubs/ft/weo/2010/02/weodata/index.aspx>
\textsuperscript{92} Hew, “Towards an ASEAN Economic Community by 2015”, supra note 83, p. 20
\textsuperscript{93} Nandan, supra note 13, p. ix
\textsuperscript{94} Ibid.
gap among the ASEAN Member Countries has made it difficult to find convergence criteria, which necessitate gradualism and flexibility in its economic integration. Most of all, differences in the level of economic development closely connect to different levels of legal system development in ASEAN, which inherently prohibits legal harmonisation of business laws and procedures that affect foreign investors. The current ASEAN institutional framework is not efficient in achieving its economic agenda and in accomplishing a single market and thus, has had little impact on closing economic gaps.

Thirdly, ASEAN is also facing the challenge of adapting its processes and institutions so that they better suit the task of deep integration. ASEAN’s traditional approach to decision-making has been characterised by consensus, voluntarism, informality and mutual trust to implement commitments. Because ASEAN’s consensus-based approach accommodates the lowest common denominator, it has also led to goals that lack ambition in terms of timing and scope.

With these challenges as background, an ASEAN Charter was incorporated aiming to give ASEAN a legal status and to support the goals of the AEC. It was an opportunity to modify ASEAN decision-making processes and institutions, and further address the development gaps between the ASEAN Member Countries. In 2007, Mr. Ong Keng Yong, then ASEAN Secretary-General, said that ‘the ASEAN Charter will serve the organisation well in three interrelated ways, such as, formally according

95 The fact that most of the ASEAN Member Countries are under the framework of the WTO itself does not constitute a strong convergence criterion because their international commitments made under the framework differ greatly due to the different status of the countries concerned due to the huge economic gap among the ASEAN Member Countries. Members of the WTO announce whether they are ‘developed’ or ‘developing’ countries. Developing-country Members benefit from special and differential treatment under many of the WTO agreements and receive WTO technical assistance; see, for example, Decision of the GATT Contracting Parties of 28 November 1979 on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries (BISD 26/S/203); GATT Art. XII: 2 of GATT; and Art. V: 3 (a) and (b) of GATS; Peter Van den Bossche (2005) The Law and Policy of the World Trade Organization: Text, Cases and Materials (Cambridge: Cambridge University Press), p. 106
96 This point is particularly mentioned by Michael Ewing-Chow; interview on 8 April, 2009; all the other ASEAN experts were also negative in regard to option (3) harmonisation of ASEAN company laws in answering Interview Question No. 9 for ASEAN Experts in Appendix A
97 See the AEC initiatives in Section 4.2 ASEAN Economic Community Instruments
ASEAN legal personality, establishing greater institutional accountability and a compliance system, and reinforcing the perception of ASEAN as a serious regional player in the future of the Asia Pacific region’. 98

2.2.2 Evolution of the ASEAN Charter

Following the entry into force of the ASEAN Charter on 15 December 2008, 99 ASEAN has henceforth operated under a new legal framework and has established a number of new organs to boost its community-building process. The purposes of establishing the ASEAN Charter can be found in the Kuala Lumpur Declaration on the Establishment of the ASEAN Charter: firstly, the ASEAN Charter will serve as a legal and institutional framework of ASEAN to support the realisation of its goals and objectives; secondly, the ASEAN Charter will codify all ASEAN norms, rules, and values and reaffirm that ASEAN agreements signed and other instruments adopted before the establishment of the ASEAN Charter shall continue to apply and be legally binding where appropriate; thirdly, the ASEAN Charter will reaffirm principles, goals and ideals contained in ASEAN’s milestone agreements 100; fourthly, the ASEAN Charter will confer legal personality upon ASEAN and determine the functions, develop areas of competence of key ASEAN bodies and their relationship with one another in the overall ASEAN structure. 101

During the ASEAN Charter preparation procedure, both ASEAN leaders and the Eminent Persons Groups on the ASEAN Charter recommended to transform

99 ASEAN Charter, supra note 20
100 Those agreements are in particular the ASEAN Declaration (1967), the Treaty of Amity and Cooperation in Southeast Asia (1976), the Treaty on Southeast Asia Nuclear Weapon Free Zone (1995), the ASEAN Vision 2020 (1997) and the Declaration of ASEAN Concord II (2003) as well as the principles of inter-state relations in accordance with the UN Charter and established international law that promote and protect ASEAN community interests as well as inter-state relations and the national interests of the individual ASEAN Member Countries.
ASEAN into an inter-governmental organisation with a legal personality and a rule-based regime. Without a formal charter, neither ASEAN nor its Secretariat could be assured of the legal basis for its actions when acting as a legal entity or entering into contracts. The ASEAN Charter confers a distinctive legal personality on ASEAN as an intergovernmental regional organisation and has become a legally binding agreement among ASEAN Member Countries.

It is worth noting that the conferral of legal personality on ASEAN has a significant practical meaning in terms of ASEAN’s budget. The fact that ASEAN did not have a legal personality prevented both ASEAN and its Secretariat from getting tax-exempt donations to augment its resources and consequently ASEAN has always suffered from budget issues. The building of the ASEAN Community requires a great deal of resources, particularly in order to move quickly on regional economic integration, on effective regional cooperation, and on strengthening its regional institutions. Substantial resources are also needed to raise public awareness of its agenda and objectives to Southeast Asians to understand how they can benefit from ASEAN.

ASEAN, from the beginning, has suffered from a fundamental problem of perception due to the reality of not acting like an international organisation despite the appearance of being one. Through the ASEAN Charter, the issue of the uncertainty surrounding ASEAN’s legal personality under international law has now been resolved.

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103 Art. 3 of the ASEAN Charter; Ong Keng Yong (2009) ‘At Close Quarters with the Drafting of the ASEAN Charter’ in Tommy Koh, Rosario G. Manalo and Water Woon (ed.) (2009), The Making of the ASEAN Charter (Singapore: World Scientific Publishing), 107, p. 111; neither the Bangkok Declaration of 1967 nor subsequent instruments such as the Treaty of Amity and Cooperation (TAC) of 1976 clarified this issue as these documents did not expressly provide for ASEAN’s legal personality.
106 Seah, supra note 29, p. 197
Furthermore, the ASEAN Charter, as one of the principles, articulates the idea of adherence to multilateral trade rules, such as WTO rules, and ASEAN’s rule-based regimes for effective implementation of economic commitments and progressive reduction towards elimination of all barriers to regional economic integration, in a market-driven economy.\(^{107}\) With the conferral of legal personality on ASEAN by the ASEAN Charter, ASEAN is now all the more ready to take up the challenges of regional integration to respond to globalisation.

The association has been governed in the ‘ASEAN Way’, that is to say, by a largely informal institutional cooperation, decision-making founded on inter-personal consultations and consensus among the ASEAN Member Countries, and on agreements which are mostly informal and non-binding in their effects.\(^{108}\) It can be traced from a particular style of decision-making within a Javanese conception, i.e. *musjawarah* (consensus) and *mufakat* (consultation). *Musjawarah* means that when a Javanese village leader makes important decisions affecting social life in the village, ‘a leader should not act arbitrarily or impose his will, but rather make gentle suggestions of the path a community should follow, being careful always to consult all other participants fully and to take their views and feelings into consideration before delivering his synthesis conclusions’ and thus, the practice of *mufakat* is a crucial aspect of consensus-building.\(^{109}\) As ASEAN is a set of countries noted more for its ethnic, religious and political heterogeneity than its homogeneity, the ‘ASEAN Way’ has helped to increase the comfort level between founding Members, who had been kept apart for over a century by different colonial spheres of influence, and also now, to raise the comfort level with the new Members, i.e. CLMV countries.\(^{110}\) The ‘ASEAN Way’ also reflects

\(^{107}\) Art 2 (2) (n) of the ASEAN Charter

\(^{108}\) Henry, *supra* note 84, p.859


\(^{110}\) ‘ASEAN: Still Attractive at 40’, Straits Times, 8 August 2007, p. 24; Seah, *supra* note 29, p. 199
the welding of global legal doctrine to local conditions, in which decisions reached by consensus are indicative of sovereign equality, hence the extensive consultations to increase the comfort level between the ASEAN Member Countries. The ASEAN Member Countries have particularly regarded the rule of non-intervention as fundamentally important to their national interests. The recognition that ASEAN Member Countries are sovereign equals under international law, who enjoy procedural parity within ASEAN, is also underscored in the equal annual contributions to the operational budget of the ASEAN Secretariat.

Although consensus is different from unanimity, many decisions have been in practice reached on the basis of genuine unanimity in ASEAN. Although, in principle, explicit consent to a decision is not necessary for consensus to be forged, it could be blocked if one or more ASEAN Member Countries feel the decision would militate against their national interests. Consequently, the non-confrontational bargaining style of the ‘ASEAN Way’ prevails, which does not lead to formal voting or procedural mechanisms to break the impasse, if consensus fails. The ‘ASEAN Way’ cares about involving a commitment by consultations among Members more than the achievement of an outcome.

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111 Seah, supra note 29, p. 200
112 The principle of non-intervention means that one state cannot interfere in the internal affairs of another state, based upon the principles of state sovereignty and self-determination, and thus, involves the right of every sovereign State to conduct its affairs without outside interference. It is a customary international law affirmed by the International Court of Justice and included in the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations; Resolution No. 2625 (XXV); available at: <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/348/90/IMG/NR034890.pdf>
114 Art. 30 (2) of the ASEAN Charter; this also implies that the funding of the Secretariat, whose responsibilities include facilitating and monitoring progress in the implementation of ASEAN agreements, has to be determined by the ability to contribute of the poorest Member State; Seah, supra note 29, p 205; see also Narongchai Akrasanee and Jutamas Arunanondchai, (2005) ‘Institutional Reforms to Achieve ASEAN Economic Integration’ in Denis Hew (ed.) Roadmap to an ASEAN Economic Community (Singapore: ISEAS), 63, pp. 70-71
115 Severino, Southeast Asia in Search of an ASEAN Community: Insights from the former ASEAN Secretary-General, supra note 3, p.34
116 Seah, supra note 29, p.199
117 Seah, supra note 29, p. 200
118 Acharya, supra note 109, p. 329
than being in a specific timetable and eventually, the issues discussed for a number of years are deferred indefinitely.\textsuperscript{119}

However, as ASEAN matures, its preference for loose arrangements over legally binding documents has created practical problems. The measured pace of institution building under this consensual approach to decision-making has struggled to keep up with the nature and pace of integration within the ASEAN region, particularly with its economic agenda.\textsuperscript{120} Accordingly, ASEAN developed an interesting method called the ‘ASEAN Minus X’ formula.\textsuperscript{121} Only in relation to economic matters, instead of taking a vote, Article 21(2) of the ASEAN Charter specifically provides for flexible participation on the basis of the ASEAN Minus X formula, which means the slowest Member Country should not impede the ASEAN’s overall economic goals and would be allowed to opt out of any economic agreement as long as there is ‘a consensus to do so’.\textsuperscript{122} In other words, the ASEAN Minus X formula enables Members which are ready to implement certain reforms to do so early. The flexible participation under the ASEAN Minus X formula may be expected to help hasten the process of ASEAN economic integration: firstly, by having a demonstration effect that can help to assure Member Countries who are uncertain of the impact of the liberalisation measures; secondly, by creating peer pressure among Member Countries.\textsuperscript{123} However, this expectation is unlikely to be fulfilled. It is unclear how the ASEAN Minus X formula is useful for the achievement of the AEC initiatives, as can be seen in the progress under the AFAS.\textsuperscript{124}

Similar to the WTO framework, the Member Countries can make different

\textsuperscript{119} This happened often to the intra-ASEAN cooperation schemes; Indorf, \textit{supra} note 33, p70

\textsuperscript{120} Seah, \textit{supra} note 29, p.201

\textsuperscript{121} The ASEAN Minus X formula has originated from the five-minus-one technique in implementing ASEAN economic cooperation projects in 1970s; Indorf, \textit{supra} note 33, p. 70

\textsuperscript{122} The exact wording of Article 21 (2) of the ASEAN Charter is that, in 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.


\textsuperscript{124} See in Section 4.2.2 ASEAN Framework Agreements on Services
commitments depending on their levels of economic developments under the ASEAN Minus X formula. It only confirms the already existing ‘two-track process’ of the ASEAN’s integration between the older Member Countries (Brunei Darussalam, Indonesia, Malaysia, The Philippines, Singapore and Thailand) and the CLMV Member Countries (Cambodia, Lao PDR, Myanmar and Vietnam).\textsuperscript{125} It is just another expression of encouraging flexible participation in economic agreements and difficult to find peer pressure for commitments. The ASEAN Minus X formula itself is inclusive and not exhaustive of flexible participation.\textsuperscript{126} Moreover, applying the ASEAN Minus X formula does not purport that ASEAN shifted away from its consensus decision-making approach. The decision of the adopting the ASEAN Minus X formula itself depends on consensus.\textsuperscript{127} It only means that one nation can exclude itself from a collective non-binding project while leaving the façade of unity undamaged, thereby keeping the traditional ‘ASEAN Way’.\textsuperscript{128} Therefore, the ASEAN style of consensus decision-making has led to broad general agreements without any clear mechanisms of commitments for reaching precise goals, leaving individual Member Countries with considerable scope for unilateral interpretation of agreements.\textsuperscript{129} The reality of regionalism in ASEAN is pursued not as an end itself but as a supplementary method

\textsuperscript{125} Ellen L. Frost(2008) \textit{Asia’s New Regionalism} (Singapore: NUS Press), p. 223; Seah, ‘Current Developments, I. ASEAN Charter’, \textit{supra} note 29, p. 206; it is noteworthy that in the EU, there is a mechanism called ‘enhanced cooperation’ which was introduced by the Amsterdam Treaty considering the differences between the EU Member States. Enhanced cooperation was established to enable some EU Member States not to be held back from developing common laws between themselves on matters covered by the Treaties, should they so wish. Because of lowering the threshold in a way that intrudes on general law-making in the EU by excluding some other Member States and thus, allowing two-tier Union, to prevent this, enhanced cooperation is under a number of safeguards (Art. 20 TEU and Articles 326 to 334 TFEU). It shall aim to enhance the process of integration within the Union (Art. 20 TEU) and shall not undermine the internal market or the Union’s economic and social cohesion. Furthermore, it shall not create a barrier to or discrimination in trade between the Member States nor shall it distort competition between them (Art. 326 TFEU). This mechanism has hardly been used in the EU. The first enhanced cooperation happened in the area of the law applicable to divorce and legal separation on 12 July 2010; Council Decision 2010/405/EU of 12 July 2010 authorising enhanced cooperation in the area of the law applicable to divorce and legal separation \cite{OJ L 189/12}.

\textsuperscript{126} Seah, \textit{supra} note 29, p. 206; Art 21(2) of the ASEAN Charter

\textsuperscript{127} Art 21(2) of the ASEAN Charter

\textsuperscript{128} Indorf, \textit{supra} note 33, p. 65

\textsuperscript{129} Nandan, \textit{supra} note 13, p. ix
for advancing national development.\footnote{Indorf, \textit{supra} note 33, p.7}

Noting this problem, a McKinsey Study has proposed to ASEAN the introduction of Qualified Majority Voting (QMV) for technical policy matters before drafting the ASEAN Charter.\footnote{ASEAN commissioned McKinsey to conduct this study before drafting the ASEAN Charter; Schwartz and Villinger, \textit{supra} note 12; see also Tay proposed that ASEAN could consider adopting a majority rule instead of consensus since this practice has been applied to less fundamental issues; Tay, ‘Institutions and Process: Dilemmas and Possibilities’ \textit{supra} note 123 p. 267} However, this basic principle of consensus and consultation in decision-making based on intergovernmentalism has been kept in the ASEAN Charter.\footnote{It only contains vague and circular provisions of the same principle: when consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made. Other ways of carrying out decisions may be employed as and when necessary and agreed upon; see for example Article 20 of the ASEAN Charter.} In the EU, QMV by the EU Council in the legislative procedure was introduced by the Single European Act (SEA) in 1986 with a view to relaunch the internal market project after a period of stagnation in the European integration in the late 1970s and early 1980s.\footnote{Art. 100 EEC (now Art. 115 TFEU (ex Art. 94 EC)); Art. 100a EEC (now Art. 114 TFEU (ex Art. 95 EC))} For the establishment of the common or single market and the proper functioning of the internal market in the EU, the SEA adopted a certain range of areas where the Council can take decisions by QMV instead of unanimity. Before the SEA, if a Member State raised ‘very important interests’ before a vote in the Council, it was agreed that the matter would not be put to vote. This gave every Member State a veto in all fields of decision-making and frequently used even where the interest in question was insignificant, which caused a period of stagnation in the European integration.\footnote{See, in particular, the Luxembourg Accords in 1966 and the shadow of the stagnation periods; Damian Chalmers, Gareth Davies and Giorgio Monti (2010) \textit{European Union Law: Cases and Materials} (2nd ed.) (Cambridge: Cambridge University Press), pp. 13-14} The unanimity requirement chilled the legislative process and made the European Commission a passive body reluctant to generate controversy.\footnote{\textit{Ibid.}} The SEA, by adopting QMV, enabled and energised the legislative processes and provided the vehicle for the passage of the programme for completion of internal market
under the European Commission. Adopting QMV instead of unanimity in the legislative process means the loss of the veto of Member States and the reinforcement of supranationalism pooling sovereignty of Member States to be exercised in common as a regional grouping. This facilitated decision-making and avoided the frequent delays inherent to the search for a unanimous agreement among the Member States. Therefore, unanimity and QMV coexist in decision-making in the EU institutions. Although QMV under the SEA was introduced only in certain areas and did not apply in core areas such as taxation and freedom of persons, it served to ‘kick-start’ the process of fulfilling the economic objectives of the EU. With the recognition that unanimity is not necessarily required for measures designed to establish the single market, the scope of QMV has been constantly extended by the following Treaty amendments to other areas of EU action, and finally, QMV became the norm in the ordinary legislative procedure following the entry into force of the Lisbon Treaty, signed on 13 December 2007 and entered into force on 1 December 2009. Particular attention needs to be paid to the fact that adopting measures aiming at developing the internal market is subject to the ordinary legislative procedure of the QMV requirement except in certain areas, for example, measures concerning taxation, the free movement of persons, and the rights and interests of employed persons.

The EU is the most developed regional grouping in the world with the

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137 See also the issue of unanimity requirement to obstruct progress in legislative process was mentioned in the 1985 White Paper; the 1985 White Paper, para. 13

138 Craig and de Búrca, supra note 136, p. 14

139 Under the Lisbon Treaty, the ordinary legislative procedure which uses QMV within the Council of Ministers became the standard decision-making process across the entire area of Freedom, Security and Justice (Title V, Part Three TFEU); it is noteworthy that, under the Lisbon Treaty, the order of the provisions in approximation of laws has reversed that the special legislative procedures requiring unanimity is now under Art. 115 TFEU (ex Art. 95 EC; Art. 100a EEC) without prejudice to Art. 114 TFEU (ex Art. 94 EC; Art. 100a EEC).

140 Art. 114 (1) TFEU

141 Art. 114 (2) TFEU; indirect taxation is under the special legislative procedure under Art. 113 TFEU and free movement of persons belong to Title IV Art. 45 TFEU et seq.
supremacy of EU law over national legislation of the EU Member States. Even though
the EU is already much more highly integrated than ASEAN, still, under the Lisbon
Treaty, the application of QMV is further extended within the EU Council to areas
which used to require unanimity in the ordinary legislative procedure, which lays even
Market Law Review, 617, p. 692} The further introduction of QMV in the EU
highlights the importance of efficient decision-making for a higher level of regional
integration. Not only in ASEAN but also in the EU, there exist different levels of
economic development among the Members. There has also been some degree of
flexibility in EU internal market law.\footnote{For this reason, since the SEA, there have been the exceptions of measures concerning taxation, the
free movement of persons, and the rights and interests of employed persons; see now Art. 114 (2) TFEU.} However, the EU has dealt with the problem
through positive harmonisation, particularly by the use of minimum harmonisation in
some sensitive fields such as taxation and through negative harmonisation by the Court
of Justice’s judicial review.\footnote{See further for the concepts of positive harmonisation and negative harmonisation in Section 5.3.2 (1)
Harmonisation Approach.} Although considerably smaller in number than the EU
Members, the ten Members of ASEAN often find it difficult to make decisions based on
consensus, particularly considering the political and economic heterogeneity and the big
economic development gap among the ASEAN Member Countries which entails
diverse national interests. It is indicative that there were twelve Members when QMV
was introduced under the SEA.\footnote{The founding Members were Belgium, France, West Germany, Italy, Luxembourg, and the
Netherlands. Later, Denmark, Ireland and the United Kingdom joined in 1973, Greece in 1981 and
Spain and Portugal in 1986.} Indeed, consensus-based decision-making in ASEAN
has contributed to the ASEAN Member Countries’ keeping an intensely nationalistic
view of what constitutes regional progress in ASEAN, which often circumscribes
compromise to a mere formality.\footnote{Indorf, supra note 33, p. 65} Along the same line, an absolute consensus has
been required before proceeding with significant economic cooperation projects. The
leisurely pace of cooperation over the years allowed compromise to develop gradually,
regardless of the time element. According to the ASEAN Way, postponing an issue when agreement seemed to be impossible was preferred to an abrupt admission of defeat in the face of preserving national interests.¹⁴⁷ Severino indicates that the ‘ASEAN Way’ has enabled ASEAN to keep the peace in the region and promote regional stability, but then, it has also limited ASEAN’s ability to live up to its potential, weakened its capacity to carry out its purposes, eroded its credibility and slowed its progress.¹⁴⁸ For a long time, the ‘ASEAN Way’ indeed contributed in handling intramural conflicts and inter-state disputes and finding political settlement to those conflicts.¹⁴⁹ Tay suggests that the ASEAN Way, considering its limitations in dealing with challenges that ASEAN faces, can be evolved and changed rather than ossified or abandoned.¹⁵⁰ Setting twelve priority sectors for fast track integration or adopting ASEAN Minus X formula in ASEAN are themselves indications that ASEAN also recognises the inefficiency of the ‘ASEAN Way’ in order to achieve its regional economic integration agenda. However, integration through the fast track approach in twelve priority sectors or through ASEAN Minus X formula both lower the threshold of developing the AEC. They do not satisfy the expectations of economic operators on the establishment of the ASEAN single market. As can be seen in the usage of the enhanced cooperation mechanism in the EU, ASEAN Member Countries have to pay attention to the relative cost of the ASEAN Minus X formula.¹⁵¹ They cannot depend on the two-track process in the long run.¹⁵² Fortunately, the ASEAN Member Countries incorporated provisions so that the ASEAN Charter can be reviewed, amended and

¹⁴⁷ Ibid., p.70
¹⁴⁸ Severino, ‘The ASEAN Charter: An Opportunity Not to be Missed’, supra note 104, p. 165
¹⁴⁹ The code of conduct provided by the ASEAN Way was useful in dealing with challenges that ASEAN experienced, such as the Philippine-Malaysia dispute over Sabah, the effort to counter the common external threat posed by the Vietnamese invasion and occupation of Cambodia; Acharya, supra note 109, p.328
¹⁵⁰ Tay, ‘Institutions and Process: Dilemmas and Possibilities’ supra note 123 p. 269
¹⁵¹ See supra note 125 on enhanced cooperation mechanism under the Lisbon Treaty in Art. 20 TEU and Articles 326 to 334 TFEU
¹⁵² It is unclear how the ASEAN Minus X formula has been useful for the achievement of the AEC initiatives; see, for example, in the AFAS in Section 4.2.2 ASEAN Framework Agreements on Services
improved in five years, which means that there is still a chance left to show their political will to establish a functioning regional grouping.\textsuperscript{153} Denis Hew mentions that one of the most valuable lessons to be learnt from the European experience was the importance of a strong political will and a common vision to integrate their economies with a view to building the European Union.\textsuperscript{154} Therefore, when the ASEAN Charter is to be amended, the ASEAN Member Countries should introduce QMV for their decision-making, particularly regarding economic matters, in order to accomplish an ASEAN single market and to respond to the changing globalised economy as quickly as possible thereby keeping the region resilient. Adopting QMV in an area means the loss of the veto of the ASEAN Member Countries in decision-making which necessarily results in the erosion of national sovereignty in that area. Considering the limits of consensus-based decision-making in ASEAN, particularly in achieving its economic agenda, ASEAN can no longer avoid the characteristics of supranationalism without abandoning any of national sovereignty of the ASEAN Member Countries. It should also be remembered that as the EU’s legislative competence has grown due to wider use of QMV, the scope for judicial review of the Court of Justice has increased to show the legislative limits of the EU.\textsuperscript{155} Therefore, the adoption of QMV in ASEAN would have to be accompanied by the proper functioning of an ASEAN judicial institution.

\textsuperscript{153} See Art. 48 of the ASEAN Charter on amendments; Art. 50 of the ASEAN Charter on review of the ASEAN Charter in five years after its entry into force
\textsuperscript{154} Denis Hew, ‘Introduction: Roadmap to an ASEAN Economic Community’ in Denis Hew (ed.) \textit{Roadmap to an ASEAN Economic Community} (Singapore: ISEAS), 1, p. 11
\textsuperscript{155} See for example the tobacco advertising case; Case C-376/98, \textit{Germany v. Parliament and Council} [2000] ECR I-8419.
2.3 Institutional Framework of ASEAN and the EU

2.3.1 Institutional Settings

I will now focus on the institutional setting of ASEAN and discuss its structural weakness as a working regional institution. An institutional framework without any clear compliance and enforcement mechanisms for the commitments made under ASEAN has caused delays and inefficiencies in achieving the AEC initiatives and the ASEAN industrial economic cooperation programmes. It is noteworthy that intentional avoidance of any characteristics of supranationalism sets the limits for the regional economic integration and the realisation of the AEC.

Intergovernmental cooperation, such as in the UN or the WTO, is the traditional form for cooperation among nation states. It is a political model as it is up to the member states and their political systems, not only whether they want to take decisions, but also whether to implement them, even if the decisions are taken by unanimity.¹⁵⁶ ASEAN is still an intergovernmental cooperation because its decision-making bodies possess intergovernmental characteristics and their consensus-based decisions cannot be put into force without the voluntary cooperation of the ASEAN Member Countries. ASEAN leaders’ resolutions decided at ASEAN Summit meetings function more like policy guidance rather than strictly enforceable rules even on the key issues pertaining to the realisation of the objectives of ASEAN.

For a long time, ASEAN has managed its affairs with a minimum of formality, with few legally binding arrangements, and with relatively weak regional institutions.¹⁵⁷ Until 1976, the only existing decision-making body in ASEAN was the ASEAN Council of Ministers, comprising of the ministers of foreign affairs.¹⁵⁸ It was not until nine

¹⁵⁶ Jørgen Ørstrøm Møller, supra note 27, p. 39
¹⁵⁷ Severino, ‘The ASEAN Charter: An Opportunity Not to be Missed’, supra note 104, p. 164
¹⁵⁸ It is now renamed as ASEAN foreign ministers meeting (AMM) by the ASEAN Charter.
years after the founding of ASEAN that the first binding treaty of ASEAN, the Treaty of Amity and Cooperation (TAC)\textsuperscript{159} was concluded, and a central Secretariat was finally established.\textsuperscript{160} The ASEAN Member Countries simply avoided any corrosive discussion over the pooling of sovereign prerogatives in a joint administration for the first five years and then, it took even longer for them to overcome the fear of a threat to sovereignty.\textsuperscript{161} It took another sixteen years for ASEAN to strengthen the Secretariat and produce another binding agreement, the one on the Common Effective Preferential Tariff (CEPT) Scheme for AFTA after the failure of long experiments of the Preferential Trade Agreements (PTA) and economic cooperation projects.\textsuperscript{162} It should be noted that AFTA has been achieved mainly as a response from ASEAN to external changes. Even after the establishment of the ASEAN Secretariat, AMM was still the key organ of ASEAN and its importance in the institutional hierarchy of ASEAN showed that ASEAN was still much of a political organisation. For example, the ASEAN Secretariat used to submit its annual budget to the AMM for approval.\textsuperscript{163} Most ASEAN agreements, even those that are technically binding, have been dependent on the voluntary compliance of the Members.\textsuperscript{164} However, the severe effect of the 1997 Asian financial crisis and the competition with neighbouring economic powers for FDI inflow brought the necessities of restructuring the institutional framework of ASEAN and of embarking on the establishment of the AEC.

\textsuperscript{159} Treaty of Amity and Cooperation in Southeast Asia, supra note 25
\textsuperscript{160} Agreement on the Establishment of the ASEAN Secretariat, Bali, 24 February 1976; available at: <http://www.aseansec.org/1265.htm>
\textsuperscript{161} Indorf, supra note 33, pp. 66-68
\textsuperscript{162} See, further, for the information on the Preferential Trade Agreements (PTA) and economic cooperation projects in Section 4.3 Industrial Economic Cooperation in ASEAN
\textsuperscript{163} Art. 9 of the Agreement on the Establishment of the ASEAN Secretariat, supra note 160; now, the ASEAN Secretariat shall seek for approval of its annual operational budget by the ASEAN Coordinating Council upon the recommendation of the Committee of Permanent Representatives (Art. 30 (3) of the ASEAN Charter). It is noteworthy that the strong presence of ASEAN foreign ministers in ASEAN continues considering that the ASEAN Coordinating Council comprises the ASEAN Foreign Ministers (Art. 8 (1) of the ASEAN Charter) and the Permanent Representatives are appointed by each ASEAN Member Country.
\textsuperscript{164} Severino, ‘The ASEAN Charter: An Opportunity Not to be Missed’, supra note 104, p. 165
The ASEAN Charter, which came into force on December 2008, serves as a new legal and institutional framework for ASEAN. It particularly confers on the ASEAN Summit more powers and on the ASEAN Secretariat additional responsibilities for deeper regional integration. Article 7 states that the ASEAN Summit, which comprises the Heads of State or Governments of the Members (ASEAN leaders), shall be ASEAN’s supreme policymaking body.\textsuperscript{165} In this role, the responsibilities of the ASEAN Summit are two-fold: firstly, ASEAN’s leaders have the discretion to decide how a ‘specific decision can be made’ if consensus cannot be achieved.\textsuperscript{166} In relation to economic matters, instead of taking a vote, Article 21(2) specifically provides for flexible participation on the basis of the ‘ASEAN Minus X’ formula.\textsuperscript{167}; secondly, under Article 20(4), a ‘serious breach’ of the Charter or non-compliance shall be referred to the ASEAN Summit. ASEAN Summit meetings are held twice annually.\textsuperscript{168} The Charter also established new bodies, such as the ASEAN Coordinating Council consisting of the ASEAN foreign ministers, three Community Councils, the Committee of Permanent Representatives to ASEAN, and the ASEAN Human Rights Body. According to the Charter, it aims to build the ASEAN Community which is composed of the ASEAN Political-Security Community, the ASEAN Economic Community and the ASEAN Socio-Cultural Community with a view to uniting under one vision, one identity and one caring and sharing Community.\textsuperscript{169} Consequently, the ASEAN Charter provides a Community Council for each Community. These councils meet at least twice

\textsuperscript{165} Art. 7(2)(a) of the ASEAN Charter
\textsuperscript{166} Art. 7(2)(b) of the ASEAN Charter; Art 20 (2) of the ASEAN Charter; some of the recommendations from the Eminent Persons Group (EPG) on the Charter to distinguish decision-making on sensitive areas, such as security and foreign policy (for which consensus should continue to obtain) from ‘other areas’ where decisions might be taken through voting if consensus cannot be achieved, were rejected; EPG Report. 2006, para.63, available at: <http://www.aseansec.org/19247.pdf>
\textsuperscript{167} See supra notes 55 and 121.
\textsuperscript{168} Art 7(3)(a) of the ASEAN Charter; since its founding in 1967, ASEAN Summits were only held in 1976, 1977 and 1987. Thereafter ASEAN leaders experimented with a system of ‘formal’ and ‘informal’ meetings and it was not until the 7th ASEAN Summit in 2001 that this tenuous distinction was abandoned; Severino, \textit{Southeast Asia in Search of an ASEAN Community: Insights from the former ASEAN Secretary-General}, supra note 3, p. 19
\textsuperscript{169} Art 9(1) of the ASEAN Charter
a year and are tasked to ensure implementation of relevant decisions by the ASEAN Summit, as well as coordinate work of different sectors under their purview and issues which cut across other Community Councils. Particular attention deserves to be given to the facilitative role of the ASEAN Coordinating Council (comprising ASEAN foreign ministers) meeting at least twice a year, some of whose responsibilities include undertaking ‘other tasks’ or ‘such functions as may be assigned by the ASEAN Summit’ and coordination with the ASEAN Community Councils ‘to enhance policy coherence, efficiency and cooperation among them’. In order to assist the Secretary-General, there are four Deputy Secretaries-General with the rank and status of Deputy Ministers. Two of the Deputy Secretaries-General will be selected from among Member States based on alphabetical order. The two additional Deputy Secretaries-General posts created by the Charter will be openly recruited: one for the AEC; another for the Community and Corporate Affairs. The Deputy Secretaries-General shall be accountable to the Secretary-General in carrying out their functions. Finally, it is noteworthy that each Member Country must now appoint a Permanent Representative (with the rank of Ambassador) to be based in Jakarta where the ASEAN Secretariat is located. This Committee of Permanent Representatives will serve as a vital interface between the various ASEAN National Secretariats, and the

170 Art 9(5) of the ASEAN Charter
171 Art 9 (4)(a) of the ASEAN Charter
172 Art 9 (4)(b) of the ASEAN Charter
173 Art 8 (1) of the ASEAN Charter
174 Art 8(2) (b) of the ASEAN Charter
175 Art 8 (2) (c) of the ASEAN Charter
177 Art 11 (4) of the ASEAN Charter
178 According to the Art 12 (1) of the ASEAN Charter; the Permanent Representatives collectively constitute a Committee of Permanent Representatives (CPR), which shall: support the work of the ASEAN Community Councils and ASEAN Sectoral Ministerial Bodies; coordinate with ASEAN National Secretariats and other ASEAN Sectoral Ministerial Bodies; liaise with the Secretary-General of ASEAN and the ASEAN Secretariat on all subjects relevant to its work; facilitate ASEAN cooperation with external partners; and perform such other functions as may be determined by the ASEAN Coordinating Council; see also at: <http://www.aseansec.org/21901.htm>
179 ASEAN National Secretariats serve as national focal points and the repository of information on all ASEAN matters at the national level which coordinate the implementation of ASEAN decisions at the national level and also coordinate and support the national preparations of ASEAN meetings; Art. 13 of
Community Council and the Coordinating Council.\textsuperscript{180} Michael Ewing-Chow mentioned that establishing the Committee of Permanent Representatives of the Member Countries to ASEAN in Jakarta can be seen as an indicator that ASEAN is moving towards the European model.\textsuperscript{181}

The use of a legal instrument that centralises and consolidates structures, powers and decision-making principles has been the priority of ASEAN towards a more recognisable and orderly institutional framework.\textsuperscript{182} The ASEAN Charter was expected to provide a legal and institutional framework for ASEAN to be strong enough to support the realisation of its goals and objectives, particularly by giving the ASEAN Summit more powers and the ASEAN Secretariat additional responsibilities to cope with deeper regional integration. However, the ASEAN Charter has not lived up to its expectations. It would have been an opportunity to deal with the weakness of the ASEAN institutions and their enforcement structures over Member States and to set a clearer direction for the future institutional development for ASEAN.\textsuperscript{183} Despite the important value of the ASEAN Charter in consolidating ASEAN on a legal basis, it still clings to consensus-based decision-making as a basic principle and lacks the enforcement mechanisms to ensure compliance with ASEAN obligations.

In contrast to the ASEAN institutional framework, based on the traditional model of intergovernmental cooperation with the assumption that the Member Countries cannot be bound without consent, the legally binding legislation made under the EU institutions comes equipped with enforceability towards individuals in the EU Member States by affirming the supremacy of EU law over national legislation of the EU Member States, or some of the EU law having the direct effect. This was achieved by a

\textsuperscript{180} Seah, ‘Current Developments, I. ASEAN Charter’, \textit{supra} note 29, pp. 202-203; Art. 12 of the ASEAN Charter on the Committee of Permanent Representatives to ASEAN

\textsuperscript{181} Interview with Michael Ewing-Chow on 8 April, 2009.

\textsuperscript{182} Hsu, L., (2008) ‘The ASEAN Charter and a Legal Identity for ASEAN’ in \textit{ASEAN Community: Unblocking the Roadblocks, ASEAN Studies Centre, Report No.1} (Singapore: ISEAS), 71, p. 75

\textsuperscript{183} Severino, ‘The ASEAN Charter: An Opportunity Not to be Missed’, \textit{supra} note 104, p. 165
dynamic history of a constant cycle of accommodating supranationalism and intergovernmentalism, which drives much of the EU’s institutional and constitutional development. Each step towards greater supranational governance is counter-weighted by more effective checks and balances to protect Member States’ prerogatives and ensure the EU remains responsive to their domestic concerns. 184

Towards the end of the Second World War, the realisation came that European states were no longer the great powers they once were. In 1950, when the Schuman Plan was announced, it consisted of three strands – political, military and economic. However, only the economic strand was taken and led to the founding of the European Coal and Steel Community (ECSC) in 1951 which was the first step going beyond intergovernmentalism. 185 The ECSC was signed by France, Germany, Italy and the three Benelux countries. The United Kingdom had refused to enter into the Shuman Plan negotiations or join the ECSC and its conservative government stood off from the conference in Messina, Italy in 1955. 186 In June 1956, the United Kingdom embarked on the creation of a European free trade area which would involve no sacrifice of national sovereignty. As a result, in 1959, the European Free Trade Association (EFTA) was established by the United Kingdom, Norway, Sweden, Denmark, Austria, Portugal, Iceland and Switzerland, with Finland as an associate member. However, as the Treaty of Rome was signed in 1957 and the membership of the EEC had increased, the United Kingdom finally decided to join in 1973. 187 During the period between the Treaty of Rome and the SEA, despite the expansion of the EEC membership from six to fifteen, there was tension between the Commission and the Council catalysed by the shift from the transitional provisions from unanimity to QMV, which erupted into a crisis in 1965.

184 Dougan, supra note 142, p. 692
185 Craig and de Búrca, supra note, 136
187 Ibid.; see the history of the United Kingdom’s membership at: <http://ec.europa.eu/unitedkingdom/about_us/history_en.htm>
De Gaulle, for the reason of the ‘federalist logic’ of the proposal, objected to a Commission’s proposal for institutional reform, which was combined with a proposal to resolve a conflict over agricultural policy. The settlement finally came in January 1966, which is later called the ‘Luxembourg Accord.’ The emergence of the European Council is also notable which acted as a political actor by allowing political leaders input to the Community agenda during the period. After the stagnation in the 1970s and 1980s, the SEA provided a revival of single market integration. The European Commission and the Court of Justice are the main supranational institutions which act independently from its Member States. The European Commission only began to strengthen its position in the 1980s, particularly through the adoption of QMV by the SEA. In 1992, the Maastricht Treaty was signed and established the EU with the three pillar structure. The rationale behind this pillar structure was the Member States’ unwillingness to subject the areas of Common Foreign and Security Policy (CFSP) Justice and Home Affairs (JHA) to the supranational methods of decision-making that characterised the Community pillar. The Amsterdam Treaty signed in 1997 has brought more of JHA into the European edifice and finally, the Lisbon Treaty abolished the pillar structure although the CFSP is still being built in the slow process of intergovernmental cooperation. The Maastricht Treaty also introduced the codecision

188 Craig and de Búrca, supra note 136, p.8
189 Paul Craig, ‘Institutions, Power, and Institutional Balance’ in Paul Craig and Gráinne de Búrca (eds.), The evolution of EU law (2nd) (Oxford: OUP), 41, p. 50
190 Chalmers et al, supra note 134, pp. 13-14
191 There are four main institutions in the EU: Council; European Commission; European Parliament and the Court of Justice. To these existing institutions, since the Lisbon Treaty, there are two new institutions: the European Central Bank and the European Council (Art 13 TEU); Art 15 TEU provides that the European Council shall provide the Union with the necessary impetus for its development and shall define the general political directions and priorities thereof.
192 See supra note 134 for more detail regarding QMV
193 The first pillar (Title II, III, and IV) was the European Community which covered the EEC, ECSC and Euratom Treaties. The second pillar (Title V) was the Common Foreign and Security Policy (CFSP) and the third pillar (Title VI) was Justice and Home Affairs (JHA). Among these, only the European Community pillar had its own legal personality. The Lisbon Treaty of Lisbon abolished the pillar system, and now, the EU has a legal personality.
194 Craig and de Búrca, supra note, 136, p. 15
procedure which embodied an institutional balance in which the Commission, the Council and the European Parliament all played a role by accommodating the differing interests with a stake in the legislative process. The subsidiarity principle was also included in the Maastricht Treaty to accommodate the increasing concern about the vertical division of authority between the Community and the Member States. The idea was to limit the expanding scope of Community law-making competence. The components of the principle were: the Community was to take action only if the objectives of the action could not be sufficiently achieved by the Member States; the Community could better achieve the action because of its scale or effects; if the Community did not take action then this should go beyond what was necessary to achieve the Treaty objectives. The component of determining whether it was better for action to be taken by the Community or the Member States was brought into the proportionality test. In fact, the proportionality principle has played its most dominant role in the assessment of the proportionality of Member State measures which may impact upon EU policies, and its greatest contribution to integration so far has been as a tool to steer and restrict the Member States. The fundamental principles in the EU competence regarding its powers are principles of conferral, proportionality and subsidiarity. The Subsidiarity Protocol on the Application of the Principles of Subsidiarity and Proportionality contained in the Lisbon Treaty, which should be

196 Art. 251 EC (now Art. 294 TFEU)
197 Paul Craig, supra note 189, pp. 56-58
198 Art. 5 EC (now Art. 5 TEU); the trace of the subsidiarity principle can be found under the SEA in Art. 130r(4)
199 Paul Craig, supra note 189, p. 59
201 Craig and de Búrca, supra note 136, p. 103
202 Ibid.
204 Art. 5 TEU; the principle of conferral means that the Union institutions enjoy only the powers conferred upon them and no others. It is the starting point, and the foundation stone of the Union’s powers, but also the weakest concept in practice; Gareth Davies, Ibid.
205 Gareth Davies, Ibid.; all the principles are under Art. 5 TEU
206 Protocol (No.2) On the Application of the Principles of Subsidiarity and Proportionality
read in tandem with the Protocol on the Role of National Parliament in the EU,\(^{207}\) imposes obligations on the Commission to consult widely before proposing legislative acts.\(^{208}\) The Protocol also confirmed that the Court of Justice has jurisdiction to consider infringement of subsidiarity under Article 263 TFEU, in actions brought by Member States or notified by them in accordance with their legal order on behalf of their national Parliament or a chamber of it.\(^{209}\) The Nice Treaty in 2000, despite its impressive expansion of the membership from 15 to 25, did not resolve certain issues, such as the division of competence between the EU and the Member States and the status of the Charter of Fundamental Rights.\(^{210}\) In 2004, the heads of the governments signed the ‘Treaty establishing a Constitution for Europe (Constitutional Treaty).’\(^{211}\) However, the negative referendums confirmed the death of the Constitutional Treaty. Finally, in 2007, the Lisbon Treaty was signed. The European integration is an ongoing process and the Lisbon Treaty continues the trend of balancing between supranationalism and intergovernmentalism.\(^{212}\)

It also has to be highlighted the function of the Court of Justice throughout the difficult political process of the European integration history. The Court of Justice provided a vision of the EU, particularly in the legal sphere, as a supranational organisation in the 1960s and enhanced the status of EU law ever since through the purposive interpretation of the Treaty provisions.\(^{213}\) The judgment of Van Gend en Loos first established the doctrine of direct effect of EU law, the principle that the EU law must be applied by national courts as the law of the land, by stating that the objective of

\(^{207}\) Protocol (No.1) On the Role of National Parliament in the European Union  
\(^{208}\) Art. 2, 5 and 9 of Protocol (No.2) On the Application of the Principles of Subsidiarity and Proportionality  
\(^{209}\) Ibid., Art. 8  
\(^{210}\) Charter of the Fundamental Rights of the European Union [2010] OJ C 83/391; the Lisbon Treaty finally deals with the status of the Charter of the Fundamental Rights. Art. 6(1) TEU states that the EU recognises the rights, freedom and principles set out in the Charter of 7 December 2000, as adopted at Strasbourg, on 7 December 2007, which shall have the same status as the Treaties.  
\(^{211}\) Treaty establishing a Constitution for Europe [2004] OJ C310/01  
\(^{212}\) Dougan, supra note 142, p. 692  
\(^{213}\) Chalmers et al, supra note 134134, p. 15
the Treaty of Rome to establish a common market, the functioning of which is of direct
cern to interested parties in the EEC, implies that the Treaty is more than an
agreement which merely creates mutual obligations between the contracting states.214
Soon after the establishment of the doctrine of direct effect of EU law in Van Gend en
Loos, the Court of Justice ruled on the supremacy of EU law over national legislation of
the EU Member States in Costa v. ENEL.215 Based on the doctrine of direct effect and
the supremacy of EU law, it became possible for individuals to rely before the national
courts on ‘sufficiently clear and unconditional’216 provisions in the Treaty and EU
legislations. In order to secure the rights for individuals, the Court of Justice elucidated,
in Francovich, the principle whereby a State must be liable for loss and damage caused
to individuals as a result of breaches of EU law for which the State can be held
responsible is inherent in the system of the Treaty.217 This principle regarding the state
liability for violation of EU law was followed by cases like Brasserie du Pêcheur and
Factortame III,218 British Telecommunications,219 and Köbler v Austria.220 The Court
of Justice has played a key role in the history of the EU integration by developing a
fundamental principle of effective and consistent judicial protection of the fundamental
right for individuals across the EU.

One of the challenges for ASEAN is to set up some kind of supranational
institution that may not have exactly the same structure as that in the EU, but has strong
support and endorsement from the Member Countries. 221 Akrasanee and
Arunanondchai suggested the establishment of some supranational institutions in order
to realise the AEC. ASEAN, at least, should consider setting up two supranational

214 Case 26/62, Van Gend en Loos, supra note 24; it was about the direct application of Article 12 EEC.
215 Case 6/64, Costa v. ENEL [1964] ECR 585
217 Cases C-6/90 and C-9/90, Francovich and Bonifaci v. Italy [1991] ECR I-5357, para.35
219 Case C-392/93 R v. Her Majesty’s Treasury ex parte British Telecommunications plc [1996] ECR I-
220 Case C-224/01 Gerhard Köbler v. Austria [2003] ECR I-10239.
221 Jose L. Tongzon (2005) ‘Role of AFTA in an ASEAN Economic Community’ in Denis Hew (ed.)
Roadmap to an ASEAN Economic Community (Singapore: ISEAS), 127, p. 138
bodies:

(i) An ASEAN Court, a supranational court similar to the Court of Justice of the European Union. The idea for this came from the fact that the current ASEAN dispute settlement mechanism is not functioning and has never been used;\(^{222}\) and

(ii) An ASEAN Economic Secretariat (AES), with the responsibility to enforce the implementation of agreements under the ASEAN economic integration framework. However, an AES will work properly only if an effective judicial institution exists to support it.\(^{223}\)

Akrasanee and Arunanondchai also point out that the tasks of the ASEAN Secretariat is rather similar to that of the European Commission, so that the ASEAN Secretariat could usefully function in the same way, acting in the interest of the ASEAN Community independently from its Members, particularly on matters regarding ASEAN economic integration.\(^{224}\) Unfortunately, all of these ideas are far from reality for ASEAN. This view was shared by all ASEAN expert interviewees. First of all, in ASEAN, facilitating the Dispute Settlement Mechanism has been preferred over building supranational institutions, inciting fear or even hostility towards subscribing to ASEAN supranationalism.\(^{225}\) A question arises if the political will of the ASEAN Member Countries to accomplish the AEC could be strengthened enough to consider establishing some supranational institutions, if some counterbalancing mechanisms were provided which formally allow more room for the Member Countries to give their

\(^{222}\) The current ASEAN dispute settlement mechanism is never used probably because the practice of the ASEAN government leaders is not to raise their mutual grievance to the surface and bring the problems under a judicial review; Indorf, *supra* note 33, p. 2

\(^{223}\) Akrasanee and Arunanondchai, ‘Institutional Reforms to Achieve ASEAN Economic Integration’, *supra* note 114, p. 69

\(^{224}\) See (Art 213 EC). The European Commission has the right to implement the European legislation, budget, and programme adopted by the Parliament and Council; Akrasanee and Arunanondchai, ‘Institutional Reforms to Achieve ASEAN Economic Integration’, *supra* note 114, p. 69

\(^{225}\) See for instance, Art 24 of the ASEAN Charter; see also the interviews with Rodolfo C. Severino on 26 March 2009, Yoong-Yoong Lee on 7 April, 2009 and Michael Ewing-Chow on 8 April, 2009.
political input into the ASEAN decision-making procedure and to monitor the ASEAN institutions. It is noteworthy that Michael Ewing-Chow mentioned that the challenge of building the AEC does not stem from a complete lack of political will but rather from a weak capacity, and thus, he emphasised the importance of capacity building.\textsuperscript{226} The failure to fulfil ASEAN obligations may actually stem from human and financial resource constraints.\textsuperscript{227} Secondly, ASEAN does not have a sufficient budget. ASEAN budget is divided into two areas:

(i) Operational budget for the ASEAN Secretariat

The ASEAN Charter articulated that the operational budget of the ASEAN Secretariat is prepared annually and funded through equal contribution of all ASEAN Member Countries.\textsuperscript{228} However, this will not help enough to solve the ASEAN’s budget issues even in the long run. It is far from practical and also inappropriate considering the huge economic development gaps among the ASEAN Member Countries, in particular between the original Members and the CLMV Members.\textsuperscript{229} Considering that the operational budget for the ASEAN Secretariat is needed to fund the enforcement mechanisms, its deficiency places a major obstacle in accomplishing the ASEAN Community.

(ii) Foreign Ministers’ Fund

\textsuperscript{226} Interview with Michael Ewing-Chow on 8 April, 2009 in answering Question 10 of Interview Question for ASEAN Experts in Appendix A; weak capacity originates from lack of resources in budget and staff; the lack of resources in the ASEAN Secretariat was also pointed by Denis Hew in answering Interview Question No. 10 for ASEAN Experts in Appendix A; interview on 13 April, 2009

\textsuperscript{227} Contributions and technical assistance for capacity building in training, human resources, and institutional development from the more advanced members of ASEAN and where possible international organisations, would be necessary for the economic integration process to move ahead; Akrasanee and Arunanondchai, ‘Institutional Reforms to Achieve ASEAN Economic Integration’, \textit{supra} note 114, p. 68

\textsuperscript{228} Chalermpulanupap, ‘In Defence of the ASEAN Charter’, \textit{supra} note 105, pp. 122-123

\textsuperscript{229} The different levels of economic developments of the Members are considered in the EU as well. For example, the gross national income (GNI)-based resources finance the EU budget. The EU budget is financed by own resources and other revenue. Own resources comprise customs duties, agricultural duties, sugar levies, the VAT-based resource and the GNI-based resource. Added to this, there is a small share of other revenue (e.g. tax and other deductions from staff remunerations, bank interest, contributions from non-member countries to certain EU programmes etc.); \textit{<http://ec.europa.eu/budget/budget_detail/financing_en.htm>
ASEAN has also possessed a Fund for funding regional development projects since 1969.\textsuperscript{230} However, it only acts as a project financing body and has very limited financial autonomy, which is in line with its limited autonomy in relation to its Members.\textsuperscript{231} In practice, spending is allocated in the budget of each ASEAN Member Country’s ministry of foreign affairs, and the national banks place these sums at the disposal of the fund. ASEAN is supported by several specialised centres of excellence based in different ASEAN capitals. The important part of the Fund’s running cost is covered by the individual ASEAN Member Countries who take charge of their own expenses in personnel and operations. Added to the ASEAN Member Countries contributions, the resources of the Fund are actually given by external partners. ASEAN has relied heavily on funding from partner countries, such as Japan, Australia and China.\textsuperscript{232}

ASEAN has major funding problems. First of all, the size of the ASEAN budget is minute, in particular when compared to the EU budget. The ASEAN secretariat proposal for the annual budget was USD 14 million (the approved budget was USD 11 million) in 2008 and the proposed budget was increased by 10 per cent in 2009 (USD 15.4 million). By contrast, the 2010 EU budget, adopted during the European Parliament plenary in 2009, amounted to EUR 141.5 billion in credit engagements.\textsuperscript{233} Some ASEAN scholars suggested that by using transfer payment, particularly to narrow

\textsuperscript{230} Agreement for the Establishment of a Fund for ASEAN Rules Governing the Control, Disbursement and Accounting of the Fund for the ASEAN, Cameron Highlands, 17 December, 1969; available at: <http://www.aseansec.org/1213.htm>

\textsuperscript{231} The Fund shall only be used for the purpose of implementing projects which have been approved by the foreign ministers of ASEAN; see the purpose of the fund at: <http://www.aseansec.org/1213.htm>; Henry, \textit{supra} note 84, p. 868

\textsuperscript{232} For example, the major source of development assistance to the CLMV Members does not come from ASEAN but from outsiders; Akrasanee and Arunanondchai, ‘Institutional Reforms to Achieve ASEAN Economic Integration’, \textit{supra} note 114, pp. 70-71

\textsuperscript{233} The ASEAN budget is almost thirteen thousand times smaller than the EU Budget. See: <http://ec.europa.eu/budget/budget_detail/current_year_en.htm>
the development gap of the ASEAN Member Countries, the conflicting objectives or interests of ASEAN Member Countries will increasingly need to be realigned which could eventually provide impetus to move ahead with consensus-based decision-making in ASEAN. Raising the level of development assistance from ASEAN to the CLMV Members can strengthen the ties among the ASEAN Member Countries, which could bring about their spontaneous compliance to the ASEAN obligations. However, ASEAN has very limited autonomy in its budget compilation. For example, the Fund is controlled by the ASEAN Member States. The ASEAN Secretariat must seek approval from the foreign ministry of its Member Countries for its annual operational budget. The ASEAN Charter also states that the ASEAN Secretariat shall operate in accordance with the financial rules and procedures determined by the ASEAN Coordinating Council which is composed of the foreign ministers of the ASEAN Member Countries. This clearly shows the lack of financial autonomy of ASEAN from its Members. Further, it has been suggested that the ASEAN Charter should have made it clear that ASEAN would be open to financial contributions not only from its Members, other governments and intergovernmental institutions, but also from corporations, foundations, non-governmental organisations and individuals. In the long run, relying heavily on funding from partner countries may not be desirable for ASEAN if it is to function independently as a proper regional organisation. Be that as it may, what ASEAN needs is to enhance the financial autonomy on its budget.

234 Akrasanee and Arunanondchai, ‘Institutional Reforms to Achieve ASEAN Economic Integration’, supra note 114, pp.70-71
235 It used to be the ASEAN Ministerial Meeting (AMM) to which an annual budget for the Secretariat should be submitted for approval. (Art. 9 of the Agreement on the Establishment of the ASEAN Secretariat, supra note 160; now, under the ASEAN Charter, the ASEAN Secretariat shall seek for approval of its annual operational budget by the ASEAN Coordinating Council upon the recommendation of the Committee of Permanent Representatives (Art. 30 (3) of the ASEAN Charter). However, considering the ASEAN Coordinating Council comprises the ASEAN Foreign Ministers (Art. 8 (1) of the ASEAN Charter) and the Permanent Representatives are appointed by each ASEAN Member Country (Art. 12 (1) of the ASEAN Charter), not much has changed from the fact that ASEAN finance is controlled by the foreign ministry of the ASEAN Member Countries.
236 Art. 30 (4) of the ASEAN Charter; see also Arts. 8 (1) and 12 (1) of the ASEAN Charter
237 Severino, ‘The ASEAN Charter: An Opportunity Not to be Missed’, supra note 104, p. 166
independent from its Members, as well as to find ways to increase its budget in order to function as a regional institution, building an ASEAN Community. The ASEAN Charter must provide some proper framework for the financial regulation to secure these two aspects when it is to be amended. It should be highlighted that the EU budget is financed by own resources and other revenue without the need for any subsequent decision by national authorities from its Member States. The financial independence of the EU from its Members has been the basic cornerstone for the EU to do its role as a functioning regional institution.

Denis Hew and Yoong-Yoong Lee highlighted that ASEAN should focus on making the existing institutions more efficient rather than setting up new institutions, drawing attention to the strengthened power of the ASEAN Secretariat, although being sceptical regarding the possibility of the ASEAN Secretariat adopting the role of the European Commission. Denis Hew emphasised that the ASEAN Secretariat had to be given more authority to be able to implement and enforce economic commitments under ASEAN. However, more resources have to be ploughed into the ASEAN Secretariat for building its capacity to overcome the issues of lack of resources, such as low budget and lack of staff.

2.3.2 Enforcement Mechanism

Regardless of the institutional strength invested in ASEAN, in particular, the ASEAN Summit and the ASEAN Secretariat, there is no working compliance and enforcement mechanism for the ASEAN Member Countries with regard to their ASEAN obligations.

239 Interview with Denis Hew on 13 April, 2009; Yoong-Yoong Lee on 7 April, 2009
240 This view was shared by every ASEAN expert interviewee; Michael Ewing-Chow, during the interview on 8 April, 2009, also highlighted the impossibility of the ASEAN Secretariat functioning in the same way as the European Commission by raising the ASEAN’s small budget issue.
241 Interview with Denis Hew on 13 April, 2009.
Article 22(1) of the Charter states that Member Countries shall endeavour to resolve peacefully all disputes in a timely manner through dialogue, consultation and negotiation. In order to resolve disputes among Members, there is also recourse to ‘good offices, conciliation or mediation’ and specific instruments, such as the ASEAN Protocol on Enhanced Dispute Settlement Mechanism. Article 25 of the Charter provides that appropriate dispute settlement mechanisms shall be established for disputes in applying the Charter and other ASEAN instruments, which implies that new dispute settlement mechanisms can be established in addition to the existing ASEAN Protocol on Dispute Settlement Mechanism. In any case, the ASEAN Summit is qualified as the final arbiter on matters related to the failure to reach a consensus and settlement of disputes between Member States. Article 20 (4) of the ASEAN Charter states that in the case of a ‘serious breach’ of the Charter or non-compliance, the matter shall be referred to the ASEAN Summit. However, the wording that vest in the ASEAN Summit the final powers of decision also raises the concerns that its decisions would inevitably be politically driven due to the lack of any clear reference as to how such a decision could be reached particularly with ASEAN adhering to the consensus-based decision-making principle. The Charter, under the section of Chapter VII Decision-Making, does not further provide what will constitute a ‘serious breach’ of the Charter and ‘non-compliance.’ Article 27 (1) of the Charter under the section of Chatter VIII Settlement of Disputes, provides that the ASEAN Secretary-General, assisted by the ASEAN Secretariat or any other designated ASEAN body shall monitor the compliance with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism, and submit a report to the ASEAN Summit. It is not even clear

244 Art 7 (2) (e), Art 20 (4) and Art 26 of the ASEAN Charter
whether some ASEAN Member Countries’ backtracking from the commitments they made under the AEC initiatives, would be caught by the terms. Whether there is serious breach of the Charter or non-compliance of any decision made under ASEAN, including the decision of the ASEAN Summit due to the non-compliance of a Member of ASEAN’s decision, would again depend on the ‘ASEAN Way’ of consensus and consultations, which can end up with a circular process. None of the provisions of the ASEAN Charter in relation to the settlement of disputes among Member States are concrete enough and only end up relying on the ASEAN Summit as the final arbiter.

By contrast, enforcement actions brought by the European Commission or by a EU Member State with regard to the infringement of EU law by another EU Member State belong to the jurisdiction of the Court of Justice. The Court of Justice is also in charge of disputes relating to the non-contractual liability on the EU institutions. When questions of interpretation of the Treaties or the validity and interpretation of the acts of the EU institutions are raised before national courts in a Member State, those national courts may refer such questions to the Court of Justice. This preliminary ruling procedure has played a pivotal role in EU legal integration. The Court of Justice shall ensure the EU law to be observed in the interpretation and application of the Treaties and also, the EU Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by the EU law.

For lack of legally binding provisions, compliance mechanisms and working dispute settlement systems, ASEAN often does not carry out measures already agreed

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246 For example, see the backtracking of the AFTA obligations by the Member Countries in Section (2) ASEAN Free Trade Area; See the AEC initiatives in Section 4.2 ASEAN Economic Community Instruments
247 Art. 27 (2) of the ASEAN Charter
248 Art. 258 and 259 TFEU (ex. Art. 226 and 227 EC)
249 Art. 268 and 340 TFEU (ex. Art. 235 and 288 EC)
251 Art. 19 (1) TEU
on to integrate the regional economy or deal with transnational problems. As mentioned above, with the antagonistic view towards supranationalism still being pervasive in ASEAN, it is almost impossible to set up supranational bodies, such as an ASEAN Court, to be responsible for dispute settlements, or an ASEAN Economic Secretariat, to be responsible for economic affairs pertaining to ASEAN economic integration. In addition, because it does not have a mandate to do so, the ASEAN Secretariat cannot authoritatively call for compliance with ASEAN agreements or initiate arrangements or other actions to advance ASEAN’s purposes.

Given the difficulty of establishing a supranational court in ASEAN, it is a serious matter that the current dispute settlement mechanism has never been used since its establishment in 1996. Disputes among ASEAN Member Countries have either been addressed and resolved through political channels or taken to the WTO. This is not very surprising in light of ASEAN’s consensus-driven and non-confrontational decision-making process, which is represented as the ‘ASEAN Way.’ However, as the AEC evolves, the number of trade disputes will inevitably rise as the region undergoes deeper economic integration. Effective judicial review of the Court of Justice has been of critical importance to furthering the EU integration. The Court of Justice has been devoted to enhance the effectiveness of the EU law and to promote its integration into national legal systems. Most of all, by developing the doctrine of direct effect of fundamental Treaty freedoms and the supremacy of the EU law over national legislation and by expanding the scope of the notion of restriction under its jurisdiction, the Court of Justice has played a critical role in the achievement of the internal market in the EU. Hence, a workable dispute settlement mechanism would be absolutely vital for the

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252 Severino, ‘The ASEAN Charter: An Opportunity Not to be Missed’, supra note 104, p. 165
253 Akrasanee and Arumanondehah, ‘Institutional Reforms to Achieve ASEAN Economic Integration’, supra note 114, p.71
254 Severino, ‘The ASEAN Charter: An Opportunity Not to be Missed’, supra note 104, p. 165
255 The 1996 and 2004 ASEAN Protocol on Enhanced Dispute Settlement Mechanism, supra note 242
successful implementation of the AEC Blueprint. The ASEAN scholars supporting the idea of establishing ASEAN supranational institutions argue that as economic integration progresses, the time will come that the opportunity cost of allowing unresolved trade disputes would be so great that the ASEAN governments would have no choice but to establish a supranational judicial system with the authority to enforce penalties. In the area of foreign business activities and investment within ASEAN, Member Countries often employ protectionist techniques to control foreign investment and protect local indigenous industries on grounds of national interests. Considering the wide scope of national interest, a working dispute settlement mechanism is essential in order to resolve conflicts among the Members. In anticipation of the formation of the AEC, in 2003, the Bali Concord II proposed that ASEAN put in place those recommendations made by the ASEAN High Level Task Force on ASEAN Economic Integration to enhance Dispute Settlement Mechanism in order to establish an effective system to ensure proper implementation of the economic agreements and the expeditious resolutions of any disputes in ASEAN. It is interesting that those recommendations included the elements both from the WTO and the EU. The Recommendations of the ASEAN High Level Task Force on ASEAN Economic Integration were as follows: to establish a legal unit within the ASEAN Secretariat to provide legal advice on trade disputes; establish the ASEAN Consultation to Solve Trade and Investment Issues (ACT) in order to foster the quick resolution of operations problems (which is similar to the EU SOLVIT mechanism); and to establish the

257 Hew, ‘Towards an ASEAN Economic Community by 2015’, supra note 83, p. 20
258 Akrasanee and Arunanondchai, ‘Institutional Reforms to Achieve ASEAN Economic Integration’, supra note 114, p. 70
259 ASEAN Member Countries’ lists of sectoral exclusion of foreign investors are based on preserving national interest; see further in Section 3.2.1 Total or Sectoral Exclusion of Foreign Investors
261 An EU SOLVIT (Effective Problem Solving in the Internal Market) is an online problem solving network in which EU Member States work together to solve problems caused by the misapplication of internal market law by public authorities without legal proceedings. The SOLVIT Centre in every EU Member State handles complaints from both citizens and businesses but it is part of national administration. The European Commission coordinates the network, provides the database facilities and helps to speed up the resolution of problems. The Commission also passes formal complaints it receives.
ASEAN Compliance Monitoring Body which is modelled after the Textile Monitoring Body of the WTO.\textsuperscript{262} If ASEAN cannot pursue the option of establishing a supranational court as in the EU, it should follow the WTO model of dispute settlement mechanism. The existing ASEAN Dispute Settlement Mechanism should be enhanced and modelled after the WTO one whose adjudication process is mandatory and binding.\textsuperscript{263} Also, elaborate procedures shall be designed to be fair and proportionate in order to ensure the realisation of the right of the aggrieved member to retaliate or withdraw equivalent concessions if the offending member does not correct the violation. However, it should be remembered that the WTO system works only to the extent that the members want it to work on the basis of contractual remedies and if the members decide that compliance is in their overall economic interest.\textsuperscript{264} It is very difficult to set up a non-political independent dispute settlement mechanism process. Even though the proceedings are more legalistic in the WTO Dispute Settlement Body, disputes among member countries during the process continue to be politically charged. The complete depoliticisation of the ASEAN dispute settlement mechanism process is a challenging task.\textsuperscript{265} Another concern regarding the implementation of the dispute settlement mechanism is sufficient funding.\textsuperscript{266} What needs serious attention in ASEAN is not only the existence of the dispute settlement mechanism, but also the establishment of the ASEAN obligations to be asserted or challenged in clearly enforceable forms. The absence of monitoring, evaluation or penalties for failure to meet commitments due to a non-working compliance system means that there is a risk that commitments may not

\textsuperscript{262} Hew, ‘Towards an ASEAN Economic Community by 2015’, supra note 83, p. 20

\textsuperscript{263} Recommendations of the ASEAN High Level Task Force on ASEAN Economic Integration, supra note 261

\textsuperscript{264} Rufas Yerxa and Bruce Wilson (2005), Key Issues in WTO Settlement: the First Ten Years (Cambridge: Cambridge University Press), p. 4

\textsuperscript{265} Hew, ‘Economic Integration in East Asia: An ASEAN Perspective’, supra note 59, p. 52

\textsuperscript{266} The ASEAN Charter only mentions equal annual contributions to the operational budget of the ASEAN Secretariat (Art 30 (2) of the ASEAN Charter).
always be followed through. This is indeed happening in ASEAN as evidenced in the backtracking of the commitments of the ASEAN Member Countries in the ASEAN agreements on the AEC.  

2.4 Conclusion: What ASEAN Needs to Do

ASEAN has paid attention to the integration process in Europe and its influence on the European economy in the search for a regional grouping model. Particularly since the 1997 Asian financial crisis, the ASEAN Member Countries set their aim on integrating their economies and establishing an economic community in the region, an AEC. The main objective of the AEC, to build a single market and production base, was influenced by the EEC Treaty. Signing the AEC Blueprint and the ASEAN Charter in 2007 was a clear indication that ASEAN is moving towards a stronger and more rules-based economic integration. The key implementation challenges in order to accomplish the AEC are: (i) the sustainability of the political will of the ASEAN Member Countries to integrate their economies; (ii) the disparity of the economic development levels of the ASEAN Member Countries; and (iii) the adaptation of the ASEAN institutions and processes for deeper integration. ASEAN must cope with these problems simultaneously as they are correlated to each other.  

The ASEAN Charter not only accords ASEAN a legal personality but also reaffirms and augments its existing principles, structures and practices. Most of all, it seeks to strengthen ASEAN’s institutions so as to enable them to ensure compliance with ASEAN norms and agreements in order to support the realisation of its goals and objectives, in particular, the accomplishment of the AEC. It is notable that the Charter vests the ASEAN Summit with more powers and the ASEAN Secretariat with

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267 See further in Section 4.2 ASEAN Economic Community Instruments
268 Nandan, supra note 13, pp. vii-ix
additional responsibilities to cope with deeper regional integration. Despite the important value of the ASEAN Charter in consolidating ASEAN on a legal basis, it keeps the traditional consensus-based decision-making mechanism, the ‘ASEAN Way’, as a basic principle and lacks the enforcement mechanisms to ensure the compliance of ASEAN obligations. The consensus-based decision-making process, based on intergovernmentalism, not only undermines institutional development but also slows down economic integration because it prohibits keeping up with the nature and pace of economic integration within the ASEAN region. It has led to broad general agreements without any clear mechanisms for reaching precise goals, leaving individual ASEAN Member Countries with considerable scope for unilateral interpretation of agreements within their nationalistic view of what constitutes regional progress in ASEAN.

Considering the difficulty in consensus-based decision-making due to the economic development gap among the ASEAN Member Countries, the ASEAN Charter accommodates an existing method called the ‘ASEAN Minus X’ principle, which is a flexible participation in economic integration projects rather than a decision-making process. This is only an expedient in order to avoid voting on consensus-based decision-making mechanisms and does not guarantee the full participation of the ASEAN Member Countries on ASEAN obligations. The ASEAN agreements on economic integration, being a mere formality without any enforcement mechanism, cannot pave a way to realise the AEC, which raises doubts about the political will of the ASEAN Member Countries to integrate their economies, despite a series of efforts on the ASEAN economic integration initiatives under the ASEAN Summit twice every year.

Due to the incapability and the inefficiency of the consensus-based decision-making, particularly on achieving the ASEAN economic agenda, ASEAN should consider adopting the QMV system in decision-making, as recommended by the McKinsey Study,\(^\text{269}\) as this has contributed much to the establishment of a common market and

\(^{269}\) Schwartz and Villinger, supra note 12
the proper functioning of an internal market in the EU since its introduction under the SEA in 1986. In addition, the Lisbon Treaty, in the ordinary legislative procedure, even extended the area of the application of QMV into areas which used to require unanimity of the Council, which again shows a strong political desire and a common vision to integrate their economies. If ASEAN has the political will to do so, adopting QMV provides a powerful mechanism to further economic integration.

The ASEAN Charter has been too carefully designed to respect and preserve the sovereignty of each Member Country as the ultimate source of authority that enacts and enforces laws within their territorially defined units.\textsuperscript{270} The central but still intergovernmental approach of ASEAN has created a teleological ambiguity that invites further friction in regional integration. Therefore, some ASEAN scholars have suggested setting up some supranational institutions: an ASEAN Court similar to the Court of Justice of the European Union; and an ASEAN Economic Secretariat, to be responsible to enforce the implementation of agreements pertaining to ASEAN economic integration.\textsuperscript{271} They also have brought forward the opinion that the ASEAN Secretariat could usefully function in the same way as the European Commission by acting in the interest of the ASEAN Community independently from its Members.\textsuperscript{272} This idea is related to the fact that there is no way to enforce ASEAN obligations and the current ASEAN dispute settlement mechanism has never been tested. It is obvious that the absence of a properly functioning dispute settlement will get in the way of close cooperation among Member States and put off achieving its ultimate goal of ASEAN.\textsuperscript{273} However, with the antagonistic view towards supranationalism being still pervasive in ASEAN, it is a serious challenge and is almost impossible to set up any kind of

\textsuperscript{270} Art. 5 of the ASEAN Charter; Seah, ‘Current Developments, I. ASEAN Charter’, \textit{supra} note 29, p. 202
\textsuperscript{271} Akrasanee and Arunanondchai, (2005) ‘Institutional Reforms to Achieve ASEAN Economic Integration’, \textit{supra} note 114, p. 71
\textsuperscript{272} \textit{Ibid}., p. 69
\textsuperscript{273} Woon, ‘The ASEAN Charter Dispute Settlement Mechanisms’, \textit{supra} note 102, p. 70
supranational institution. Facilitating the ASEAN dispute settlement mechanism has been preferred over building supranational institutions. It is very interesting to see how far ASEAN economic integration could be accomplished while avoiding the characteristics of supranationalism and without abandoning any of the national sovereignty of the ASEAN Member Countries although the language that ASEAN uses on the AEC connotes a European-style common market.

When ASEAN was created in 1967, there was an apparent consensus that regional integration is the most appropriate mechanism for creating a strong resilient Southeast Asia. It has finally endorsed the AEC Blueprint and the ASEAN Charter to support the regional economic integration and establish the AEC. ASEAN’s interest can no longer remain as a mere compound of national interests of individual ASEAN Member Countries. There is a common denominator in terms of their objectives in attracting foreign business and investments in order to develop their economies. If they do not cooperate and collaborate for regional economic developments, it is difficult for them to survive in the competitive globalised world. Despite the obvious shortcomings due to the consensus-based decision-making process and its lack of mechanisms to ensure compliance with ASEAN obligations, the ASEAN Charter will enhance the ASEAN’s catalytic role in regional security and economic integration by consolidating ASEAN on a legal basis. It was an opportunity to modify ASEAN decision-making processes and institutions, and further address the development gaps between the ASEAN Member Countries. However, the remaining shortcomings should be reviewed, amended and improved at the latest in the next amendment of the Charter. Therefore, much depends on the implementing rules still to be formulated and on how effectively the ASEAN Member Countries use the Charter as a tool to advance ASEAN’s purposes. There are at least three aspects to be ensured in the future amendment of the ASEAN Charter: firstly, with regard to the decision-making in the fields which require efficiency

274 ASEAN (1977), 10 Years ASEAN (Jakarta: Sagittarius Offset), 10; Indorf, supra note 33, p. 5
for the establishment of the AEC, QMV system should be adopted; secondly, it should include legally binding provisions in order to provide enforcement and compliance mechanisms for the ASEAN Member Countries to keep the ASEAN obligations leaving no room for back-tracking from the commitments; thirdly, regardless of the form of judicial institutions, whether establishing an ASEAN Court or some other dispute settlement mechanism, the ASEAN Charter should ensure it to be a properly working mechanism to judicial review on the problems to integrate the regional economy or deal with transnational problems. It should always be remembered that the reasons for the failure of former economic cooperation developments include a lack of political will among ASEAN Member States, weak institutional mechanisms, and insufficient mobility of the private sector and foreign investors due to the lack of publicity or attractiveness of these projects.\textsuperscript{275} In addition to these structural problems, the slow progress in ASEAN economic cooperation is closely related to the financial aspect and the size of the ASEAN budget.\textsuperscript{276} As was originally intended, the amendment of the ASEAN Charter shall include provisions to establish greater institutional accountability and a compliance system, and reinforce the perception of ASEAN as a serious regional player in the future of the Asia Pacific region.

We have looked at ASEAN’s aims and its organisational features and institutional setting in this Chapter. Understanding the aims and the institutional backgrounds of ASEAN forms an important basis for developing mechanisms to improve business cooperation and collaboration within ASEAN and assists in evaluating the viability of the mechanisms suggested in later chapters. In order to develop such mechanisms, we analyse obstacles in relevant areas. With a deeper understanding of the institutional limits to such development in this chapter, we will


\textsuperscript{276} See interviews with Denis Hew on 13 April, 2009 and Michael Ewing-Chow on 8 April, 2009.
next focus on finding out the major barriers for foreign business activities within ASEAN Member Countries.
Chapter 3  Major Barriers for Foreign Business Activities in ASEAN

3.1 Introduction

In order to characterise the existing barriers to effective business cooperation across ASEAN, I investigate current conditions for business cooperation and collaboration in the ASEAN Member Countries. I will particularly focus on the regulatory business environments in those countries noting that disparities in company laws and business regulations among ASEAN Member Countries form major barriers in performing cross-border businesses within the region. In this chapter, I claim that the major barriers for foreign business activities within ASEAN Member Countries are based on ASEAN Member Countries’ protectionist techniques to control foreign inward investments. I will categorise what type of protectionist techniques place major barriers in the path of entrepreneurs seeking to do business across borders. An analysis of these barriers will provide the groundwork to see if any of the mechanisms drawn from the EU company law remedies could be viable suggestions to ASEAN with a view to enhance the freedom of establishment for companies and cross-border corporate mobility within the region and to promote intra-ASEAN trade. Any mechanism suggested in the later part of the thesis needs to work efficiently in order to overcome the major existing barriers dealt with in this chapter.

ASEAN Member Countries have recognised that foreign direct investment (FDI) is beneficial for boosting industrial developments and have set their foreign investment and trade policies accordingly at the core of their economic developments. ASEAN has been mostly an outward looking economic grouping with open economies, such as Singapore, Malaysia and Thailand.¹ With the sharp exchange rate depreciation during

¹ For example, Singapore, Thailand and Malaysia are positioned very high in the World Bank’s ease of
the 1997 Asian financial crisis, the economic recoveries of ASEAN Member Countries in the immediate post-crisis period were crucially dependent on the growth of the export sector working as an international production base, particularly for multinational corporations.\(^2\) FDI policies of Southeast Asian countries have been also crafted within a ‘WTO determined environment’ as rapid changes in the world economy were delivering new sources of foreign investment.\(^3\) Therefore, regulatory reforms for creating a favourable investment environment to attract FDI have been carried out in many ASEAN Member Countries, including the recent crisis response aimed at encouraging formal entrepreneurship.\(^4\)

On the other hand, the economic reforms and internal restructuring of the ASEAN Member Countries were more significantly influenced by external pressure of multinational bodies, such as the International Monetary Fund (IMF) and the World Trade Organization (WTO), rather than by a domestic push for reform.\(^5\) While trying to avoid the appearance of contravening international trade agreements and norms, all ASEAN governments, regardless of their development level, have developed various techniques to protect their national interests and local indigenous industries.\(^6\)


\(^3\) To date, all the ASEAN Member Countries except Lao PDR are Members of the WTO.

\(^4\) For example, according to the World Bank’s Doing Business 2010 report, Indonesia was nominated Asia’s most active reformer of business regulations in 2008 and 2009 and improved the country’s ease of doing business ranking by 7 places, 122 out of 183 economies; World Bank (2009) Doing Business in Indonesia 2010, Subnational Series (Washington D.C.: World Bank Group), pp. 13-16

\(^5\) For example, since the 1997 Asian financial crisis, the reform of foreign investment law in Thailand was demanded by the IMF to replace the Alien Business Law of 1972 (National Executive Council Announcement No. 281) to the Foreign Business Act of 2000. The IMF conditions also demanded for Thailand to open additional sectors to foreign investment, to increase foreign equity investment up to 48 per cent in certain sector, and to privatise state-owned enterprises (SOEs); Jakkrit Kuanpoth (2009) ‘Pushing against Globalization: The Response from Civil Society Groups in Thailand’ in John Gillespie and Randall Peerenboom (ed.) Regulation in Asia: Pushing Back on Globalization (Oxon: Routledge), 190, p. 194; the IMF intervention in Indonesia was highly unpopular based on a mistrust of market forces and liberalism, born out of the country’s anti-colonial struggle; Kelly Bird, Hal Hill and Sandy Cuthbertson (2008) ‘Making Trade Policy in a New Democracy after a Deep Crisis: Indonesia’, The World Economy, 947, p. 958

\(^6\) See the points on ASEAN Member Countries’ protecting national interests in the interview with Denis Hew on 13 April, 2009; Anil Hira (2006) ‘Governance Crisis in Asia: Developing a Responsive Regulation’ in M. Ramesh and Michael Howlett (ed.), Deregulation and Its Discontents: rewriting the
Consequently, the techniques for the economic development of the ASEAN Member Countries can be characterised by the dual governmental strategy of largely open and outward-oriented development and of a strong protectionist and bureaucratic propensity for intervention to control foreign investment.\(^7\)

The ASEAN Economic Community (AEC) Blueprint charts ASEAN’s path towards transforming ten individual economies into building a single market and production base with free flow of goods, services, investment and skilled labour and freer flow of capital along with equitable economic development and reduced poverty and socio-economic disparities by 2015.\(^8\) It has been recognised that facilitating business cooperation and collaboration among ASEAN-based companies and enhancing private sector mobility across ASEAN will be beneficial to the overall economic development within the region.\(^9\) As globalisation of national economies progressed, the issue of incompatibility of different regulatory and business systems across trading states became a matter of increasing concern.\(^10\) In order to understand the progress of the regional integration process and to make suggestions for future developments for region-wide business cooperation, it is necessary to look at the regulatory business environments in the ASEAN Member Countries in order to identify national measures and practices which form barriers to cross-border businesses. Related questions arise such as, to what level private sector and industries have been liberalised in ASEAN Member Countries in this area and in what way the states play an active role in developing or protecting their industries.

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\(^8\) AEC Blueprint, para. 9; available at: <http://www.aseansec.org/21083.pdf>

\(^9\) See Art 1 (5) of the ASEAN Charter; available at <http://www.aseansec.org/publications/ASEAN-Charter.pdf> and ASEAN Blueprint, para.6; available at: <http://www.aseansec.org/21083.pdf>; see also Section 1.1 Background: General Considerations on ASEAN and Intra-ASEAN Trade

3.2 Barriers Affecting All Foreign Investors in ASEAN: Protectionist Techniques in ASEAN Member Countries

While recognising the benefits of foreign investments for their national economies, host states still endeavour to control the entry and establishment of foreign direct investment (FDI) in order to preserve national economic independence against possible threats from activities of foreign direct investment. The techniques to control inward investment range from the complete exclusion of foreign investors to the controlled access to host state’s economy.\(^\text{11}\)

There are three major levels of techniques by which host states control inward investment. Firstly, there may be restrictions excluding such investment from the state as a whole or from specific sectors and/or industries. Secondly, FDI may be permitted after a review process, which may or may not place conditions upon the foreign investor in return for permission to enter the host state. Thirdly, once the foreign investment has been established, the activities of the investor will be subject to the general laws of the territory.\(^\text{12}\) First and second levels operate at the stage of entry of foreign investments controlling the presence of foreigners at this stage, subject only to restraints voluntarily undertaken in international economic agreements.\(^\text{13}\) Many host states, including the ASEAN Member Countries, have submitted to international protection standards for foreign investors through the conclusion of bilateral investment treaties, or free trade agreements containing investment provisions. The content and effect of host state laws on the legal rights of foreign investors may be subject to review in accordance with the standards contained in applicable treaties.\(^\text{14}\) The third level belongs to the post-entry

\(^{12}\) *Ibid.*, p. 177
\(^{13}\) *Ibid.*, pp. 177-178
\(^{14}\) *Ibid.*, p. 178; bilateral free trade agreements, such as in US and Canadian bilateral treaties, and international regional agreements, such as NAFTA, ASEAN and MERCOSUR, extended the protection of non-discrimination standards to entry and establishment by investors from other member states. Such provisions constitute techniques of investment liberalisation extending equal protection of investors to the pre-entry stage;
stage where foreign investors are subject to the laws of the host state. In general, the laws applicable at this stage are the same as those applied to national persons and domestic businesses, but the host state, theoretically, has national autonomy to regulate the activities of the foreign investors. For example, the screening of foreign investments and the exclusion of investments that are not beneficial to the host economy are based on sound economic and political grounds. It is at this stage that the question arises how far international standards for the treatment of foreign investors should affect the extent of the national discretion of host states.

At the stage of entry, the right to accept or deny foreign investments in certain sectors or industries depends on how far each ASEAN Member Country has made commitments to the multinational, regional or bilateral international agreements and accepted those obligations to guarantee access for foreign investors into its territory. Recognising the importance of investment to the economic development of the region, ASEAN adopted a series of formal instruments that promote and protect cross-border investment among nationals of ASEAN Member Countries with a view to establish an ASEAN Investment Area, i.e. the ASEAN Agreement for the Promotion and Protection of Investments (ASEAN IGA), the Framework Agreement on the ASEAN Investment Area (AIA Agreement) and the ASEAN Comprehensive Investment Agreement

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16 Muchlinski, *supra* note 11, p. 178
17 All ASEAN Member Countries except Lao PDR are WTO members. ASEAN itself and the ASEAN Member Countries are also active in signing bilateral agreements within ASEAN and outside of ASEAN. This phenomenon is called Noodle Bowl Syndrome as the East Asian version of Bhagwati’s spaghetti bowl problem; Richard E. Baldwin (2007) ‘Managing the Noodle Bowl: The Fragility of East Asian Regionalism’ ADB Working Paper Series on Regional Economic Integration No. 7, pp. 5-6; see Jagdish Bhagwati and Arvind Panagariya (1996) ‘Preferential Trading Areas and Multilateralism: Strangers, Friends or Foes?’ in Jagdish Bhagwati and Arvind Panagariya (eds.) *The Economics of Preferential Trade Agreements* (Washington, D.C: AEI Press) 1, p. 77
18 Agreement among the governments of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments. Manila, 15 December 1987 (ASEAN IGA); it was signed in 1987 between the original six ASEAN countries (Indonesia, Malaysia, Philippines, Singapore, Thailand and Brunei Darussalam). It was amended in 1996 with the accession of Vietnam; the original text can be found at: <http://www.aseansec.org/12812.htm>, and the amending protocol at: <http://www.aseansec.org/6465.htm>
19 See the ‘Framework Agreement on the ASEAN Investment Area (AIA)’, October 7, 1998, Makati,
However, none of these limit the conditionality rights of their Member States in respect of ASEAN investors, allowing Member States to impose point of entry and operating conditions on investments or to discriminate through various tax, concessional or incentive systems as a means of directing or selecting investments deemed to be beneficial to the host country. Accordingly, this preserves the ability of their Member States to screen foreign investment from other ASEAN countries and to shelter domestic investment from intra-regional investment competition.\(^{21}\) Even in the other international agreements to which ASEAN Member Countries are committed, differentiations between domestic investors and foreign investors to protect special national interest are still widely employed in order to ensure national security and sovereignty, legitimately protecting domestic production.\(^{22}\)

In addition, at the post-entry level of ASEAN foreign investments, those agreements for the establishment of the ASEAN Investment Area tend to preserve national discretionary autonomy, allowing states to withhold or confer national treatment to foreign investors on an ad-hoc basis.\(^{23}\) At the background of the development of the ASEAN Economic Community, some less developed Member Countries have genuine concerns about the pace of ASEAN economic integration. While agreeing in principle, they are concerned that if they open up their markets to intra-ASEAN competition too quickly, their domestic producers will face strong competition from other ASEAN countries.

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\(^{22}\) Vo Tri Thanh and Nguyen Tu Anh (2008) ‘Institutional Changes for Private Sector Development in Vietnam’ in Philippa Dee (ed.) *The Institutional Foundation of Structural Reform in the Asia-Pacific Region* (East Asian Bureau of Economic Research Crawford School of Economics and Government: Australian National University) 197, p. 205; see, for example, the general exceptions (Art. 12) and security exceptions (Art. 13) of the Framework Agreement on Comprehensive Economic Cooperation in November 2002 to establish the ASEAN-China Free Trade Area; at: <http://www.aseansec.org/16646.htm>

\(^{23}\) See, for example, Article IV (4) of ASEAN IGA stating that any two or more of the contracting parties ‘may negotiate’ to accord national treatment; Jarvis, *supra* note 21, p. 11
competition from more developed Member States, without the compensation of expanding their own intra-ASEAN exports or other exports. 24 In those countries, there is strong government involvement in business with substantial reliance on foreign firms for the development of key economic sectors and the growth of indigenous companies, particularly through those dominated by public enterprises or state-owned enterprises (SOEs).25

The protectionist techniques taken by the ASEAN Member Countries to control foreign direct investments are categorised as follows: firstly, total or partial restrictions in what are perceived as ‘key sectors’ in their economy; secondly, restrictions on foreign shareholdings which, in particular, are associated with privatisation programmes and the national market domination of public enterprises; thirdly, laws regulating equity joint ventures between foreign and local enterprises; and lastly, foreign investment screening procedures and bureaucratic process-related restrictions such as requirements of business licences or certificates.

3.2.1 Total or Sectoral Exclusion of Foreign Investors

Each ASEAN Member Country has enjoyed high economic growth due to direct foreign investment which has deepened the integration of ASEAN economies and enlarged intra-ASEAN trade.26 Further, the governments of ASEAN Member Countries rely on the possibilities of spillover, i.e. transfer of knowledge of product or process technologies or markets generated by foreign firms, for their economic development, particularly in high-tech industries.27 Accordingly, a total ban on inward direct

24 Dennis and Yusof, supra note 2, p. 4
25 Giroud, supra note 7, p. 103
26 Fumio Nagai (2001) ‘Thailand’s Attitudes toward Trade Liberalization: In the Context of the ASEAN Free Trade Area (AFTA)’ Working Paper Series 00/01-No. 3, IDE APEC Study Center, Institute of Developing Economies, pp. 5-6
27 The affirmative attitudes towards FDI in the ASEAN Member Countries is primarily the result of the fact that ownership advantage of firms embodied in their technology, the human capital, learning
investment, which isolates the host state from access to foreign capital and technology and requires the development of substitute domestic products and technology, was hardly ever applied in ASEAN.\(^{28}\) However, there are various tools to restrict foreign investors in ASEAN. The most common way is sectoral exclusion or promotion of certain industries. ASEAN governments favour this technique as a means of controlled economic development by deciding which sectors to open to the benefits from foreign investments or to close or limit other sectors in order to protect indigenous industries from foreign competition.

All the governments of ASEAN Member Countries run investment promotion agencies to assist potential foreign investors and their local partners.\(^{29}\) The promotion agencies are there to help foreign investors with red-tape procedures required in applying for the governments’ approvals or licences to set up foreign companies and to regulate foreign businesses as well.\(^{30}\) Most ASEAN Member Countries have separate legislation specifically to regulate foreign business activities on top of general companies or business acts. Also, if there are other laws and regulations which restrict the rights of foreigners in specific business sectors, foreign investors should consider those sector specific laws, as they prevail. It is noteworthy that sectoral exclusion of certain industries for foreign business activities is often combined with foreign equity ownership restrictions. In Brunei Darussalam, full and majority foreign ownership and minority foreign ownership are allowed depending on the type of industry and activity. 100 per cent foreign equity ownership may be permitted in certain industries and activities which the government promotes. Activities relating to national food security and those activities requiring the use of local resources, including government sites (i.e.

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28 Muchlinski, *supra* note 11, pp. 179-180
29 See the list of ASEAN investment agencies at: <http://www.aseansec.org/20645.htm>.
agriculture, fisheries, and food processing) must have at least 30 per cent local equity participation.31

The Philippines do not apply national treatment to certain investments areas as specified by its Constitution and the Foreign Investments Act of 1991 (RA No. 7042, as amended by RA No. 8179, 1996).32 The Foreign Investments Act of 1991 adopted the negative list system and thus, 100 per cent foreign equity ownership is allowed in all areas except financial institutions and those identified in the Regular Foreign Investment Negative List in effect at the time of investment.33 According to the current Negative List, it is composed of List A where foreign ownership is limited by mandate of the Constitution and specific laws and List B where foreign ownership is limited for reasons of security, defence, risk to health and morals, and protection of small and medium-sized enterprises (SMEs).34 Non-Filipino companies registered with the Board of Investments are required to become Filipino companies within 30 years by reducing foreign ownership ratio to less than 40 per cent except for export-oriented enterprises.35

As no formal restrictions are placed on the level of foreign participation in Cambodian companies, a great proportion of investors choose to establish 100 per cent foreign-owned limited companies in Cambodia.36 However, there are distinctions in the scope of commercial activities allowed for Khmer national companies and foreign-owned companies.37 Whereas for Khmer national companies, the registration allows

31 ASEAN Secretariat (2010) ASEAN Investment Guidebook 2009 (Jakarta: ASEAN Secretariat), pp. 11-12
32 Ibid., p. 196
33 Ibid., p. 193
34 The current negative list, the 7th Regular Foreign Investment Negative List (EO No. 584 dated 08 December 2006); ASEAN Secretariat, ASEAN Investment Guidebook 2009, supra note 31, p. 197.
35 An export enterprise is an enterprise which exports 60 per cent or more of its output. In general, there is no restriction on the extent of foreign ownership for export enterprises unless the activity falls within the negative list; ASEAN Secretariat, ASEAN Investment Guidebook 2009, supra note 31, pp 193, 196
36 The legal forms of investment permitted include the following: wholly owned domestic capital; wholly owned foreign capital; joint ventures; Built-Operate-Transfer (BOT); and Business Cooperation Contract (BCC); Siphana Sok and Denora Sarin (2009) ‘Cambodia’ in Christian Campbell (ed.) Legal Aspects of Doing Business in Asia (Salzburg, Austria: Yorkhill Law Publishing), p. CMB-13.
37 According to Article 9 of Kram NS/RKM 0498/06, a company is deemed to be a Khmer national company if: its stated office is located in Cambodia; more than 51 per cent of its stated capital is held by a Khmer citizen or a Khmer legal entity; and more than 51 per cent of its financial interests in the profits and losses are held by Khmer citizen or a Khmer legal entity; Sok and Sarin, supra note 36, p. CMB-13.
them to engage in importing or exporting without limitations, foreign-owned enterprises face two limitations in the scope of their activities. First, they are registered as eligible to engage in import and export activities only as required by their investment and ‘production’ activities. In other words, they are not authorised to engage in import and export trading activities, that is to import and export for the sole purpose of re-selling without transformation. Foreign representative offices are not allowed to engage in commercial activities. Second, these enterprises are not allowed to own, sell or buy land or engage in real estate business outside their stated scope of activities.\(^\text{38}\)

In Indonesia, foreign investment is presently available in most fields except where limited by the Foreign Investment Law (No. 25 of 2007) and the periodically published ‘Negative List’.\(^\text{39}\) Article 12 (2) of the Foreign Investment Law sets out certain fields of activity which are totally closed to foreign investment for reasons of national defence or because of the importance of such fields to the country, such as transports, telecommunications and mass media. Further, the government may determine certain fields of activity in which foreign capital may no longer be invested based on the criteria of health, moral, culture, environment, national defence and security, and other national interests.\(^\text{40}\) Also, the government is to specify business fields open to investment with certain conditions based on the criteria of national interest.\(^\text{41}\) Added to this, there are some fields not available to foreign investors at the behest of the specific ministries which govern those fields.\(^\text{42}\)

After the 1997 Asian financial crisis, the IMF conditions demanded for

\(^{38}\) Sok and Sarin, supra note 36, p. CMB-13.

\(^{39}\) The Negative List (Daftar Negatif Investasi) stipulated in the Presidential Regulation No. 111 of 2007 which is an amendment to Presidential Regulation No. 77 of 2007 concerning the list of business fields closed and open with conditions to investment could be accessed at BKPM’s website at: <http://www.bkpm.go.id>.

\(^{40}\) Article 12 (3) of the Foreign Investment Law (No. 25 of 2007)

\(^{41}\) National interest means, namely, the protection of natural resources, protection of micro, small and medium-sized enterprises, as well as cooperatives, supervision of production and distribution, increase of technological capacity, participation of domestic capital, and joint venture with companies appointed by the government, Article 12 (5) of the Foreign Investment Law (No. 25 of 2007).

\(^{42}\) These include, for example, drilling, mining in Java, and professional services such as legal, medical and tax consulting; Mills and Syah, supra note 30, p. INO-14.
Thailand to open additional sectors to foreign investment, to increase foreign equity investment up to 49 per cent in certain sector and to privatise SOEs. However, a more detailed and structured example of sectoral exclusion can also be found in Thailand. Firstly, the definition of foreigners in the Foreign Business Act B.E. 2542 (1999) is very restrictive and has a particular impact in regulating foreign investments in Thailand. According to the Act, a company is foreign if it is registered under the laws of: another country (including all branches, representative offices, and regional offices of overseas companies operating in Thailand); or Thailand, and 50 per cent or more of its shares are held by non-Thais. Secondly, in its appendix, the Act has identified three lists of business areas where foreign participation is either totally prohibited or restricted. This restricts the rights of foreigners in the sense that they are required to have a government approval or a licence prior to the operation or before the establishment of a corporate vehicle in the country if foreign equity participation for establishing commercial presence exceeds 49 per cent of the total shareholding and to apply relevant provisions of sector specific laws for the foreign investors. Where other laws regulate shareholding structure or restrict the rights of foreigners in certain businesses, the

43 Kuanpoth, supra note 5, pp. 190, 194
44 The Foreign Business Act has been in force since 3 March 2000 replaced the 1972 Alien Business Law.
45 Section 4 of the Foreign Business Act defines a foreigner as:
   (1) Natural person not of Thai nationality.
   (2) Juristic person not registered in Thailand.
   (3) Juristic person registered in Thailand having the following characteristics:
      (a) Having half or more of the juristic person's capital shares held by persons under (1) or (2) or a juristic person having the persons under (1) or (2) investing with a value of half or more of the total capital of the juristic person.
      (b) Limited partnership or registered ordinary partner-ship having the person under (1) as the managing partner or manager.
   (4) Juristic person registered in Thailand having half or more of its capital shares held by the person under (1), (2) or (3) or a juristic person having the persons under (1), (2) or (3) investing with the value of half or more of its total capital. For the purpose of the definitions, the shares of a limited company represented by share certificates that are issued to bearers shall be deemed as the shares of aliens unless otherwise provided by ministerial regulations. Cf. (1), (2), (3) are the repealed regulation by the Foreign Business Act which are: (1) Announcement No. 281 of the National Executive Council dated November 24, 1972; (2) The Act of 1978 amending Announcement No. 281 of the National Executive Council dated November 24, 1972; (3) Act No. 2 of 1992 amending Announcement No. 281 of the National Executive Council dated November 24, 1972.
specific laws prevail and shareholding provisions of the Act do not apply. Restrictions on foreign ownership in commercial banks, insurance companies, commercial fishing, aviation business, commercial transportation, commodity exports, mining and other enterprises exist under various laws.\textsuperscript{47}

Most host states have adopted either total or partial restrictions in what are perceived as ‘key sectors’ in their economy. These sectors generally encompass industries relevant to national security and defence, which are recognised as ‘reserved domain’ for national ownership and control.\textsuperscript{48} For example, in Singapore, no restrictions are placed on foreign ownership of Singapore corporations with exceptions for national security purposes and in certain industries.\textsuperscript{49} However, as host states adopt privatisation, deregulation or open market policies, the justification for excluding certain sectors from foreign investment becomes more tenuous. Difficulties arise particularly where a host state interprets its vital national economic and security interests as to create a discriminatory regime for the exclusion of foreign investors from the sectors where national firms are under the threat from foreign competition.\textsuperscript{50} The reservation of specific sectors from foreign investors has been used by developing countries to protect indigenous industries from foreign domination, on the basis of ‘infant industry’ or ‘crowding out’ arguments.\textsuperscript{51} The designated activities under the

\textsuperscript{47} Julian, supra note 46, p. 253
\textsuperscript{48} For example, shipbuilding or aerospace, culturally significant industries, such as film and broadcasting, and public utilities; Muchlinski, supra note 11, p. 180
\textsuperscript{49} The following are some of the exceptions: A 40 per cent limit is placed on foreign ownership of locally incorporated banks. The laws for certain companies, such as airlines and shipping companies, specifically restrict the amount of foreign ownership. The manufacturing of arms and ammunitions is subject to a government approval. Legislative control is exercised over the newspaper publishing industry. Public utility services, e.g. electricity, gas and water, will eventually be privatised. Recently, telecommunication has been privatised.
\textsuperscript{50} Muchlinski, supra note 11, p. 181
\textsuperscript{51} According to the infant industry argument, a newly established national enterprise is seen as entitled to protection from the full effect of market forces. The fully open market could impose fatal competitive pressures from established foreign firms and deprive the concerned country of an opportunity to create its own industrial base in the relevant industrial sector. The crowding out theory argues that unless local enterprises are protected from foreign competition, they may disappear from the market to the detriment of local capital formation and economic independence. However, the actual phenomenon is rather mixed and may even suggest that increased inward investment could stimulate additional domestic investment, which is called ‘crowding-in’ impact; Muchlinski, supra note 11, pp. 183-184
Lists of the Thai Foreign Business Act present explicit examples: the activities in List 2 of the Act which requires prior Cabinet approval are businesses related to ‘national safety or security, or affecting arts and culture, traditional and folk handicraft, or natural resources and environment’;\textsuperscript{52} and activities stated in List 3 of the Act which require a Foreign Business Licence are businesses in which Thai nationals are not yet ready to compete with foreigners’.\textsuperscript{53}

In the case of the Philippines, Indonesia, Vietnam, and Lao PDR, the sectoral inclusion and conditionality clauses mention openly restricted investment access that affects SMEs in the manufacturing, forestry, fishery, agriculture and mining sectors. Equally, the retailing, food and beverage processing, manufacturing sector, construction and allied services, electronic component manufacturing, hospitality, hotel and tourism sectors are all typically restricted or prohibited on the basis of being ‘reserved for domestic SMEs’.\textsuperscript{54} Far from an open investment regime, many of ASEAN’s Member Countries continue to utilise protectionist measures.\textsuperscript{55}

### 3.2.2 Regulating Equity Joint Ventures between Foreign and Local Enterprises

As the economies in host states are liberalised, private inward direct investment is allowed firstly, through the introduction of joint venture laws, followed by the

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\textsuperscript{52} According to the Foreign Business Act Section 15 in Thailand, foreigners may operate the business under List Two only if Thai nationals or juristic persons that are not foreigners under this Act hold the shares of not less than 40 per cent of the capital of that foreign juristic persons. Unless there is a reasonable cause, the Minister with the approval of the Cabinet may reduce the proportion requirement but it shall not be less than 25 per cent and the number of Thai directors shall not be less than two-fifths of the total number of directors.

\textsuperscript{53} Section 8 of the Foreign Business Act 1999; for List 2 or List 3, a foreign company may obtain an exemption from the above stated rule if it is promoted under the Investment Promotion Act or permitted under the law governing Industrial Estate Authority of Thailand or other laws; Section 12 of the Foreign Business Act 1999; ASEAN Secretariat, ASEAN Investment Guidebook 2009, supra note 31, pp. 233-234; Chapter 5 of Business Guide to Thailand 2007 and Requirements for international trade in Services, Thailand.

\textsuperscript{54} See, for example, Article 13 of the Foreign Investment Law (No. 25 of 2007) under chapter VIII, Investment development to micro, small and medium-sized enterprises, and cooperatives.

\textsuperscript{55} Jarvis, supra note 21, p. 21
introduction of laws permitting direct investment through wholly owned subsidiaries and then by the eventual transition to a full market economy. Collaborative joint ventures have been preferred as the method for foreign investment entry in many developing host countries and in the socialist and post-socialist states due to the significant advantages for both foreign investors, particularly multi-national companies, and the host states. For investors, joint ventures associated with domestic entrepreneurs and state entities offer an opportunity to enter a new market with the local business know-how of the local partner, which may prove to be invaluable in an unfamiliar business environment. This is of particular importance in Southeast Asian countries where non-tariff barriers cause major obstacles to conducting business. For the host state, joint ventures introduce new capital and technology while retaining the legal form of control over the foreign investors. Consequently, joint venture laws have been playing a critical role in states supporting economic development policies in a strong nationalistic political environment, such as ASEAN Member Countries, who mostly share a form of reactive nationalism resulting from post-colonisation. In joint venture laws, shareholder protection is of particular importance to attract foreign investments through locally incorporated joint ventures.

Equity ownership in a joint venture has proved to be an important determinant of its performance and it has been argued that joint venture partners tend to use equity ownership to control the venture operations despite the availability of other means of control. It was evidenced that corporate ownership patterns support the importance of investor protection. Countries with poor investor protection typically exhibit more

56 Muchlinski, supra note 11, p. 180
57 Sornarajah, supra note 15, p. 107; Muchinski, supra note 11, p. 192
58 In order to retain control over foreign investors, foreign parties used to be kept as minority shareholders in the joint venture corporations; Sornarajah, supra note 15, p. 199
59 Thailand, an exception from the colonization in the region, also shares the nationalistic style of development; Frank B. Tipton (2008) ‘Southeast Asian Capitalism: History, Institutions, States and Firms’ Asia Pacific Journal of Management, p. 1; Muchlinski, supra note 11, p. 192
60 Sornarajah, supra note 15, p. 107; Muchinski, supra note 11, pp. 197-198
concentrated control of firms than do countries with good investor protection.\textsuperscript{62} For example, according to Country Profile 2009 of the World Bank Enterprise Surveys, more than 90 per cent of firms of the Surveys in Lao PDR used the legal form of sole proprietorship and the use of open shareholding companies was very scarce.\textsuperscript{63} In general, equity joint venture laws require not only local shareholding but also local participation in the management of a locally incorporated joint enterprise with the foreign investor, which enables the states to retain direct control over the activities of the foreign investor.\textsuperscript{64} There are also laws which require local financial participation by restricting foreign shareholdings within locally incorporated companies. A major purpose behind legal restrictions on foreign ownership in local companies has been to secure the ‘indigenisation’ of foreign owned companies, that is, to transfer the ownership of shares in the concerned company to nationals of the host state by placing its shares on the market for local investors to purchase at market prices.\textsuperscript{65}

As globalisation has progressed, the techniques to control inward direct investment have moved from direct intervention towards more indirect methods.\textsuperscript{66} In Cambodia, there shall be no limit on the permitted shareholding proportions of each shareholder in a joint venture and thus, a foreign investor shall not be treated in any discriminatory way by reason only of the investor being a foreign investor, except in respect of ownership of land as set forth in the Land Law.\textsuperscript{67} Foreign shareholding in a joint venture shall not exceed 49 per cent when the joint venture owns or intends to own land, or holds or intends to hold an interest in land in the Kingdom.\textsuperscript{68}  

\textsuperscript{64} Muchlinski, supra note 11, p. 184
\textsuperscript{65} Ibid., p. 185
\textsuperscript{66} Hira, supra note 6, p. 21
\textsuperscript{67} Article 8 of Law on Investment; ASEAN Secretariat, ASEAN Investment Guidebook 2009, supra note 31, p. 61
\textsuperscript{68} A ‘Cambodian Entity’ means any legal entity incorporated and registered at the Ministry of Commerce under the laws of the Kingdom of Cambodia in which more than 51 per cent of the equity capital are directly owned by natural persons or legal entities holding Cambodian citizenship. Therefore, enterprises
investment enterprises shall not own or hold any ownership interest in land and also, a Cambodian national or a Cambodian Entity which legally owns land in the Kingdom also shall be prohibited from transferring their shares in a way which would cause the investment enterprise to be a foreign entity.  

In Indonesia, under a Government Policy Statement of 22 January 1974, all new foreign investment in Indonesia should have Indonesian participation of not less than 30 per cent. All new foreign investment had to be initiated as a joint venture with Indonesian participation being raised to 51 per cent within a period of 10 years. In 1986, Indonesia relaxed its previously strict rule over majority Indonesian equity participation in joint ventures with foreign firms, allowing a more flexible period within which the requirement of 51 per cent local ownership was to be met. In 1992, for the first time, 100 per cent foreign ownership was allowed.  

100 per cent foreign equity ownership was allowed in all areas except those in the negative list under Government Regulation No. 20 of 1994. According to the current Foreign Investment Law in Indonesia, a foreigner can conduct business either by establishing a fully-owned company or by having a joint venture with the domestic shareholder by establishing a foreign company. In terms of entity, these are limited liability companies called a ‘Penamanan Modal Asing (PMA) company’. Regardless of whether it is 100 per cent foreign-owned or has an Indonesian partner, it is still subject to the Negative List, providing which business areas are closed or open with certain conditions for foreign investments. What is still notable is that even in the sector where foreign investors can own all shares of a PMA company, the company must divest a portion of shares to an

that are less than 51 per cent Cambodian owned are considered foreign enterprises; Sok and Sarin, supra note 36, p. CMB-13.

69 Ibid., p. CMB-13

70 Law on Foreign Capital Investment Law No. 1 of 1967; Muchlinski, supra note 11, p. 192

71 Ibid., pp. 192-193

72 Law No. 25 of 2007(April 26, 2007), replacing two old laws, i.e. No. 1 of 1967 regarding Foreign Investment and Law No 6 of 1968 regarding Domestic Investment, accommodates both foreign and domestic investments.

73 These companies called ‘PMA Companies’.
Indonesian party within 15 years after commencing commercial operations. Also, in the
case of establishing a joint venture PMA company at the beginning, Indonesian parties
should own at least 5 per cent of the company.\textsuperscript{74} Therefore, despite the innovative
provisions introduced under the new Foreign Investment Law to accommodate foreign
investments into the Indonesian legal system, an equal treatment between foreign and
domestic investments has not been accomplished. In addition, when 100 per cent
foreign equity was allowed, often foreign equity ownership shall be in the form of joint
cooperation with Indonesian national small scale industry or an interim cooperative of
supplier, sub-contractor, agent general trade and etc.\textsuperscript{75} For example, the new Law No. 4
of 2009 on Mineral and Coal Mining specifically requires mining companies to use
national mining contractors over foreign-owned contractors.\textsuperscript{76} Foreign equity
ownership in infrastructure projects such as seaports generation as well as distribution
distribution of electricity for public use, telecommunications, airlines, potable water, public railways,
atomic energy reactors shall establish by way of joint venture between foreign equity
ownerships and Indonesian national equity which is maintained at 5 per cent.\textsuperscript{77}

Malaysia was generally regarded as having one of the best legal regimes in Asia,
rivaling her closest neighbours Singapore and Hong Kong, but it also has restrictions
on foreign equity ownership in key economic sectors that are deemed to be of national
interest.\textsuperscript{78} Bumiputeras (native Malays)\textsuperscript{79} were given substantial Malaysian
governmental support to establish business enterprises under New Economic Policy

\textsuperscript{74} Mills and Syah, \textit{supra} note 30, p. INO-14 and 15
\textsuperscript{75} Presidential Decree No. 99/1998
\textsuperscript{76} Foreign-owned contractors can only be used where no local contractors are available; Mills and Syah, \textit{supra} note 30, p. INO-18.
\textsuperscript{77} This relaxation is applicable for all applications received from 31 July 1998 until 31 December 2000 to
set up manufacturing projects with the exception of specific activities and products where Malaysian
small and medium-scale companies have the capabilities and expertise. These activities and products are
paper packaging, plastic packaging (bottles, films, sheets and bags), plastic injection moulding
components, metal stamping, metal fabrication and electroplating, wire harness, printing and steel service
centers. For these activities and products, the prevailing specific equity guidelines are applicable. All
projects approved under this policy will not be required to restructure their equity after the period.
\textsuperscript{78} Bidin, \textit{supra} note 10, pp. 298-300
\textsuperscript{79} Among the groups recognised as Bumiputera are the Malays and the native of Sabah and Sarawak. The
Malaysian Federal Constitution defines all these three groups in a limited ethnic-based and race-specified
way; Article 161 A (6) of the Malaysian Federal Constitution; Bidin, \textit{supra} note 10, p. 302
According to the Industrial Co-ordination Act in 1975, foreign investors are restricted to a percentage of the shareholdings and required to partner *bumiputera* in certain kind of investments. The *bumiputera* policy to ensure pre-occupation with *bumiputera* participation in commerce and industry has discouraged the growth and expansion of non-*bumiputera* SMEs. A foreign corporation can now have a 100 per cent full ownership for manufacturing ventures for export. The Malaysian government encourages foreign and local investors to set up joint ventures, but, in general, it is 70 per cent equity for Malaysians and 30 per cent foreign equity for industries processing non-renewable resources. Foreign equity participation in manufacturing projects used to be governed by the level of exports. However, effective from 31 July 1998, the Malaysian government has liberalised the equity policy for the manufacturing sector irrespective of the level of exports. Accordingly, foreigners can hold 100 per cent equity in any new manufacturing project and manufacturing expansion or diversification investment by existing companies, regardless of whether the product is destined for export or the domestic market. Foreigners also can hold 100 per cent equity in any new venture involving extracting, mining or processing mineral ores. The 2005 Budget Speech announced 100 per cent foreign ownership would be allowed in future broking companies and venture capital companies. However, foreign ownership in other industries is still very limited. For example, it is limited to 30 per cent in commercial banks, merchant banks, leasing companies, telecommunication companies, and any

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80 The Malaysian government started the intervention by launching the New Economic Policy, which aimed at redressing ethnic economic imbalances through restructuring in employment; restructuring in ownership of wealth; and creation of *Bumiputera* Commercial and Industrial Class; Lrong Lim (2002) ‘A Dynamic Bumiputera Commercial and Industrial Class? A Mismatch with Market Rationality, 37 (4) Southeast Asian Studies, 443, at 443; Giroud, supra note 7, pp. 104-105.
companies whose activities involve national interests such as water and energy supply, broadcasting, defence and security. Foreign Investment Committee approval is required for any acquisition involving 15 per cent or more of the voting power by one foreign interest or 30 per cent or more of the voting power by multiple foreign interests. The Foreign Investment Committee guidelines contain more detail on foreign ownership regulations regarding businesses and property.  

In order to subject the process of foreign investment to the administrative control of the host state, some foreign investment legislations require the entry of foreign investment to be made by way of a joint venture with a state entity, thus ensuring the government policy in a particular industry is given expression at every state of the venture in which the foreigner participates as in the case of Fraport v. Philippines. This was based on the 1991 Philippine Foreign Investment Act which provided that a foreign corporation may only own up to 40 per cent of a public utility, which enabled the executive and management of the utility to be only Filipino.

Three main forms of investment are allowed in Vietnamese law: joint ventures, wholly foreign-owned enterprises and business cooperation contracts. Prior to the Doi Moi reforms, FDI was unknown in Vietnam, and the Law on Foreign Investment 1987 opened the door to a rapid influx of foreign capital. Vietnam’s needs in long-term and large scale investment to sustain economic growth required informal institutions to be

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85 *Fraport AF Frankfurt Airport Services v. Republic of Philippines*, ICSID Case No. ARB/03/25 (Award, 16 August 2007); Somarajah, *supra* note 15, p. 93
86 These provisions are enforced by the operation of the so-called ‘Anti-Dummy Law’, which imposed both criminal and civil penalties for violations of the provisions of the 1991 Act; see the Philippine Constitution provides that a foreign corporation may only invest in a public utility.
legalised to make the business environment more transparent and accountable. In response to this, Vietnam’s Constitution was amended in 1992, laying the foundations for the private sector to compete with the state sector. Until 1995 in Vietnam, there had been no legal framework to specify, to guarantee or to enforce property rights. Property rights and private ownership were further detailed in the first Civil Code 1995. Amending its Law on Foreign Investment in 2000 was to show that Vietnam was intensifying economic cooperation with foreign countries. The reform on the Law on Enterprises of 2000 was also a remarkable step in developing the country’s private sector. By officially acknowledging the right of doing business for the first time in Vietnam, the reform brought a boom of business registrations creating a million jobs.

Based on the widely-recognised successes of the Law on the Enterprises, the unified Law on the Enterprises of 2005 was approved and entered into force on 1 July 2006. The Law on Enterprises of 2005, stipulating on establishment, organisational management and operation of forms of enterprise (limited liability company, joint stock company, non-limited liability company).

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89 Thanh and Nguyen, supra note 22, p. 197
90 The Constitution acknowledges private ownership and provides guarantees against nationalisation (Article 23), states that foreign investment and trade are to be encouraged (Articles 24 and 25), and specifies that SOEs should be run autonomously and be accountable for their performance (Article 19); Government of Vietnam 1992, Constitution 1992 (Foreign Language Publishing House: Hanoi).
91 Thanh and Nguyen, supra note 22, p. 200
92 This Law has expanded the autonomy and ability for initiative in regards to an enterprise’s operations and created a legal basis for a level playing field for all domestic private enterprises, ensuring a more transparent relationship between the State and enterprises. It also simplifies requirements for entry registration of firms; ibid., p. 200; see also UNDP Newsroom, 01 June, 2003; at <http://content.undp.org/go/newsroom/choices-one-million-jobs-created-by-new-enterprise-law-in-vietnam2003-06.en?categoryID=349425&lang=en>
93 It was issued in 1999 and took effect from January 2000. Statistics from the Agency for Small and Medium Enterprise Development reveal that 160,672 private enterprises were registered during the 2000-05 period. This is 3.2 times more than the total number of private enterprises registered during 1991-99; Thanh and Nguyen, supra note 22, p. 203
95 Before the adopting the unified Law on the Enterprises of 2005, Vietnamese laws on companies had been even more fragmented and opaque: there was a law for domestic companies (Law on Enterprises 2000), a law for state-owned enterprises (Law on Foreign Investment 2000), and a law for agricultural companies (Law on Cooperatives 2003); Jean Michel Lobet, (2008) ‘Protecting Minority Shareholders to Boost Investment’ in Celebrating Reform 2008: Doing Business Case Studies (The International Bank for Reconstruction and Development: The World Bank), 61, p. 61
shareholding company, partnership and proprietorship), is uniformly applied for every economic sector. Thus, it is considered a breakthrough in terms of the scope of application that creates a common legal framework for establishing enterprises without separating by ownership regime. The constraint on ownership for foreign investment is fundamentally abolished, except in some restricted industries and areas. The Law on Enterprises of 2005 increases shareholders’ participation in approving important company decisions and introduces director duties for the first time. Increased legal certainty due to the legal reform drew more investors and capital to Vietnam. Furthermore, the Law on Investment of 2005 was established to abolish discrimination between investors regardless of all forms of ownership on the basis of size and status, i.e. domestic or foreign, and state or private, and to respect the freedom of business and investors’ rights of self-determination in making management decisions. However, despite the law reform by the Law on Enterprises of 2005 and the Law on Investment of 2005, there still exist the constraints of foreign ownership depending on sectors based on the list provided by the Ministry of Planning and Investment. Also, no foreign business ventures will be established without the approval and support of the People’s Committee through licensing procedures of issuing investment certificates or investment evaluations. It is noteworthy that Vietnam’s application to join the WTO became another key driver for legal reform of the investor protection. Upon Vietnam’s accession, it was required not only to adopt the principle of national treatment (NT) and

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96 Thanh and Nguyen, supra note 22, p. 203
97 Ibid., p. 204
98 Lobet, supra note 95, p. 64
99 Law No. 59/2005/QH11 dated 29.11.2005
100 Based on the socio-economic development planning and orientation for each five year period, the Ministry of Planning and Investment issues a list of: (i) specially encouraged investment projects; (ii) encouraged investment projects; (iii) geographical regions in which investment is encouraged; (iv) sectors in which the licensing of investment is conditional; and (v) sectors in which investment will not be licensed; see Law on Investment No. 59/2005/QH11 and Decree 108/2006/ND-CP dated 22.9.2006; PricewaterhouseCoopers in Vietnam, ‘Viet Nam: A Guide to Business and Investment’, supra note 87, p. 43
most-favoured nation (MFN) of the WTO but to make legal institutions transparent, rule-based and neutral in their application towards domestic and foreign business as the gaps in investor protection between the two had been recognised to be too large.\textsuperscript{102} The initial commitments only allowed foreign entities to provide commission agents’ services, wholesale and retail services through the establishment of joint venture companies in which the foreign capital contribution did not exceed 49 per cent. As of 1 January 2008, the joint venture requirement still remains but the 49 per cent capital limitation has been abolished. Since 1 January 2009, 100 per cent foreign-owned enterprises have been allowed to provide these services.\textsuperscript{103} Vietnam also committed to permit the establishment of 100 per cent foreign-owned banks as of 1 April 2007. The scope of operations of foreign bank branches, joint venture banks and 100 per cent foreign-owned banks has also gradually expanded to comply with Vietnam’s commitments under the WTO and other bilateral or multilateral international agreements.\textsuperscript{104} A study suggests that the effect of cultural distance on the foreign partner’s equity ownership percentage in a joint venture is conditional on the type of joint venture activity.\textsuperscript{105} When engaging in joint ventures that involve multiple activities in Vietnam, the foreign partner has a higher equity ownership when there is a high cultural dissimilarity between partners. By contrast, a greater cultural dissimilarity between partners is associated with a lower equity ownership by the foreign partner in purely manufacturing or R&D joint ventures in Vietnam.\textsuperscript{106} Therefore, persisting in the policy of limiting foreigner ownership in joint ventures in certain sectors such as in manufacturing area may not be necessary if it were to protect ASEAN companies from non-ASEAN investors.

\textsuperscript{102} Vietnam became a WTO member since 2006; Lobet, \textit{supra} note 95, pp 62; Thanh and Nguyen, \textit{supra} note 22, p. 205
\textsuperscript{103} PricewaterhouseCoopers in Vietnam, ‘Viet Nam: A Guide to Business and Investment’, \textit{supra} note 87, p. 39
\textsuperscript{104} \textit{Ibid.}, p. 37
\textsuperscript{105} Indro and Richards, \textit{supra} note 61, p. 195
\textsuperscript{106} \textit{Ibid.}, p. 201
In transitional economies such as CLMV countries (Cambodia, Lao PDR, Myanmar and Vietnam), most domestic companies are state-owned or a large number of the joint ventures in those countries are in partnership with the government. Further, even when one or both of the joint venture parents were governments, a government may not allow complete private ownership in some industries. The reason for partnering with a government looks like a good idea because the government writes law. On the other hand, such a partnership, particularly in a country with underdeveloped legal infrastructure, is risky due to the possibility of expropriation by the government, and thus, the intention to minimise the risk originated from the weaker legal and regulatory framework in the host country will put the foreign investors off from entering the said economy. Accordingly, if a transitional economy wishes to step up foreign investment, particularly in high-tech industries which requires considerable amount of capital investment, it should strengthen its legal and regulatory systems first. For CLMV countries who are on their way to approaching democratic regimes, the extent to which democracy and self-determination are normative factors affecting the exercise of power of governments in the conclusion of contracts is yet to be settled. The case Yaung Chi Oo Ltd v. Myanmar, the first and only arbitration between the ASEAN Member Countries so far, shows a good example of the difficulty of joint venture cooperation with a government. It was about the alleged expropriation originating from the failure of the renewal of the contract.

107 See for example in Vietnam; ibid., p. 203
108 Ibid, p. 194
109 Ibid, p. 203
110 Ibid, p. 203
111 Sornarajah, supra note 15, p. 76
113 Ibid., para. 54
3.2.3 Restriction on Foreign Shareholdings and Foreign Ownership in Privatisation and Domination of Public Enterprises

Privatisation is often conceived as a pushing back of the border between the state sector and private enterprise and a progressive replacement of bureaucratic administration with modern corporate governance. It is a complex concept which is said to improve efficiency by changing state interventions, improving monitoring and introducing competition, but then, the results of privatisation have been mixed with the evidence of efficiency gains being inconclusive, which leads to a debate about the relative efficiency of the state versus markets and private property in the allocation of resources. The Southeast Asian countries also had varying perceptions regarding the privatisation largely influenced by their socio-economic objectives and policies towards public enterprises. Chua notes that since the 1950s, many Southeast Asian countries had been in a privatisation and nationalisation cycle due to their historical and ethnic backgrounds. Allowing for local differences, many of those countries chose nationalisation post-independence against the colonial free-trade economy experience after the Second World War influenced by nationalist movements while developing their economies towards market-oriented open economy or creating frameworks within which economic activities can take place. Nationalisation is often seen to bring capital flight, inefficient production, employment, and pricing decisions, excessive

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114 Tipton, supra note 59, p. 23
118 Ibid., pp.244-256; Chua particularly mentioned Malaysia, Thailand, Myanmar, Indonesia and the Philippines as the examples of the nationalization; see also for the specific rationale for establishing public enterprises in Indonesia, Singapore, Malaysia, Thailand and the Philippines; Ng and Wagner, supra note 116, pp.211-213
bureaucratization and corruption, and thus, countries return to free-market policies.\textsuperscript{119} Public enterprises in Southeast Asian countries, through which state intervention was possible, were involved in activities of the domain of private enterprises, whose performance exhibited poor profitmaking, overstaffing, suboptimal allocation of resources and increasing external indebtedness.\textsuperscript{120} Therefore, in the 1980s, Southeast Asian countries were actively engaged in the privatisation, deregulation and liberalisation of their economies.\textsuperscript{121} However, the progress of the privatisation in Southeast Asia slowed sometimes due to the nationalist resistance to foreign participation or just consisted of a part of national policy objectives.\textsuperscript{122} The open and transparent implementation of the privatisation was also hampered because of the lack of capital market developments in many countries except Singapore.\textsuperscript{123} In the aftermath of the 1997 Asian financial crisis, Southeast Asian governments have committed themselves to reforms in corporate governance.\textsuperscript{124} The IMF also gave its assistance to Southeast Asian states conditional on the adoption of reform programs. Two of the major reform efforts of Southeast Asian states are privatisation and corporate governance. The WTO also actively encouraged continuation of those reforms.\textsuperscript{125} However, given that publicly-owned enterprises have dominated strategic industries, such as transport, public utilities, natural resources, energy, financial services and defence, the unregulated sale of such enterprises to the private sector raises the possibility of their falling under foreign ownership and control, thereby threatening

\textsuperscript{120} For example, according to Asian Wall Street Journal, 5 October 1988, in 1988, the public foreign debt of some Southeast Asian countries are approximately as follows: Indonesia (USD 50 billion), the Philippines (USD 28 billion), Malaysia (USD 19 billion), Thailand (USD 18 billion), and Singapore (USD 0.2 billion); Ng and Wagner, \textit{supra} note 116, pp.213-214.
\textsuperscript{122} See, for example, Malaysia for the ethnic equality objective (p.249), Thailand and Myanmar for the nationalist resistance to foreign participation (pp.251-254); and the Philippines for state control to protect Filipinos against Westerners and powerful Chinese minority (p.255); Chua, \textit{supra} note 117, and 255
\textsuperscript{123} Ng and Wagner, \textit{supra} note 116, p. 215
\textsuperscript{124} Tipton, \textit{supra} note 59, p. 24; Bidin \textit{supra} note 10, pp. 297-298
\textsuperscript{125} Tipton, \textit{ibid.}, p. 24; see also Kuanpoth, \textit{supra} note 5, p. 194
existing national control over vital economic interests. Accordingly, privatisation of
publicly-owned companies has often involved restrictions on foreign ownership.\textsuperscript{126} The
state-owned industrial sector includes enterprises owned and operated by the central
government, as well as locally owned and managed state enterprises at provincial,
district or ward levels.\textsuperscript{127}

In Indonesia, private manufacturing industries are owned mainly by Sino-
Indonesians and foreigners, not by indigenous Indonesians. The domination of larger
enterprises by the non-indigenous has resulted in government policies to favour
cooperatives and smaller indigenous enterprises, which almost have never had an
important role in the economy. Because subsidising the Sino-Indonesians and foreign-
owned industries was not attractive politically for economic development, the
alternative was to promote large, important manufacturing enterprises through the
development of state enterprises in Indonesia. Moreover, the 1997 Asian Economic
Crisis resulted in a large, unintentional increase in SOEs because privately-owned failed
banks were taken over by Indonesian government through the \textit{Badan Penyehatan
Nasional} (Indonesian Bank restructuring Agency).\textsuperscript{128} Although it has been encouraged
by international institutions such as IMF and the World Bank to privatise state
enterprises, this was resisted in Indonesia, partly because of the Indonesian Constitution
and the government intention to develop strategic industries and partly for other reasons,
including the protection of vested interests.\textsuperscript{129} The Indonesian Constitution of 1945
reveals the roles of the state and provides the grounds for state intervention,
notwithstanding that there have been debates as to whether control requires ownership
or not.\textsuperscript{130} In particular, Article 33 (2) of the Indonesian Constitution of 1945 articulates

\textsuperscript{126} Muchlinski, supra note 11, p. 189
\textsuperscript{127} Trace, supra note 87, p. 112
Vicziany (eds.) \textit{Business in Asia} (Clayton: Monash University Press), 147, pp. 148-149
\textsuperscript{129} Ibid., p.148
\textsuperscript{130} Ibid., p.147
that sectors of production that are important for the country and affect the life of the people ‘shall be controlled’ by the state. Indeed, said Article serves as the main basis for economic nationalists to argue that foreign ownership over certain sectors should be limited. However, the key terms of Article 33 of the Indonesian Constitution are not very clear. Therefore, both policy makers and the Indonesian Constitutional Court (Mahkamah Konstitusi or MK) have been forced to confront a series of legal questions regarding the meaning of ‘controlled by the state’, ‘important sector’ and ‘common endeavour’ under Article 33 and the scope of private involvement of these sectors and the scope of interpretation conferred to the Constitutional Court regarding this Article. The Constitutional Court referred to the opinion that the meaning of ‘controlled by the state’ is ‘owned by the state’ and went further that Article 33 has higher and broader meaning than civil law ownership. The Article 33 ‘people’s economy’ debate between the state and market and between global economy orthodoxy and local political discourses is in the heart of the continuing process of transfer of state assets into the hands of private business, which forms a central feature of economic reform agenda sponsored by the international bodies. All in all, in Indonesia, some state enterprises have been able to delay or avoid privatisation altogether, and some privatised firms have been damaged by the government’s inability to prevent poaching.

131 Article 33 of the Indonesian Constitution under Chapter XIV: The National Economy and Social Welfare (Fourth Amendment) states as follows: (1) The economy shall be organized as a common endeavour based upon the principles of the family system; (2) Sectors of production which are important for the country and affect the life of the people shall be controlled by the State; (3) The land, the waters and the natural resources within shall be controlled by the State and shall be used to the greatest benefit of the people; (4) The organisation of the national economy shall be conducted on the basis of economic democracy upholding the principles of togetherness, efficiency with justice, continuity, environmental perspective, self-sufficiency, and keeping a balance in the progress and unity of the national economy; (5) Further provisions relating to the implementation of this article shall be regulated by law.


133 The Indonesian Constitutional Court (Mahkamah Konstitusi or MK) has been established in 13 August, 2003; Simon Butt and Tim Lindsey (2009) ‘The People’s Prosperity? Indonesian Constitutional Interpretation, Economic Reform and Globalization’ in John Gillespie and Randall Peerenboom (ed.) Regulation in Asia: Pushing Back on Globalization (Oxon: Routledge), 270, p. 275

134 Ibid., p. 275

135 See pages 332-333 in the MK’s Electricity Law case regarding the constitutional validity of Law No. 20 of 2002 on electricity: MK Decision No. 001-021-022/PUU-I/2003; ibid., pp. 280-281

136 Ibid., pp. 287-288
and illegal exports.\textsuperscript{137}

Malaysia appears more successful in this respect with a history of privatisation extending over two decades that has resulted, for instance, in substantial improvement in telecommunications.\textsuperscript{138} However, privatisation has run in parallel with the agenda of the promotion of the economic interests of ethnic Malays.\textsuperscript{139} Although Malaysian economy has always been described as fairly open, Malaysia has a long tradition of ethnically based distributive policy with restrictions on foreign equity ownership in key economic sectors that are deemed to be of national interest.\textsuperscript{140} As Chinese-owned manufactures led the industries from the early stage of its development, economic imbalances between ethnic groups became a great concern.\textsuperscript{141} Since 1970s, the government embarked on domestic industrial interventions by launching SOEs in all activities, thus increasing \textit{bumiputera}\textsuperscript{142} employment rates.\textsuperscript{143} Malaysian domestic policies had been gradually aimed at increasing the share of \textit{bumiputera} participation in terms of companies’ ownership structure and in terms of number of employees.\textsuperscript{144} Accordingly, state control has increased in a number of regulated sectors in the Malaysian economy by means of allocation of resources as well as the creation and distribution of economy.\textsuperscript{145} However, the 1997 Asian financial crisis exposed the inherent problem of the Malaysian corporate regime relating to the protection of minority shareholders, who are normally \textit{bumiputera}.\textsuperscript{146}

Until 1986, SOEs dominated Vietnam’s industries. Private ownership of

\begin{itemize}
\item[\textsuperscript{137}] See the case of PT Tambang Timah who was the world’s largest tin producer; Tipton, \textit{supra} note 59, p. 24
\item[\textsuperscript{138}] Ibid., p. 24
\item[\textsuperscript{139}] Jeff Than, \textit{supra} note p. 41 \textit{et seq.} 115; Chua \textit{supra} note 117, pp.249-250; Ng and Wagner, \textit{supra} note 116, p. 212
\item[\textsuperscript{140}] Chua, ibid.
\item[\textsuperscript{141}] In 1960s, Malaysian economic growth was primarily the result of import-substituting industries, which was mainly Chinese-owned and concentrated in light first-stage manufactures such as textiles, footwear and garments; Giroud, \textit{supra} note 7, p. 104
\item[\textsuperscript{142}] See for the definition of \textit{bumiputera}; Bidin, \textit{supra} note 10, p. 298
\item[\textsuperscript{143}] Lim, \textit{supra} note 80, pp. 443; Giroud, \textit{supra} note 7, pp. 104-105
\item[\textsuperscript{144}] Giroud, \textit{ibid.}, p. 108
\item[\textsuperscript{145}] Bidin, \textit{supra} note 10, p. 298
\item[\textsuperscript{146}] \textit{Ibid.}, p. 300
\end{itemize}
productive facilities was forbidden prior to the reforms of the late 1980s and 1990s. Recognising that the reform of the state enterprise sector was fundamental for the transformation into the market system, the Vietnamese government set out to restructure government-owned firms and the number of SOEs had been reduced to around 7000 by 1993.\footnote{Trace, supra note 87, p. 113; PricewaterhouseCoopers in Vietnam, ‘Viet Nam: A Guide to Business and Investment’, supra note 87, p. 19} The main instrument of the post-1992 approach for the reform was equitisation in which all or some of the state’s interest in an enterprise is sold in the form of shares.\footnote{Trace, supra note 87, p. 113} Particularly, since 1998, the government has formulated a detailed reform programme focusing on equitisation of state companies.\footnote{PricewaterhouseCoopers in Vietnam, ‘Viet Nam: A Guide to Business and Investment’, supra note 87, p. 19} In response to the inefficiency of SOEs, Vietnam has attempted to restructure or equitise them rather than privatising them.\footnote{Thanh and Nguyen, supra note 22, p. 210} However, with respect to the transformation of SOEs, the monitoring and enforcement of the transformation process may remain weak because of a clear gap between having a mandatory equitisation program and creating a framework where SOEs can transform if they wish to.\footnote{World Bank, Vietnam: delivering on its promise, supra note 94, p. 26} Also, according to the 2003 World Bank Report on Vietnam, there were barriers which discourage trading by non-state enterprises, for example, stringent regulatory requirements imposed by ministries prevent private firms from participating in rice exports and fertiliser imports or monopolies in production as in the case of coal.\footnote{Trace, supra note 87, p. 122; World Bank, Vietnam: delivering on its promise, supra note 94, p. 16} The Report indicated the prioritisation of SOEs constrains private sector development and the growth in firm size because the scope of SOE remained dominant in various commercial sectors.\footnote{World Bank, Vietnam: delivering on its promise, ibid., p. 36} Consequently, the playing field in Vietnam ended up in favour of public sector enterprises and the government appears determined to ensure that SOEs remain dominant in a number of industrial sectors, which results in private firms facing
discrimination in factor markets.\textsuperscript{154}

Singapore, in this regard, is not too different from other states of the region. Development from the 1960s to the 1980s took place largely through government-linked companies, and despite privatisation since the mid-1980s, the government sector remains large.\textsuperscript{155} The government has retained control of a number of large firms through blocks of shares held by Temasek Holdings,\textsuperscript{156} which is owned by the Ministry of Finance of Singapore.\textsuperscript{157} Temasek describes itself as ‘an Asia investment company, headquartered in Singapore’, but it is a government agency with no discernable input into the management of either the firms it controls or its foreign holdings. In addition, the accounts of Singapore’s government-linked companies are generally not publicly available as an ‘exempt private company’ and thus, not required to publish any financial information.\textsuperscript{158} It is noteworthy that other ASEAN Member Countries are aiming at emulating the success of Temasek Holdings. Malaysia and Vietnam have set up a holding company for its SOEs and Indonesia is about to adopt the similar holding company structure.\textsuperscript{159}

The motives of establishing public enterprises or SOEs can vary country by country. Most of the objectives are derived from public policy geared towards the achievement of some national goals and public interest.\textsuperscript{160} The SOE, with its efficient

\textsuperscript{154} In general, the banking sector’s loan policies are in favour of public enterprises. Only public enterprises, including Singapore’s government-linked companies, have access to state funding. Commercial and industrial land in urban areas is mainly in the hands of SOEs, whereas private firms face considerable difficulties in getting land. Therefore, private firms lacking land-use rights or other forms of collateral have to rely more heavily on extended families or personal connections; Trace, supra note 87, p. 115; Tipton, supra note 59, p. 13; Indro and Richards, supra note 61, p. 203
\textsuperscript{155} Asian Productivity Organization (1989) \textit{Management Dynamism in State-owned Enterprises in Asia}, pp.90-91
\textsuperscript{156} For example, Temasek owns stakes of many companies including local monopoly or near-monopoly providers of power and transportation, 100 per cent of port and harbor facilities provider PSA International, 6 per cent of SingTel, 57 per cent of Singapore Airlines, and 28 per cent of DBS Bank; Tipton, supra note 59, pp. 10-11
\textsuperscript{157} Temasek’s management and board of directors are appointed by the Ministry of Finance; Tipton, supra note 59, p. 12
\textsuperscript{158} It has only provided an annual ‘review’ since 2004; Tipton, supra note 59, p. 12
\textsuperscript{159} Wicaksono, supra note 132, pp. 157, 161
use of finances and being free from market consequences, is a useful tool for carrying out public policies.\textsuperscript{161} Aharoni also indicates that public enterprises may be a pragmatic response to economic problems, such as the need to eliminate, reduce or control a monopoly or to ensure an adequate supply of essential goods and services at reasonable prices when excessive financial and technical risks deter private-sector investments or in cases where the private sector is not able to deliver what the government feels is required in the public interest.\textsuperscript{162} Southeast Asian governments have actively used public enterprises and SOEs to achieve national goals, such as rapid industrialisation and economic development, protection of natural resources attributed to the aspiration of a newly independent country, rapid reduction of poverty and unemployment with strong nationalistic sentiments and redistribution of wealth for ethnic groups.\textsuperscript{163} However, it was the ASEAN governments’ decision for privatisation and deregulation due to the poor performance of public enterprises and the increase of foreign indebtedness in 1980s.\textsuperscript{164} The momentum of SOE reform was also adopted by the Vietnamese government after realising the importance of private sector development to the economy since \textit{Doi Moi} reforms.\textsuperscript{165} It was perceived that given the relatively high capital intensity of SOEs, compared to their private sector counterparts, the cost of expanding their employment base would simply be unaffordable in Vietnam.\textsuperscript{166} The expansion of SMEs offers the best prospects for job creation, particularly when the financial and economic crisis has become a jobs crisis in developing and industrialised countries.\textsuperscript{167} It is thought to be a good instrument in order to reduce poverty in rural

\textsuperscript{161} Ibid., p.3  
\textsuperscript{162} Yair Aharoni (1986) \textit{The Evolution and Management of State-Owned Enterprises} (Cambridge, MA: Ballinger Publishing Company), p.4; see also for economic reasons for the existences of the SOEs in Haririan, \textit{ibid.}, pp.4-9  
\textsuperscript{163} Ng and Wagner, \textit{supra} note 116, p. 211-213; Jeff Than, \textit{supra} note p. 41 \textit{et seq.} supra note 115  
\textsuperscript{164} See \textit{supra} note 120  
\textsuperscript{165} Thanh and Nguyen, \textit{supra} note 22, p. 204  
\textsuperscript{166} See \textit{supra} note 92 on the success of the reform on the Law on enterprises of 2000  
\textsuperscript{167} World Bank, Vietnam: delivering on its promise, \textit{supra} note 94, p. 3; see also the core idea of the Law on the Enterprises of 2005 (Law No. 60/2005/QH11) was to further simplify the procedures and reduce the obstacles to market entry for non-state enterprises.  
\textsuperscript{167} Charles Harvie (2004) ‘East Asian SME Capacity Building, Competitiveness and Market
and urban areas by generating off-farm employment in rural areas and to give earning opportunities to migrants to urban areas in the long run. The growth in the private sector is of critical importance in transitional economies, particularly for job creation. A stronger private sector will also create the competitive pressures required to improve the performance of SOEs as well. Public enterprises can make significant contributions to the economic and social development of a country, particularly in infrastructure building and service sector. However, their performance should not interfere with the growth of the private sector. While close links between the state and leading entrepreneurs were thought to facilitate the goals of the developmental state, more recently, attention has focused upon the costs of close government-business relations. Continuing reforms of public enterprises and giving more chance to the private sector should be taken more seriously for the long-term economic developments of ASEAN Member Countries. This will also contribute to removing many of the non-tariff barriers that could impede the enjoyment of concessions under AFTA.

3.2.4 Screening and Process-Related Restrictions

Screening laws involve a case-by-case review of proposed foreign investment by a specialised public authority in the host state. Screening procedures may be used as it is a technique of regulation often established in association with restrictive regimes regulating the ownership and control of foreign investments. Administrative control over foreign investments from screening investment to permit entry seems to be

168 World Bank, Vietnam: delivering on its promise, supra note 94, p.4
169 Ibid., p. 35
172 Muchlinski, supra note 11, p. 201
common both to developing and developed countries.\textsuperscript{173} The administrative agencies of host states primarily aim to ensure the foreign investors bring tangible benefits without affecting local entrepreneurs by the entry of a powerful foreign company into industry sectors of national interests.\textsuperscript{174} Regulations to control foreign investments are usually implemented through licensing systems and the sanction is withdrawal of the licence without which the foreign investor cannot operate lawfully.\textsuperscript{175} Before the beginning of the screening procedure by administrative agencies for the proposed foreign investment, indicating the potential benefits to the local economy, it is extremely important that the necessary information and the conditions for the investment to be provided in the relevant legislation of the host state are straightforward enough to be understood by foreign investors. In addition, the requirements of due process and transparency have to be fulfilled before the withdrawal of a licence.\textsuperscript{176} Sornarajah emphasises that the state had to provide adequate reasons for cancelling a licence and further suggested that the creation of machinery to review the adequacy of these reasons through external arbitral tribunal could be most effective to counter the use of discretionary administrative power over foreign investment.\textsuperscript{177}

Although markets are opening to the private sector gradually, host state governments in ASEAN have commonly used state interventions through different licensing and registration procedures for businesses and investments depending on size and the sector of investments. They tend to keep a business licence system due to its role in restraining and directing private sector activities.\textsuperscript{178} Adopting import licencing and quotas, or standards, labelling and certification permit requirements for products in some sectors also work as protectionist tools to support domestic producers in some

\textsuperscript{173} Sornarajah, \textit{supra} note 15, p. 96
\textsuperscript{174} \textit{Ibid.}, p. 105
\textsuperscript{175} \textit{Ibid.}, p. 77
\textsuperscript{176} \textit{Ibid.}, p. 96
\textsuperscript{177} \textit{Ibid.}, p. 97
\textsuperscript{178} Having a business registration system, where governments only set the ground rule for private sector to operate, represents more business freedom than having a licence system, Tipton, \textit{supra} note 59, p. 22
strategic sectors or to promote foreign investments in export-oriented industries.\(^{179}\) In addition, there are measures in regulatory processes that are not seemingly discriminatory as they apply to both domestic and foreign providers, but in fact do inhibit foreign business access to the ASEAN markets. These measures limit transactions with foreign suppliers, for example, systems of regulated standards applied to goods traded internationally or licensing systems applied to services.\(^{180}\) With reference to the ASEAN database on non-tariff barriers (NTBs),\(^{181}\) it was also reported that non-automatic licensing is the most commonly employed measure in Southeast Asia, followed by technical regulations or prohibitions.\(^{182}\) Michael Ewing-Chow clearly mentioned corruption as a barrier for businesses in some ASEAN Member countries. It raises business transaction costs and reduces the attractiveness of investing.\(^{183}\) The more screening and process-related restrictions exist, the higher the chance of corruption.\(^{184}\) This places a major barrier for foreign investments in ASEAN Member Countries.

The Foreign Business Act B.E. 2542 (1999) in Thailand provides a clear example of state intervention introducing different levels of licencing by sectors. There are three broad categories of businesses to control foreign business activities in different levels: firstly, 9 businesses under List 1 of the Act completely prohibited to foreign

\(^{179}\) Giroud, *supra* note 7, p. 108; Dennis and Yusof, *supra* note 2, pp. 5-6

\(^{180}\) While the ASEAN Concord II (Bali Concord II) refers to a single market, at other places the text refers only to ‘goods, services and investments and a freer flow of capital’. The interpretation adopted in this project is that in ASEAN the notion of integration applies to FDI flows, but not full liberalisation of all capital flows; Christopher Findlay (2007) ‘An Investigation into the Measures Affecting the Integration of ASEAN’s Priority Sectors (Phase 2): Overview: Summary’ REPSF Project No. 06/001a: Final Report, p. 1

\(^{181}\) The ASEAN Non-tariff Measure database is available at: <http://www.aseansec.org/16355.htm>


\(^{183}\) Interview with Michael Ewing-Chow with on 8 April, 2009; World Bank, *Doing Business in Indonesia 2010*, supra note 4, p. 16

\(^{184}\) The score ranking of the ASEAN Member Countries in the Corruption Index 2010 is as follows: Singapore (1), Brunei Darussalam (38), Malaysia (56), Thailand (78), Indonesia (110), Vietnam (116), the Philippines (134), Cambodia (154), Lao PDR (154), Myanmar (176); available at: <http://www.transparency.org.uk/corruption/statistics-and-quotes>
investors for special reasons, relating to national media, agriculture national resources, religion, heritage and land; 13 businesses related to national safety or security, or affecting arts and culture, traditional and folk handicraft, or natural resources and environment under List 2 of the Act require licenses to be issued by the Minister of Commerce with prior Cabinet approval; 21 businesses in which Thai nationals are not yet ready to compete with foreigners under List 3 of the Act require a Foreign Business Licence issued by the Director-General with the Consent of the Foreign Business Operation Committee.¹⁸⁵

Although Indonesian Foreign Investment Law (No. 25 of 2007) aims to give legal certainty to foreign investors that investment shall be protected and they shall receive equal treatment from the government of Indonesia regardless of their country of origin,¹⁸⁶ business fields open for foreign investors depend on the Negative List and foreign investments are eventually allowed pursuant to licensing process.¹⁸⁷ Any investment application, therefore, should be submitted to the Investment Coordinating Board (BKPM) for evaluation.¹⁸⁸ Foreign investors must secure necessary foreign investment licence, named Penanaman Modal Asing (PMA). The licence is valid for 30 years and can be extended up to another 30 years starting from the time of commercial production of the investment for expansion.¹⁸⁹ The investment licence also needs a provision on the land. Legal entities domiciled in Indonesia including foreign

¹⁸⁵ Julian, supra note 46, p. 253; see also Business Guide to Thailand 2007 and Requirements for international trade in Services, Thailand.
¹⁸⁶ It introduces corporate social responsibility and dispute settlement mechanism between the government and investors. See the features of Law No. 25 of 2007 on Investment in ASEAN Secretariat, ASEAN Investment Guidebook 2009, supra note 31, pp. 85-86
¹⁸⁷ Rice, supra note 128, pp. 153-154
¹⁸⁸ Foreign investments in the manufacturing, industrial or non-financial services sectors are licensed by the BKPM. However, investments in the areas of banking, insurance, general mining, oil and natural exploration, production and related activities are licensed by other government agencies under separate legislation; UHY (2009) Doing Business in Indonesia (Jakarta: UHY International Ltd.), p. 15; available at: <http://www.uhy.com/media/PDFs/doing_business_guides/Doing%20Business%20in%20Indonesia.pdf>
¹⁸⁹ ASEAN Secretariat, ASEAN Investment Guidebook 2009, supra note 31, pp. 92-93; Rice, supra note 128, p. 154
companies, have no freehold rights to land ownership. They must obtain the Land Cultivation Right (*Hak Guna Usaha*: HGU), the Right of Building on Land (*Hak Guna Bangunan*: HGB) or the Right of Use on Land (*Hak Pakai*: HP) subject to government approval.

In Southeast Asia, except Singapore, administrative and implementation capacities remain low, marked by inefficiency and competitive and uncoordinated overlapping of agencies. Government agencies tend to be tall structures with multiple layers of administration or management. In addition, within agencies, over-centralisation and an unwillingness to cooperate across agency boundaries reflect a preference by senior officials both to maintain distance from their subordinates and to maximize their numbers. For example, public service reforms in Indonesia, Thailand, and the Philippines have not reduced the number of agencies or of lower-level officials. The problem of multiple layers of uncoordinated administration and management of government agencies relates to the division of licensing responsibilities. For example, in a big country like Indonesia, the division cuts across the national, provincial, district and city governments. New companies must obtain up to five different licenses, depending on which city they operate in: location permit, nuisance permit, certificate of company domicile, trading license and business registration certificate. This can create administrative confusion. Provincial governments issue their own regulations, rate structures and standard times for specific licenses, which can be in line with the ministerial decree for the same permit, but can also be quite different. The wide range of results recorded in the World Bank Doing Business in Indonesia 2010 Report also points to differences in interpretation or lack of awareness of national

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190 Indonesian individual citizens are entitled to own freehold land; Rice, *supra* note 128, p. 154
192 Tipton, *supra* note 59, p. 21
194 World Bank, *Doing Business in Indonesia 2010*, *supra* note 4, p. 16
guidelines. About 85 per cent of local regulations were inconsistent with national laws and incomplete or distorting to economic activity. Fees and user charges have proliferated as local governments use their regulatory authority as a revenue raising mechanism. Since the implementation of the laws on regional autonomy in 2001 based on Law No. 34/2000, new taxes, user charges and other levies had been extracted by provinces, districts and municipalities. Such levies were depicted as having a distorting effect as they would hamper the free flow of goods within national borders. There are extractions on enterprises by local governments, ostensibly as user charges (retribusi) often called as the practice of demanding ‘third party contributions’.

Retribusi licences and fees are especially burdensome and distorting for small business activities. Formalisation requires many licences which do not always seem to be necessary on public interest grounds. Also, the licensing process is overly complicated requiring many unnecessary documents and approvals. There is also a clear lack of competence from officials issuing licences, particularly when the official must understand technical matters. Licences from one agency duplicate that of another, but are imposed upon the same business. Moreover, licensing often restricts expansion of small business into neighbouring districts, as new sets of licences must be pursued. Although business people perceive more transparent, faster and simpler licensing processes in recent years in Indonesia, the costs of licences have increased considerably because licences and permits are being used as revenue raising instruments for local

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195 For example, while, according to Art. 7e of the Regulation of the Ministry of Law and Human Rights, M-01-HT. 01-10 of September 21, 2007, the national government has eliminated the need for a certificate of company domicile, notaries in various cities report that the certificate is still requested for new company registration; World Bank, Doing Business in Indonesia 2010, supra note 4, p. 16
196 World Bank, Doing Business in Indonesia 2010, supra note 4, p. 7
197 Ibid., p.7
199 Ibid., p. 159
201 Sadli, supra note 198, p. 159
governments. Local government interference in domestic trade through the imposition of tariff and non-tariff barriers was common even before decentralisation. Types of trade distorting regulations cover the following: (a) import-export tariffs in internal trade; (b) certificates of origin; (c) loading/unloading fees; (d) third party contributions (Sumbagan Pihak Ketiga) which requires local business to provide voluntary payments to local government; and (e) road and transport charges. Firms are in need of consistency and transparency in policy-making by host countries, and have an aversion to gratuitous bureaucracy and red tape both of which are often associated with corruption. Consequently, there is a need for better coordination between the local licensing offices and both their line ministries and the local government structure they are part of. Clear and complete guidelines for business licensing would eliminate inconsistency between local and national law, and reduce inefficiencies and opportunities for corruption.

However, it is noteworthy that Indonesians’ attitudes towards foreign investment and a freer market economy have become much more favourable over the years. According to the Doing Business 2010 report, Indonesia receives Asia’s ‘most active reformer of business regulations’ distinction in 2008 and 2009 and improved the country’s ease of doing business ranking by 7 places, 122 out of 183 economies. It

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203 SMERU (1999) Monitoring the Regional Implementation of Indonesia’s Structural Reforms and Deregulation Program: Lessons Learned to Date, September 1999 (Jakarta: SMERU), p. 1
204 The forms of these taxes are (i) trade taxes (Kabupaten Bima 16/2000, Lombok Tengah 5/2001); (ii) retribusi charges for issuance of licences to export/import (Provincial Regulation of Lampung No. 6/2000; Kabupaten Ogan Komering 20/2001); (iii) taxes and charges on specific commodities such as fish, cattle and plantation produce and forestry products; and (iv) agreements across Kabupaten governments; Sadli, supra note 198, pp. 160-161
205 Ibid.; for example, Kabupaten Ogan Komering No.01/2001 and No. Bima 15/2001
206 The central government tried to cancel the local regulations on charges on road users because often they duplicate other taxes and charges, such as vehicle registration, fuel taxes, etc.
207 Foreign Direct Investment in Southeast Asia: Experience and Future Policy Implications for Developing Countries’, Report of UNIDO Expert Group Meeting, 21-23, March 2005, Bangkok, Thailand, p. 14; see the Corruption Index 2010 ranking supra note 183
208 World Bank, Doing Business in Indonesia 2010, supra note 4, p. 16
209 Rice, supra note 128, p. 153
eliminated the requirement to obtain a certificate of company domicile from the local municipality. Improvements to the business licensing process reduced the time and cost to obtain a business trading licence (Surat Izin Usaha Perdagangan, or SIUP) and the company registration certificate (Tanda Daftar Perusahaan or TDP). Online reforms at the tax registration office cut registration time. The application to publish the company articles of association was merged with the issuance of the deed of establishment. In addition, to shorten property registration, Indonesia introduced time limits: one working day for issuing the ownership certificate and five working days for registering at the land office, seven working days bringing the time to complete a property transfer in Jakarta down 17 days, from 39 to 22. Indonesia also strengthened disclosure requirements for transactions between company insiders and other companies they control, to protect investors. Reforms focused mainly on three areas: simplifying start-up procedures, expanding credit information and improving the rights of minority shareholders.

The Vietnamese government has been trying to revoke and clarify licenses. At the backdrop of the success the Law on Enterprises of 2000, simplification of the procedures for business registration and business establishment was considered to be one of the breakthroughs. This Law also defined the rights of the State as well as the rights of State officials in relation to the rights of the investor and the enterprise. Also 159 business licences have been abolished, removing a significant amount of

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210 Art. 7e of the Regulation of the Ministry of Law and Human Rights, M-01-HT. 01-10 of September 21, 2007
211 This service is free according to Article 16 Chapter V of the Regulation of the Ministry of Trade No. 36 of September 4, 2007. In Jakarta, the municipality charges IDR 25,000 for this service. The Regulation of the Ministry of Trade No. 36/M-Dag/PER/9/2007 on Issuing Business Trading License (SIUP) sets a period of 3 days to issue the SIUP after receiving completed documents; World Bank, Doing Business in Indonesia 2010, supra note 4, p. 12
212 Regulation of the Ministry of Trade No.37/M-DAG/PER/9/2007; World Bank, Doing Business in Indonesia 2010, supra note 4, p. 12
213 World Bank, Doing Business in Indonesia 2010, supra note 4, p. 8
214 Ibid.
215 World Bank, Vietnam: delivering on its promise, supra note 94, p. 36
unreasonable administrative barriers on the operations of enterprises.\textsuperscript{216} Although more streamlined than before, the current licensing and registration procedures are still complicated and different depending on size and the sector of investment, based on the list provided by the Ministry of Planning and Investment: business registration, investment registration, or investment evaluation.\textsuperscript{217} Relevant sectoral legislations also provide for what form of conditions a foreign investment enterprise is required to meet. Small domestic enterprises, whose investment is less than VND 15 billion (USD 940,000) not falling within conditional investment sectors, are subject to business registration. Domestic invested projects with the total invested capital of between VND 15-300 billion are subject to the investment registration procedure. FDI projects with the total invested capital of less than VND 300 billion (USD 19 million) which do not fall within conditional sectors, are also subject to the same registration but additionally requiring the issuance of an investment certificate which serves as the business registration of a corporate entity for foreign investors. Foreign and domestic projects with a total invested capital of over VND 300 billion (USD 19 million) or below VND 300 billion within conditional sectors must undergo a screening procedure of an investment evaluation.\textsuperscript{218} There are also a number of sectors that are unconditional for Vietnamese enterprises but conditional for foreign investment enterprises.\textsuperscript{219} Even in some sectors where 100 per cent foreign ownership is allowed, the assessment of the foreign investment enterprises meeting the relevant conditions involves investment evaluations such as assessing the capital structure or project-specific experience of the foreign enterprises.\textsuperscript{220} The authority to approve investment projects is currently divided

\textsuperscript{216} The time it takes to establish an enterprise has been reduced from 90 days from the receipt of proper documentation to seven days on average and the cost of business registration has been significantly reduced, from an average of 10 million to about 500,000 Vietnamese Dong; Thanh and Nguyen, supra note 22, p. 208


\textsuperscript{218} Ibid., p. 45

\textsuperscript{219} For example, exploitation and processing of mineral resources, and investment in the field of import, export, trading and distributions; ibid., p. 43

\textsuperscript{220} Ibid., p. 43
amongst (i) the Prime Minister of the Government with the scope of approval being limited to the ‘investment policy’, (ii) the People’s Committees in the provinces and cities under the central State administration, and (iii) the management authorities of industrial zones, export processing zones, high-tech zones and economic zones in the provinces and cities under the central State administration. All investment certificates are now issued by either the People’s Committees or the management authorities, but, in specialised sectors such as banking or insurance, the relevant line ministries are still empowered by the approval and licensing authority as previously.

In addition, the alignment of the commitments and initiatives of the central government with the grassroots policy implementation at the provincial and local levels is one of the major challenges in Vietnam. When the Law on the Enterprises of 2005 unified the regulatory system for different corporate structures and this single law started to regulate all companies regardless of ownership or corporate form, there was a big opposition among provincial governments to the one-stop process for incorporating a company under the Law on the Enterprises 2005 as the law reduced provincial authorities’ involvement and their control.

Vietnam is the best example of the Southeast Asian developmental states, which has achieved relatively high economic growth by attracting foreign investments and reducing the incidence of poverty. One of the main contributing factors to Vietnam’s success is prudent adjustments in the microeconomic foundations for supporting the private sector through a series of law reform on enterprises and investment. However, many ASEAN Member Countries including Vietnam have difficulty in putting into effect the government’s commitments and initiatives to accelerate the transition to a market economy and attract more foreign investments. Their administrative capacity is

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221 Ibid., p. 43
222 Ibid., p. 44
223 Trace, supra note 87, p. 127
224 Lobet, supra note 95, pp. 64-65
225 Thanh and Nguyen, supra note 22, p. 197
often limited to implementing the decisions both at the central and the local level, as can be seen in Indonesia. In order to start a business in Southeast Asia, all the foreign business eventually undergo some form of screening, evaluation and licensing procedures despite the fulfilment of the conditions provided by relevant legislation in the form of sectoral exclusion and ownership constraints. Even though the number of licensing procedures to go through is being reduced, the licensing procedures seem to be still complicated and not straightforward both in the central or provincial levels. There is plenty of room for the discretion of the relevant authorities in those procedures. Foreign investors who are interested in starting businesses cannot do much about the slowness of government decision-making and review processes, which emerges as the major impediment to investment. In addition, as can be seen in the case of Amco v. Indonesia, the manner of the withdrawal of the licence given to the foreign investor could be without sufficient due process. Process-related restrictions such as licensing impose an unnecessary cost on businesses and thus, the more licensing is involved, the higher the business cost. This is burdensome to small and medium-sized businesses. The government with plenty of process-related restrictions indeed means that it favours large businesses to small businesses. The high estimated proportions of informal economic activity suggest that even many Southeast Asian local businesses avoid contact with government agencies due to the cost of entering the formal sector by excessive bureaucracy and regulation.

226 See the result of the Survey of Australian Investment in the Philippines; East Asia Analytical Unit, Department of Foreign Affairs and Trade (1998) the Philippines: Beyond the Crisis (Barton, ACT: Commonwealth of Australia), p. 138.
227 Case Amco Asia Corporation v. Republic of Indonesia, ISCID Case No. ARB/81/1 (Award November 1984); (1984)23 International Legal Materials 351; (1988)27 International Legal Materials 1281; 1 ICSID Reports 589; Sornarajah, supra note 15, p. 93
228 Rice, supra note 128, p. 35
229 The World Bank has noticed that in the economies in developing countries, up to 80 per cent of economic activity takes place in the informal sector; The World Bank (2009) Doing Business 2010 (Washington D.C.: The World Bank Group); Tipton, supra note 59, p. 27
3.3 Conclusion: An Analysis of Barriers

Host states, often developing countries, seek to modernise their economy, diversify their production structure and industrial base, create employment and generate technology transfer by welcoming foreign firms, in trying to encourage sufficient spillover and linkage effect on the host economy.\textsuperscript{230} Since they benefit from FDI and its spillover effect in boosting their economies and industrial developments, ASEAN Member Countries have pursued intra-regional market liberalisation in order to provide more flexibility to the manufacturing and servicing operations of multinationals across the borders within the region and to promote the whole region as a production platform for the distributed operations or foreign assembly of multinational corporations (MNCs), thereby competing effectively against China and India.\textsuperscript{231} Therefore, the premise of the creation of a single market and production base is aspired to in AFTA and now the AEC in the context of increased economic interdependence and open regionalism in ASEAN. However, the ASEAN Member Countries’ attitudes towards FDI are double-sided. ASEAN is an export-oriented market economy with strong national governments’ presence in controlling inward foreign investments in order to protect national economic interests. The national governments of the ASEAN Member Countries are not only relying on foreign firms for their economic developments in particular sectors but are also interested in protecting certain industries from foreign competition and supporting the growth of indigenous firms. Therefore, various protectionist techniques have been used by the national authorities in ASEAN from the entry level to the post-entry level of foreign investments.

Strong government intervention is facilitated through investment promotion.

\textsuperscript{230} Giroud, \textit{supra} note 7, p. 59

\textsuperscript{231} The systemic nature of MNEs networks leads to the emergence of asymmetric properties of, and synergetic relations between, the constituent elements (headquarters, regional headquarters, subsidiaries and out-source partner firms, etc); Frank L. Bartels (2005) Foreign Direct Investment in Southeast Asia: Experience and Future Policy Implications for Developing Countries, UNIDO Expert Group Meeting Working Paper IWPS 001/05, 66, p. 70
agencies in each ASEAN Member Country. First of all, the most common way adopted
in the ASEAN Member Countries is sectoral exclusion of foreign investments in certain
industries often coupled with foreign equity ownership restrictions. Sector specific laws
and policies affect the establishment, expansion or operations of foreign investment and
thus, foreign investment is allowed, depending on the type of industry and activity
according to the national authorities’ preference. In most ASEAN countries, for example,
the Philippines, Cambodia, Indonesia, Thailand and Singapore, extensive negative lists
to exclude certain industries from opening to foreign investments are provided by
national laws and legislation relevant to foreign business activities. This is why ASEAN
has taken a largely sectoral approach to integration through negotiating the elimination
of various barriers sector by sector with the intention of accelerating integration in some
sectors before others. This approach has the advantage of providing case studies in the
early sectors that can demonstrate the benefits of integration for other sectors. Sector-level integration and AEC building is also expected to foster and multiply
regional linkages, thus transforming ASEAN into a single market and production base,
and sustaining the region as a dynamic and competitive player in the global value chains
and supply networks. However, sector-level integration may not only take a
considerable amount of time, but also slow down integration where economy-wide
measures are the best approach to use. In addition, the criteria of ‘national interests’
which often are mentioned as grounds for sectoral exclusion from foreign investments
need to be consistently interpreted throughout ASEAN. Considering the vast range of
the concept in which the interpretation of the criteria preserves national discretion
against foreign investors, the active role of the Dispute Settlement Body is very

232 For example, integration process in 11 priority sectors in ASEAN

Implications and Options’ 24 (2) Asian Development Review, 64, p. 65

234 Gita Nandan (2006), ASEAN: Building an Economic Community (Canberra: Australian Government,
Aus AID), p. 45

235 See, for example, Article 12 (5) of the Foreign Investment Law (No. 25 of 2007)
important to clarify the meaning of national interests whenever it matters in the process of building AEC.

Foreign equity ownership in joint ventures have been frequently used by the ASEAN Member Countries to protect local shareholding and control foreign investments for the purpose of securing indigenisation of foreign owned companies. The ASEAN non-tariff measures database provides the complex data for foreign equity ownership limitations differentiated by sectors and types of establishments for each ASEAN Member Country.\textsuperscript{236} Despite the extensive use of foreign equity ownership control, ASEAN is making progress in removing restrictions on trade in services, particularly in four priority sectors.\textsuperscript{237} It is noteworthy that the limitations on sectoral exclusion of foreign investors or foreign equity ownership control are more relaxed in terms of regulation for export-oriented companies, particularly in manufacturing industries.\textsuperscript{238} Further, the ASEAN Member Countries provide special incentives, such as inducements towards export-oriented activities, towards high-tech-intensive industries or towards the development of targeted underdeveloped geographical areas.\textsuperscript{239} The ASEAN Member Countries use promotion as a key policy instrument to steer investment into strategic sectors that complement national comparative advantage, promote export activity and employment generation.\textsuperscript{240} A targeted sector policy has included promotional approaches, such as allowing investment incentives or establishing free trade zone, where exports generated by multinational companies were

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\textsuperscript{236} http://www.aseansec.org/16355.htm
\textsuperscript{237} The ASEAN Member Countries are committed to remove restrictions on trade in services for four priority sectors (air transport, e-ASEAN, health care and tourism) by 2010; logistics services by 2013; remove substantially all restrictions on trade in services for all other services sectors by 2015; and undertake liberalisation through consecutive rounds of every two years until 2015. It will allow for foreign ASEAN equity participation of not less than 51 per cent by 2008, by 70 per cent by 2010 for the four priority sectors; not less than 49 per cent by 2008, 51 per cent by 2010 and 70 per cent by 2013 for logistics and not less than 49 per cent by 2008, 51 per cent by 2010, and 70 per cent by 2015 for other services sectors; and progressively remove other Mode 3 (commercial presence) market access limitations by 2015; Rafaelita M. Aldada and Josef T. Yap (2009) ‘Investment and Capital Flows: Implications of the ASEAN Economic Community’ The PIDS Discussion Paper Series No. 2009-01, p. 4
\textsuperscript{238} See, for example, the relaxation of foreign equity ownership in manufacture industries in Malaysia; the same point has been indicated by Michael Ewing-Chow in the interview on 8 April, 2009.
\textsuperscript{239} Giroud, supra note 7, p. 56
\textsuperscript{240} Jarvis, supra note 21, p. 3
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generally concentrated in a narrow range of economic activity. All in all, this tendency is reflected in the sectoral distribution of FDI, whose largest share is in manufacturing. However, sector specific open policy has limitations in the long run for increasing overall FDIs and trade within the region. For example, the priority services sectors may have a close linkage with other manufacturing industries, and thus, the cross-sectoral effects of the removal of these barriers will be significant.

With the growing recognition of the importance of private sector development in ASEAN, privatisation of public-owned companies has been carried out since the 1997 Asian financial crisis under the influence of the IMF conditions. However, as the pressure of economic reform came from outside rather than from inside the region, a process of state-guided experimentation in the ASEAN Member Countries continues and government-linked enterprises or state-owned companies play an important role in the economy and their scope remained dominant in various commercial sectors. It has been suggested that some ASEAN Member Countries have strategically supported the growth of state-owned companies in order to compete against foreign multinationals and to avoid their domination of the economies as indigenous firms are not ready for competition against foreign multinationals. However, relying on the domination of government-linked corporations for the economic development not only stifles foreign investments but also may not necessarily improve the resilience of the national economy. It has even been suggested that the prioritisation of public enterprises constrains private sector development and the growth in firm size as private firms are facing

241 Because of this concentration of economic activities in a narrow range, the linkages between foreign firms and the local economy did not exist; Singapore has offered incentives to foreign manufactures since 1960s; Muchlinski, supra note 11, p. 220; Giroud, supra note 7, pp. 105-108

242 It was followed by financial services and trade and commerce next to manufactures; Michael Plummer and David Cheong (2008) FDI Effects of ASEAN Integration (The Johns Hopkins University, SAIS-Bologna) p. 6

243 Findlay, ‘An Investigation into the Measures Affecting the Integration of ASEAN’s Priority Sectors (Phase 2): Overview: Summary’, supra note 180, p. 6

244 Ibid., it has been said that some ASEAN Member Countries have been interested in supporting the growth of strong national conglomerates as in South Korea.
discrimination in factor markets in competition with SOEs.\(^\text{245}\) It was also perceived that given the relatively high capital intensity of state-owned companies, compared to their private sector counterparts, the expansion of the private sector, particularly SMEs, offers the best prospects for job creation and thus, is of critical importance in transitional economies as in many ASEAN Member Countries.\(^\text{246}\) More direct mechanisms to support indigenous private sector development must be introduced. This is of particular importance because most of the indigenous firms in Southeast Asia are SMEs (including micro-enterprises) and SMEs play a significant structural role in some of ASEAN Member Countries providing largest source of domestic employment across all economic sectors.\(^\text{247}\) Note that, in East Asia, since the 1997 Asian financial crisis, the need to develop more adaptable and flexible economies and business sectors has resulted in increased emphasis on the development of the SME sector, particularly given the relative resilience of the Taiwanese economy, dominated by SMEs and the potential platform they provided for a sustained recovery, as well as employment potential and poverty alleviation, of regional economies. On the other hand, South Korea, whose economy is dominated by large conglomerates, was severely affected by the 1997 Asian financial crisis.\(^\text{248}\) In recognition of the potential for SME start-ups as a major source of job creation and overall economic growth of the ASEAN region, the ASEAN Policy Blueprint for SME Development (APBSD) was finalised at the 13th Meeting of the ASEAN Small and Medium Enterprise Agencies Working Group (SMEWG) in 2003.\(^\text{249}\)

All of the protectionist techniques of the ASEAN Member Countries’ governments which were mentioned above to control foreign investment in order to

\(^{245}\) World Bank, Vietnam: delivering on its promise, supra note 94, p. 36

\(^{246}\) See the World Bank, Vietnam: delivering on its promise, supra note 94

\(^{247}\) For example, SMEs contribute over 70 per cent of employment in Thailand and Vietnam and around 40 per cent in Indonesia and Malaysia. In Philippines, SME contribution to economic value added, sales and output is about 50 per cent; Charles Harvie (2004) ‘East Asian SME Capacity Building, Competitiveness and Market Opportunities in a Global Economy’, supra note 167, pp. 5-7

\(^{248}\) ibid., pp. 1-2

protect indigenous industries from foreign competition by deciding which sectors to
open or close up to a certain extent by regulating foreign ownership will eventually end
up with various screening procedures in host states such as licensing or other
requirements of restrictive formalities. That is to say that, although a foreign investor
satisfied all the conditions provided under the relevant national regulation, there are still
possibilities left for host state governments to restrain foreign investments and direct
private sector activities under their discretion. Examples emerged where the major
impediments to investments are the cost and complexity of obtaining and renewing a
business licence, 250 and the slowness of government decision-making and review
processes in obtaining relevant requirements. 251 Accordingly, streamlining and
harmonising licensing procedures would have the greatest impact on reducing
impediments to trade in ASEAN, and building a centralised, managed accessible
databank of trade regulations would be an enormous support to businesses across the
region. 252 Due to the large variety of procedural barriers, it is difficult to remove them
altogether anytime soon. Still, ASEAN should at least endeavour to provide clear and
complete guidelines for business licensing and other screening procedures, which would
eliminate inconsistency between the national governments or between provincial and
national authorities, and thus, reduce inefficiencies and opportunities for corruption. 253

The ASEAN Member Countries have been seeking to grow their economies in
both ways: on the one hand, through policies to welcome foreign investments to boost
their economies and to get the benefit from the experience of foreign firms; and on the

250 In particular, unofficial fees have a direct impact in terms of costs to businesses, but also appear to be
impacting on the length of import processes. Unofficial fees are mentioned by businesses across all
countries surveyed; however this is more of an issue in some of the less developed countries; Catherine
Eddy, Rowena Owen and PT ACNielsen Indonesia (2007), ‘An Investigation into the Measures Affecting
the Integration of ASEAN’s Priority Sectors (Phase 2): Region-wide Business Survey’, REPSF Project
No. 06001e, Final Report, pp. 1-2
251 East Asia Analytical Unit, Department of Foreign Affairs and Trade (1998) the Philippines: Beyond
the Crisis, supra note 226, p. 138
252 Eddy et al, supra note 250, pp. 1-2
253 Interview with Michael Ewing-Chow with on 8 April, 2009; World Bank, Doing Business in
Indonesia 2010, supra note 4, p. 16
other, through policies to save indigenous industries or strategic sectors of national interests and to protect indigenous firms from foreign competition until they become strong enough to lead the national economies. They try to introduce various promotional instruments to attract foreign investments, particularly in export-oriented industries or in high-tech-intensive manufacturing, but maintain protectionist methods to preserve their national interests and indigenous industries. National policy makers in ASEAN have been on the verge of this contradiction for a long time. However, they have been reducing the barriers for foreign investments particularly in recent years, e.g. open more industries to foreigners by exempting more sectors from the negative lists and reduce limitations for foreign ownership or allow 100 per cent foreign equity ownership in many Member Countries. Also, in some Member States, there have been improvements to the business licensing process reducing the time and cost to obtain a business trading licence and the company registration certificate. As long-term beneficiaries of outward-oriented development strategy, ASEAN Member Countries cannot give up their open policy for FDI. Now that most of ASEAN Member Countries are members of the WTO, they cannot keep their protectionist techniques forever. The ASEAN Member Countries as host countries offer similar location advantages for foreign investments against China and India, which increase the location choices open to the investing firms. Therefore, the ASEAN economies need to pursue further liberalisation and deeper reforms to improve their competitiveness and enable them to attract more investment and make ASEAN a single investment area. That is why the AEC Blueprint emphasises the importance of regional cooperation to facilitate efficiency seeking FDI and intensifying the region’s participation in regional and global

254 See, for example, the foreign investment laws have changed to allow 100 per cent foreign ownership in Indonesia and Vietnam; the reduction of foreign ownership limitation in the ASEAN Member Countries was also mentioned during the interview with Michael Ewing-Chow on 8 April, 2009.
255 See the ratings of ASEAN Member States; The World Bank (2009) Doing Business 2010 (Washington D.C.: The World Bank Group); particular attention to Indonesia as most active reformer; World Bank, Doing Business in Indonesia 2010, supra note 4, p. 8
256 All the ASEAN Member States are member of the WTO except Lao PDR.
production networks.\textsuperscript{257} While improving their region-wide locational advantages under ASEAN, ASEAN Member Countries must cooperate in developing mechanisms to support faster growth of their indigenous industries, particularly for SMEs as most of the indigenous firms in ASEAN are SMEs. In order to enhance the competitiveness of local SMEs, it will be efficient if the mechanism can function as a generator of sufficient spillover and linkages between local and foreign firms. In the long-run, increasing value of a level playing field for both domestic and foreign investors should be underscored. This is why this thesis will suggest the introduction of uniform entities across ASEAN to facilitate business cooperation, especially between SMEs. If such entities are accorded the same treatment as national entities in each Member Country, this could help to overcome many of the restrictions based on foreign nationality.

\textsuperscript{257} See AEC Blueprint paras. 10, 29 and 64.
Chapter 4  Cross-Border Business Cooperation Developments within ASEAN

4.1 Introduction

Having just looked at the situations and barriers to cross-border business activities in Southeast Asia, I now focus on how ASEAN has perceived and dealt with those problems under its framework of establishing the ASEAN Economic Community (AEC) and also under the ASEAN industrial economic cooperation schemes. Thus, this chapter reviews the two core areas of the ASEAN economic cooperation from the perspective of ASEAN cross-border business activities. The first area shall provide ASEAN’s perception of barriers for cross-border business activities within the region and the response to them to increase intra-ASEAN trade under each section of the major instruments to establish the AEC. The second area deals with a series of ASEAN industrial economic cooperation schemes. The experience of encountering these obstacles during the implementation of the schemes will guide us when suggesting the development of mechanisms to increase cross-border businesses and intra-ASEAN trade.

In addition, in this chapter, I discuss the limits of the current ASEAN initiatives in both areas in order to facilitate cross-border business activities in ASEAN. Exploring those areas also tells us more regarding the approaches of the ASEAN Member Countries towards the private sector development under the ASEAN economic integration. It is noteworthy that the attitudes of the ASEAN Member Countries not only towards economic integration but also towards the increase of intra-ASEAN trade have changed since the 1997 Asian financial crisis.

In the early years of ASEAN, the magnitude of intra-ASEAN trade was neither large nor significant as ASEAN Member Countries traded more with non-ASEAN
countries than among themselves.¹ However, as indicated by a 1983 UNIDO study, the existing low level of intra-ASEAN trade has always been the rallying point for the ASEAN regionalists who advocated a rapid growth of intra-regional trade in order to diversify the region’s market base and to reduce its over-dependence on non-ASEAN countries.² One of the earliest manifestations of ASEAN cooperation was the promotion of increased intra-ASEAN trade. The first principled instrument for carrying this out was the signing of the Preferential Trade Agreements (PTA) in 1977, providing for tariff preferences for trade among ASEAN Member Countries. Efforts to increase intra-ASEAN trade have come a long way to date, particularly through the Preferential Trade Agreements (PTAs) and the ASEAN Free Trade Area (AFTA).³

Firstly, under the Framework Agreement on Enhancing ASEAN Economic Cooperation (the Framework Agreement) adopted in Singapore on 25 January 1992,⁴ ASEAN Member Countries agreed to establish the AFTA within 15 years for cooperation in trade.⁵ It reaffirms the previous ASEAN Member Countries’ commitment to the 1967 ASEAN Declaration, the 1976 Declaration of ASEAN Concord (Bali Concord I), the Treaty of Amity and Cooperation in Southeast Asia, the 1977 Accord of Kuala Lumpur and the 1987 Manila Declaration,⁶ and furthermore suggests the existing commitments of removing trade barriers to be extensively improved as tariff and non-tariff barriers (NTBs) are impediments to intra-ASEAN trade and investment flows. Most notably, it recognises the necessities of cohesive and

¹ Estimates between 1967 and the early 1970s were between 12 and 15 per cent of total trade with much of these accounted by trade between Indonesia and Singapore: ASEAN Secretariat (1997) ASEAN: Economic Co-operation, Transition & Transformation (Singapore: ISEAS) p. 43
³ PTAs last for fifteen years until the transition made by the AFTA in 1992; ASEAN Secretariat, ASEAN: Economic Co-operation, Transition & Transformation, supra note 1, p. 51
⁴ Framework Agreement on Enhancing ASEAN Economic Cooperation, Singapore, 28 January 1992
⁵ The target was reduced to 10 years.
⁶ <http://www.aseansec.org/5117.htm>
effective performance of intra-ASEAN economic cooperation.\textsuperscript{7} The Framework Agreement established the basis for regional cooperation in the areas of trade, industry, minerals, energy, finance, banking, food, agriculture, forestry, transport and communications.\textsuperscript{8} In addition, ASEAN Member Countries agreed to investments, industrial linkages and flexibility for new forms of industrial cooperation schemes, and to encourage cooperation and exchanges among the ASEAN private sectors and between ASEAN and non-ASEAN private sectors, in consideration of appropriate policies aimed at promoting greater intra-ASEAN and extra-ASEAN investments and other economic activities.\textsuperscript{9} A few days after the adoption of the Framework Agreement, adhering to the principles, concepts and ideals therein, the AFTA Common Effective Preferential Tariff Scheme (CEPT) in 1992 was adopted to further cooperate in the economic growth of the region by accelerating the liberalisation of intra-ASEAN trade.\textsuperscript{10} Secondly, following this agreement on tariff reduction commitments under the AFTA for trade in goods, ASEAN Member Countries turned their attention towards enhancing trade in services and signed the ASEAN Framework Agreement on Services (AFAS) in 1995.\textsuperscript{11} This was in recognition that intra-ASEAN economic cooperation will strengthen and enhance trade and investments among ASEAN Member Countries.\textsuperscript{12} Thirdly, in 1998, the Framework Agreement on ASEAN Investment Area (AIA) was adopted, whose preamble reaffirms the importance of sustaining economic growth and development in all Member Countries through joint efforts in liberalising and promoting intra-ASEAN trade and investment flows enshrined in the Framework Agreement. One could say that the idea of promoting intra-ASEAN trade is upheld whenever the Framework Agreement is referred to in other ASEAN documents, such as in the

\textsuperscript{7} The preamble to the 1992 Framework Agreement on Enhancing ASEAN Economic Cooperation  
\textsuperscript{8} Article 2 of 1992 Framework Agreement on Enhancing ASEAN Economic Cooperation  
\textsuperscript{9} Article 6 of 1992 Framework Agreement on Enhancing ASEAN Economic Cooperation  
\textsuperscript{10} The preamble to the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area; Singapore, 28 January, 1992  
\textsuperscript{11} ASEAN Framework Agreement on Services (AFAS), Bangkok, Thailand, 15 December 1995; available at: <http://www.aseansec.org/6628.htm>  
\textsuperscript{12} The preamble to the 1995 ASEAN Framework Agreement on Services (AFAS);
agreements for the AFAS and the AIA, which constitute the framework of the AEC. Therefore, the objective to increase intra-ASEAN trade is clearly maintained in building the AEC.\textsuperscript{13}

The events that shaped cooperation in intra-ASEAN trade have been cumulative. Under the conviction that ASEAN industrial cooperation will increase intra-ASEAN trade and investment, there have been a series of ASEAN industrial developments.\textsuperscript{14} These initiatives constitute another core area for ASEAN economic cooperation. Three modalities of cooperation have been pursued since 1977, namely, the ASEAN Industrial Project (AIP), ASEAN Industrial Complementation (AIC) and ASEAN Industrial Joint Venture (AIJV). These three modalities were all later replaced by the ASEAN Industrial Cooperation (AICO) Scheme. In summary, the major ASEAN economic integration schemes are the AFTA, AFAS, AIA, and the AICO scheme.\textsuperscript{15}

The first part of this chapter deals with the major AEC instruments, namely, AFTA, AFAS and AIA. The second part deals with a series of ASEAN industrial economic cooperation schemes from AIC to AICO.

4.2 ASEAN Economic Community Instruments

4.2.1 From Preferential Trade Agreement to ASEAN Free Trade Area

(1) Preferential Trade Agreements

With the perceived significance of ASEAN economic cooperation, a United Nations

\textsuperscript{13} The preamble to the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area; the preamble to the 1995 ASEAN Framework Agreement on Services (AFAS); the preamble to the Framework Agreement on the ASEAN Investment Area; the preamble to the Basic Agreement on the ASEAN Industrial Cooperation Scheme (AICO Agreement); available at: <http://www.asean.org/1948.htm>

\textsuperscript{14} See, for example, the preamble to the Basic Agreement on the ASEAN Industrial Cooperation Scheme, \textit{supra} note 13

\textsuperscript{15} ASEAN Investment Area: An Update; available at: <http://www.aseansec.org/6480.htm>
(UN) team was commissioned by the ASEAN Foreign Ministers in 1969 and they prepared the Kansu Report in 1972.\textsuperscript{16} The Kansu Report first proposed the Preferential Trade Agreement (PTA) because they felt that ASEAN countries were not ready to have a free trade area or a customs union because of their economic nationalism and protectionism.\textsuperscript{17} The PTA, adopted at the Bali Summit in 1976 and signed by the foreign ministers in 1977, was the principal instrument for carrying out the promotion of intra-ASEAN trade and the first commitment of ASEAN countries to preferential joint trade liberalisation. It was the lowest form of economic integration which provides for tariff preferences for trade among ASEAN Member Countries. Under preferential trading arrangements, each ASEAN country would grant imports from other ASEAN Member Countries a discount on most-favoured-nation (MFN) tariffs, called margin of preference (MOP).\textsuperscript{18} Preferences were extended on a voluntary and product-by-product basis. The PTA was appropriate for the earlier stage of ASEAN since it was a mechanism whereby intra-ASEAN trade could be liberalised at a pace that was acceptable to all Member Countries.\textsuperscript{19}

\textsuperscript{16} UNDP’s initial technical assistance provided the basis for ASEANs early industrial development initiatives, such as the ASEAN Preferential Trading Agreement (PTA), the Basic Agreement on Industrial Projects and the Basic Agreement on ASEAN Industrial Joint Ventures; see the long partnership between ASEAN and the UNDP; at: <http://www.aseansec.org/20195.htm>

\textsuperscript{17} The Kansu Report (or Kansu-Robinson Report) sponsored by the UN proposed selective trade liberalisation due to ASEAN Member Countries’ disagreement with each other about the establishment of an ASEAN free trade area. For instance, Singapore and the Philippines wanted to establish an ASEAN free trade area or at least an across-the-board tariff cut whereas Indonesia, Malaysia and Thailand, on the other hand, being more cautious, preferred a more gradualist approach to protect their own national market and industries. As a result, the gradualist approach prevailed for the PTA was closer to the Indonesian concept than the Singaporean. Therefore, adopting the PTA agreement was a compromise between the proponents of free trade and those favouring protectionist policies; Dewi Fortuna Anwar (1994) \textit{Indonesia in ASEAN: Foreign Policy and Regionalism} (Singapore: ISEAS), pp. 69-70 and 78

\textsuperscript{18} At first, the level of MOP started at 10 per cent in 1977; ASEAN Secretariat, \textit{ASEAN: Economic Co-operation, Transition & Transformation}, supra note 1, p. 43; Severino, \textit{Southeast Asia in Search of an ASEAN Community: Insights from the former ASEAN Secretary-General}, supra note 2, p. 215

\textsuperscript{19} One of the basic rules of PTA was the rule of origin. According to the rule, the total value of the materials, parts or produce originating from non-ASEAN countries may not exceed 50 per cent of the value of the products manufactured or obtained and the financial process of manufacture is performed within the territory of the exporting contracting state. There was also a cumulative rule of origin specifying that products which used imported inputs which were themselves subject to preferential tariffs must have an aggregate ASEAN content of not less than 60 per cent of value; Gerald Tan (1992) ‘ASEAN Preferential Trading Agreement; Overview,’ in K. S. Sandhu, Sharon Siddique, Chandran Jeshurun, Ananda Rajah, Joseph L. H. Tan and Pushpa Thambipillai, \textit{The ASEAN Reader} (Singapore: ISEAS), 237, p. 237; Mya Than (2005) \textit{Myanmar in ASEAN: Regional Cooperation Experience} (Singapore: ISEAS), pp. 26 and 57
However, the PTA had little impact on intra-regional trade as it was based on a cumbersome item-by-item approach.\textsuperscript{20} ASEAN Member Countries, being protective of domestic industries and having import-substitution policies of the time, tend to include mostly items that were not likely to be extensively traded.\textsuperscript{21} Only a limited number of products were approved for preferential tariff reductions.\textsuperscript{22} In other words, ASEAN Member Countries were free to define sensitive lists of products for which the MOPs did not apply. After 1980, the PTA switched from being voluntary to an across-the-board approach under which a minimum preferential tariff cut of 20 per cent was applied to all intra-regional imports below a certain ceiling value but this import ceiling was progressively raised until 1984.\textsuperscript{23} Also, at the Third Summit in 1987, in an effort to promote intra-ASEAN trade, an ‘Enhanced PTA Programme’ was supplemented by other non-tariff commitments, but the imposition of further trade barriers was brought to a standstill and there was a rollback of NTBs.\textsuperscript{24}

According to the ASEAN Secretariat, there were several reasons for this failure.\textsuperscript{25} Firstly, the tariff cuts were not implemented on an across-the-board basis but were dependent on items offered by individual ASEAN Member Countries. Secondly, the size of the tariff cuts itself did not work. For example, until 1981, most of the items on the list had tariff reductions of only 10 per cent. In addition to this, the PTA covered only a limited scope in trade manufactures. Thirdly, the low impact on intra-ASEAN trade of the PTA is due to the failure of the PTA to deal with NTBs. Apart from these, the unpreparedness of ASEAN Members to pursue trade liberalisation at that time was

\begin{itemize}
\item \textsuperscript{20} For example, by 1986, the PTA applied to only about 5 per cent of intra-ASEAN trade; Mya Than, \textit{ibid.}, p. 27
\item \textsuperscript{21} Severino, \textit{Southeast Asia in Search of an ASEAN Community: Insights from the former ASEAN Secretary-General}, supra note 2, p. 216
\item \textsuperscript{22} It was estimated that in 1976, only USD 47 million worth of intra-ASEAN imports, less than 2 per cent of total intra-ASEAN trade; Mya Than, \textit{supra} note 19, pp. 26-27
\item \textsuperscript{23} \textit{Ibid.}, p. 27
\item \textsuperscript{24} See at: <http://www.aseansec.org/5117.htm>
\item \textsuperscript{25} Mya Than, \textit{supra} note 19, p. 27; Severino, \textit{Southeast Asia in Search of an ASEAN Community: Insights from the former ASEAN Secretary-General}, supra note 2, pp. 215-216; ASEAN Secretariat, \textit{ASEAN: Economic Co-operation, Transition & Transformation}, supra note 1, pp. 43-51
\end{itemize}
mentioned as a reason. The extensive national exclusion lists, i.e. sensitive lists, in ASEAN Member Countries effectively negated the PTA, which collectively became an obstacle to intra-ASEAN trade. Therefore, in order to further improve intra-ASEAN trade, new ways were considered by ASEAN. Under the stimulus of the NAFTA and the Maastricht Treaty in the EU, ASEAN started a framework for AFTA and couched it as a CEPT scheme at the Fourth ASEAN Summit meeting in Singapore 1992.

(2) ASEAN Free Trade Area

By turning ASEAN into a free trade zone, AFTA’s main feature was trade liberalisation through the elimination of intra-ASEAN tariffs and NTBs, which would then raise the efficiency and cost effectiveness of doing business and facilitate trade and investment consistent with the General Agreement on Tariffs and Trade (GATT) of the World Trade Organization (WTO). ASEAN is also facilitating trade not only among its Member Countries but also with groups of countries that share the principle of open regionalism and a rule-based multilateral trading system. Efforts were also made to develop linkages with other regional groupings, such as NAFTA, the Mercado Comun del Sur (MERCOSUR), the European Free Trade Association (EFTA), and the Southern African Development Community (SADC). The objective of AFTA is to ‘increase ASEAN’s competitive edge as a production base geared for the world market’, which could imply that promoting intra-ASEAN trade is only a secondary aim for AFTA.

26 ASEAN Members had fear and apprehension about the likely detrimental impact on production and employment in domestic industries, in particular infant manufacturing sector; Mya Than, ibid., p. 27; ASEAN Secretariat, ASEAN: Economic Co-operation, Transition & Transformation, ibid., p. 43
27 ASEAN Secretariat, ASEAN: Economic Co-operation, Transition & Transformation, ibid., p. 45
28 ASEAN Secretariat, ASEAN: Economic Co-operation, Transition & Transformation, ibid., p. 203
The main mechanism of AFTA is the CEPT Scheme. While PTAs reduced tariffs item-by-item on an individual basis, and allowed a difference between preferential tariff rates, CEPT reduces tariffs collectively and applies a common tariff. With regard to the principle of original production, CEPT reduced PTA’s 50 per cent to 40 per cent. Under CEPT, each Member Country allocates goods that are subject to tariffs on one of four indicative lists: Inclusion List (IL), Temporary Exclusion List (TEL), Sensitive List (SL) and General Exception List (GEL). Each list has different tariff reduction deadlines. Countries also have different deadlines; the less developed countries such as CLMV (Cambodia, Lao PDR, Myanmar and Vietnam) are allowed more time to liberalise.\textsuperscript{30} The CEPT scheme is unique in its flexibility and gradualism. However, this flexibility has proven to be a double-edged sword: On one hand, it caters to the wide developmental gap in ASEAN by allowing unique treatment for each Member Country, easing agreement negotiations; on the other hand, there have been abuses and backtracking of Member Countries which have led to a slow liberalisation process.\textsuperscript{31}

Behind the scenes of ASEAN host states’ promotion of trade liberalisation by implementing the AFTA, there have always been concerns as to the impact upon indigenous industries. For example, most ASEAN auto producing nations apart from Thailand have been concerned with the question whether indigenous auto industrial structures can survive.\textsuperscript{32} In particular, Malaysia’s delay in implementing AFTA is a widely reported manifestation of these concerns. Malaysia helped its national

\textsuperscript{30} For products covered under the CEPT scheme and the acceleration of the AFTA timetable, see ASEAN Free Trade Area (AFTA): An update at: <http://www.aseansec.org/7665.htm>

\textsuperscript{31} Vietnam, for instance, has put a larger than average proportion of products in its General Exception list, which accounts for 5.9 per cent of its total tariff lines, more than three and a half times the general proportion in ASEAN. Its General Exception List contains 165 product categories, including automobiles and motorcycles, computers, telecommunication and information technology equipment and food and beverage products; Lim and Tay, supra note 29, pp. 6–7

\textsuperscript{32} Major auto producing nations in Southeast Asia are Malaysia, the Philippines, Indonesia and Thailand; Andrew J. Staples (2008), \textit{Response to Regionalism in East Asia: Japanese Production Networks in the Automotive Sector} (New York: Palgrave MacMillan), p. 195
automakers, such as ‘Proton and Perodua’, to dominate its national auto market through a national car project with the policies designed to maintain a high degree of local content and low foreign penetration. However, the viability of these firms was in doubt with the full implementation of AFTA in 2003. The implementation would require Malaysia to lower import duties on Completely Built Ups (CBUs) and components from participating Member Countries, which would lead to the influx of foreign high quality competitors against the national automakers’ products. During this delay, Malaysia lost its lead position in auto production and sales to Thailand although national automakers expanded production capacity to contend with projected domestic demand and intra-ASEAN exports. In late 2004, Malaysia agreed to lower import duties under the pressures of Thailand, Indonesia and the lobbying by global automakers, but still locally produced cars in Malaysia still continued to enjoy a 50 per cent exercise rebate while imported cars will face exercise rates between 90 and 250 per cent. The Malaysian government is still known to protect local motor vehicle industry and channel investment and production to targeted motor vehicle products through its National Automotive Policy. Malaysia’s industry reportedly manufactures automotive components to the ‘Proton level’ rather than to the more rigorous specifications of global automakers, keeping many of its parts producers out of the global market. Thus, some Malaysian auto parts makers reportedly moved to Thailand to enhance their export competitiveness. What happened in this case was opposite to the intention of the Malaysian protectionist policy. Malaysian government’s policy was to protect local industries and preserve national markets for them. On the contrary, the Malaysian local companies, because of the policy, had to move to another country to improve their

33 In 2003, the sales have been also declined in Malaysia as Malaysian consumers were reluctant to purchase locally produced cars in anticipation of AFTA; ibid., p. 155
34 Ibid., pp. 155 and 195
36 Ibid., p. 7-7
competitiveness. Therefore, it shows that the protectionist policy to protect a local industry from foreign competition not only could lower the competitiveness of the local industry but also the policy itself may not be what the local industry actually preferred. It highlights the importance of considering the needs of the private sector.

Regarding the application of CEPT rates, it requires compliance with the stipulated Rule of Origin agreed upon between the ASEAN Member Countries. In other words, to get the reduced tariff rates, the benefits of regional integration, the product shall be considered as originating from ASEAN and supported by a Certificate of Origin issued by an ASEAN Member government designated by the exporting Member Country and notified to the other Member Countries. Particularly when products are not wholly produced or obtained in the exporting Member Country, they have to satisfy a certain rule, called the ‘ASEAN Content.’ However, it has been criticised that application of Rule of Origin is unclear. Screening and procedures in acquisition of a Certificate of Origin are different in detail in each Member Country. In addition, some parts manufacturers dependent on imports for materials have difficulties in satisfying the ASEAN content rule in some Member Countries where supporting industries are weak.

The implementation of economic integration under AFTA to date has been less impressive than expected as a major instrument of increasing intra-ASEAN trade. Despite the fact that a large percentage of intra-ASEAN trade is eligible for low or zero tariffs, only a very small percentage of intra-ASEAN trade in fact utilises the lower

37 See the Rules of Origin for the CEPT, at: <http://www.aseansec.org/10149.htm>; in order to further invigorate intra-ASEAN trade, ASEAN has been considering expanding and easing the standards for the rule of origin. Now, under ATIGA, the goods which are not wholly obtained from a Member Country can be considered as an ASEAN product if they satisfy at least one of the two requirements: if a product has a regional value content (RVC) of forty per cent or if all non-ASEAN materials used in the production have undergone a change in tariff classification (CRC); for the detail of the revised CEPT rules, see the chapter 3 of the ASEAN Trade in Goods Agreement (ATIGA), Cha-am, Thailand, 26 February, 2009; available at: <http://www.aseansec.org/22223.pdf>

38 For example, the application of Rules of Origin is unclear; Lim and Tay, supra note 29, p. 6-7

39 This was the case in a country such as the Philippines according to the interview regarding the utilisation and assessment of CEPT by Japanese-affiliated firms; Japan External Trade Organization Overseas Research Department, ‘ASEAN’s FTAs and Rules of Origin’, November 2004, at p. 4
AFTA preferential rates. AFTA has been reminded frequently to be wary of previous failures at economic cooperation.\(^{40}\) The utilisation of the CEPT has been relatively low due to: (i) the lack of clarity and transparency in procedures, particularly in the application of the Rules of Origin; (ii) the lack of mutual trust between the preference-receiving country and the preference-granting country; (iii) the low margin of tariff preferences between CEPT rates and MFN rates which makes the benefits of the CEPT scheme unattractive;\(^{41}\) (iv) the lack of private sector awareness about the concessions under AFTA; and (v) bureaucratic inefficiency.\(^{42}\)

At the fourteenth ASEAN Summit in 2009, in acknowledgement of the important role and contribution of the business sector in enhancing trade and investment among ASEAN Member Countries, the ASEAN Trade in Goods Agreement (ATIGA), a recent improvement of the AFTA, has been adopted.\(^{43}\) The ATIGA integrates all ASEAN commitments and initiatives related to trade in goods into one comprehensive framework.\(^{44}\) While it is still new and its effectiveness remains to be seen, ATIGA addresses some of the shortcomings embedded in the AFTA and contains a number of key features that would enhance transparency, certainty and predictability in the ASEAN legal framework and AFTA’s rules-based system, which is important to the ASEAN business community.\(^{45}\)

\(^{40}\) Lim and Tay, supra note 29, p. 6-7
\(^{41}\) Declining margins of preference is caused as MFN rates have also come down at the same time; Hadi Soesastro (2005) ‘Accelerating ASEAN Economic Integration: Moving Beyond AFTA’ CSIS Working Paper Series WPE 091, p. 2
\(^{42}\) It has also been criticised that the details of the CEPT scheme have not been thoroughly drawn out; J.L. Tongzon (2005) ‘Role of AFTA in an ASEAN Economic Community’ in Denis Hew (ed.) Roadmap to an ASEAN Economic Community (Singapore: ISEAS), 127, p. 135; Soesastro, ‘Accelerating ASEAN Economic Integration: Moving Beyond AFTA’, supra note 41, p. 2
\(^{43}\) The ATIGA is adopted on 26 February, 2009 and entered into force since 17 May 2010; the preamble to the ASEAN Trade in Goods Agreement (ATIGA), Cha-am, Thailand, 26 February, 2009, supra note 37
\(^{44}\) The ATIGA integrates the following agreements: the Agreement on ASEAN Preferential Trading Arrangements (1977), the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area (1992), the ASEAN Agreement on Customs (1997), the ASEAN Framework Agreement on Mutual Recognition Arrangements (1998), the e-ASEAN Framework Agreement (2000), the Protocol Governing the Implementation of the ASEAN Harmonised Tariff Nomenclature (2003), the ASEAN Framework Agreement for the Integration of Priority Sectors (2004), the Agreement to Establish and Implement the ASEAN Single Window (2005); the preamble to the ASEAN Trade in Goods Agreement (ATIGA), Cha-am, Thailand, 26 February, 2009, supra note 37
\(^{45}\) Joint Media Statement of the Fortieth ASEAN Economic Ministers’ (AEM) Meeting, Singapore, 25-26
First of all, the arrangement includes greater transparency of the trade liberalisation processes and trade facilitation in areas such as customs and standards, technical regulation and conformity assessment procedures. Moreover, ATIGA noted that NTBs can be more trade restricting than tariffs as can be learnt from the failure of the PTAs. There has been little progress on the removal of NTBs because there has been no agreement on what this entails. In line with establishing the AEC, ASEAN Member Countries have emphasised working on eliminating NTBs, which includes the process of verification and cross-notification; updating the working definition of non-tariff measures (NTMs)/ non-tariff barriers (NTBs) in ASEAN; and the setting-up of a database on all NTMs maintained by Member Countries. Considering the broad and vague scope of NTBs, ATIGA stressed on-going work on reviewing the NTMs to identify measures that pose prohibitive barriers to trade for elimination and established the mechanism of a continuous monitoring of NTMs. Before the elimination of NTBs, identifying NTBs is a first step which requires considerable amount of work. Although the ASEAN Secretariat maintains and updates the ASEAN Trade Repository regarding trade information including NTBs, the database therein is mainly based on the notification from the ASEAN Member Countries to the Senior Economic Official Meeting (SEOM) and the ASEAN Secretariat. As the monitoring mechanism of NTBs depends on the database of the ASEAN Trade Repository, it will not work effectively

August 2008; at: <http://www.aseansec.org/22738.htm>
46 For this purpose, an ASEAN Trade Repository, an online database of trade and customs legislation and procedures, has been created under the ATIGA; Article 13 of the ATIGA; however, issuing a Certificate of Origin still belongs to a government authority of a Member Country as before although the Operational Certificate Procedures set out under Annex 8 of the ATIGA.
47 Soesastro, ‘Accelerating ASEAN Economic Integration: Moving Beyond AFTA’, supra note 41, p. 2
48 <http://www.aseansec.org/19585.htm>
49 Non-tariff barriers (NTB) means measures other than tariffs which effectively prohibit or restrict imports or exports of goods within Member Countries; Article 2 (1) (k) of the ATIGA.
50 ASEAN Member Countries shall review the non-tariff measures in the database referred to the ASEAN Trade Repository with a view to identifying non-tariff barriers (NTBs). The elimination of the identified NTBs shall be dealt with by the Co-ordinating Committee for the Implementation of the ATIGA (CCA), the ASEAN Consultative Committee on Standards and Quality (ACCSQ), the ASEAN Committee on Sanitary and Phytosanitary (AC-SPS), the working bodies under ASEAN Directors-General of Customs and other relevant ASEAN bodies, as appropriate, in accordance with the provisions of the ATIGA, which shall submit their recommendations on the identified non-tariff barriers to the AFTA Council through Senior Economic Official Meeting (SEOM); Article 42 of the ATIGA.
without the ASEAN Member Countries’ active notification of NTBs. The key point of increasing trade flows within ASEAN relies on the Member Countries’ political will to participate in removing trade barriers in ASEAN. Their attention has been to focus not only on trade facilitation activities in the areas of customs, but also on the elimination of technical barriers to trade, which would represent concrete, practical and business friendly initiatives that should lower the cost of doing business in the region. At the same time, emphasis needs to be placed on promoting awareness and understanding of the long-term economic benefits of the AFTA to the private sector.\(^5^1\) This shall be supported by the establishment of active dispute settlement mechanisms to prevent the ASEAN Member Countries’ backtracking from the commitments they made under AFTA, which will ensure the implementation of the AFTA’s rules and its procedural clarity and transparency.\(^5^2\) All things considered, these improvements in ATIGA are welcome and expected to help businesses navigate and make use of the AFTA more easily.\(^5^3\)

Despite its shortcomings, the development of the AFTA was a clear sign of ASEAN Member Countries’ stronger political will of the economic regional integration in ASEAN. It should be remembered that the AFTA, the leading instrument to increase intra-ASEAN trade, has been expanded and become one of the principal components of the AEC together with the AIA and the AFAS.\(^5^4\)

### 4.2.2 ASEAN Framework Agreements on Services

ASEAN has also made progress in liberalising its trade in services, as services take a

\(^{51}\) Tongzon, *supra* note 42, p. 144

\(^{52}\) See Art. 25 of the ASEAN Charter; see Section 2.3.2 Enforcement Mechanisms in Chapter 2

\(^{53}\) Lim and Tay, *supra* note 29, p. 7

\(^{54}\) See the ASEAN Economic Agreements that ASEAN Economic Ministers signed at the Fourteenth ASEAN Summit in Cha-am, Thailand on 26 February, 2009, including ASEAN Comprehensive Investment Agreement (ACIA) and Protocol to Implement the Seventh Package of Commitments under the ASEAN Framework on Services (AFAS); at: <http://www.aseansec.org/22210.htm>
larger share of Member Countries’ economies and account for more than 50 per cent of the total foreign direct investment (FDI) inflows into the region. Free flow of trade in services is one of the most important elements in establishing ASEAN as a single market economy, where there will be substantially no restriction to ASEAN services suppliers in providing services and in establishing companies across national borders within the region, subject to domestic regulations. Services liberalisation is also important because it is vital to easing of the flow of goods within the region and to integrating the regional economy in general. Barriers to services trade potentially have much greater leverage on economic performance than do barriers to goods trade. Effective policies to liberalise trade in services require a detailed knowledge of border and investment restrictions on individual service industries. Border restrictions limit the flow of services into the country, while investment restrictions affect foreign firms’ competitive position relative to that of local firms. Services trade reform encompasses non-discriminatory measures that impede indigenous service suppliers as well as those measures that explicitly discriminate against foreigners. This implies indigenous firms can also benefit from the reform.

There are two approaches towards services liberalisation among the different trade agreements at the regional trade level: one is the ‘negative list’ approach; and the other is the ‘positive list’ approach. These differ according to the negotiating modality adopted by members to regional agreements. The negative list approach is also called

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55 ASEAN Economic Community Blueprint, para. 20; text available at: <http://www.aseansec.org/21083.pdf>
56 Severino, Southeast Asia in Search of an ASEAN Community: Insights from the former ASEAN Secretary-General, supra note 2, p. 231
‘top-down’ approach whereas the positive list approach is called ‘bottom-up’ approach. The former is based on negative listing, whereby all service sectors and measure are to be liberalised unless otherwise specified in annexes containing reservations or non-conforming measures. Accordingly, any exceptions to sectoral coverage and to non-discriminatory treatment must be specified in the annexes, either being in the form of permanent exceptions or subject to future liberalisation through consultations or periodic negotiations. The latter is based on positive listing, whereby members to an agreement list national treatment (NT) and market access commitment specifying the type of conditions under which foreign service suppliers can enter a given market or the type of treatment that will be granted to services or service suppliers in sectors included in the schedules of commitments. Liberalisation is to be progressed through rounds of negotiations.

ASEAN and MERCOSUR have adopted a positive list approach while the majority of other regional agreements have opted for the negative list approach.

Following the framework of the General Agreement on Trade in Services (GATS) of the WTO, AFAS, signed on 15 December 1995 at the Fifth ASEAN Summit in Bangkok, Thailand, aims to create a free trade area in services in the sectors of air transport services, maritime transport services, business and professional services such as accounting, engineering, telecommunication and financial services. As AFAS is following the GATS structure, it distinguishes four modes of service supply. Under

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59 According to this approach, the concept of ‘market access’ does not appear as a separate Article in the agreement but is addressed under disciplines covering core obligations including the obligation to provide MFN treatment, NT, guaranteed freedom of cross-border trade and to disclose non-discriminatory quantitative restrictions; ibid., p. 90

60 The commitments undertaking for each service sector, once listed, are considered to be binding but may be modified or withdrawn after a certain period of time, subject to negotiating appropriate compensation; ibid., p. 90

61 Ibid., p. 90; the GATS indeed combines both positive and negative listing approaches. The positive list is with respect to the sectors committed, while the negative list is with respect to non-conforming measures affecting market access and NT. The use of positive list as being associated with GATS essentially refers to the listing of sectoral commitments; Pasadilla, supra note 58, pp. 10-11

62 The four modes of supply, each of which constitute the definition of trade in Services in Article I of the GATS, are as follows: (1) cross-border supply; (2) consumption abroad; (3) commercial presence in the consuming country; and (4) temporary movement of natural persons. The establishment of branches, agencies or firms to deliver some kind of services will be included in Mode 3, commercial presence, which amounts to an international agreement to liberalise investment.
the GATS, the establishment of branches, agencies or firms to deliver some kind of services will be included in Mode 3, commercial presence.\textsuperscript{63} The GATS was a beginning of negotiations on rule-making areas of services whose work started in 1995 to establish disciplines on domestic regulations i.e. the requirements foreign service suppliers have to meet in order to operate in a market. It focused on qualification requirements and procedures, technical standards and licensing requirements. Commitments under AFAS are made according to a positive list of services sub-sectors and a negative list of remaining trade restrictive measures. Therefore, ASEAN Member Countries choose the sub-sectors in which they wish to make binding market opening commitments and, in those sectors and for each mode of supply, identify all measures that limit the provision of services by foreigners.\textsuperscript{64}

The AFAS provides the broad guidelines for ASEAN Member Countries to progressively improve market access and ensure NT for services suppliers among ASEAN countries. It entails cooperation in improving efficiency and competitiveness of services providers, reducing restrictions to trade in services among Members, and liberalising trade in services beyond the scope of the GATS, which is referred to as the ‘GATS-Plus’ principle. That is to say, under AFAS, ASEAN Member Countries are expected to schedule commitments that are wider and deeper than those under GATS.\textsuperscript{65}

ASEAN Member Countries also use the request-and-offer format for carrying out their

\textsuperscript{63} In contrast to the WTO system which accommodates the right of establishment as Mode 3 (commercial presence) together with all other types of services under a single article of the GATS, the EU Treaty articulated the freedom of establishment in a separate chapter from the freedom to supply services considering that the right of establishment entails any form of settlement by moving companies and firms or by setting up agencies, branches or subsidiaries in a host state for economic purposes which implies a potent influence upon the economy of the host state.


\textsuperscript{65} ASEAN Secretariat 2007, ASEAN Integration in Services, p. 4; available at: <http://www.aseansec.org/20661.pdf>; GATS V permits additional mechanism of regional services arrangements (RSAs) to eliminate barriers on trade in services as among themselves without extending these concessions to non-members, provided that such RSAs involve substantial sectoral coverage and involve the elimination of substantially all discrimination in covered sectors, and do not raise barriers to non-member within covered sectors; Weiler, The \textit{EU, the WTO and the NAFTA}; (Oxford: OUP) p. 175
regional services negotiations, similar to the GATS. In addition, AFAS contains references to the GATS in general although it is not clear whether it can be read as a direct incorporation of all the provisions of GATS or whether they only refer to general principles and terms. However, in reality, most AFAS commitments do not go substantially beyond those scheduled under the GATS.

In order to provide measures to deepen and broaden internal economic integration and linkages in services liberalisation, with the participation of the private sector, ASEAN Member Countries identified eleven priority sectors to be fully integrated by 2010. One of the rationales for this priority sector approach is to promote tangible progress on a limited range of sectors first, which could show the way for other sectors in the future. The liberalisation processes under AFAS have been carried out through rounds of negotiation mainly under the Coordinating Committee on Services (CCS) with several sectoral negotiating groups corresponding to the priority sectors. The officials of ASEAN Member Countries have started with a three-year cycle of rounds of services negotiations since 1996, and carried out four rounds of

66 Stephenson and Nikomborirak, supra note 58, p. 92
67 Article XIV:1 holds: The terms and definitions and other provisions of the GATS shall be referred to and applied to matters arising under this Framework Agreement for which no specific provision has been made under it; Markus Krajewski, ‘Services Liberalization in Regional Trade Agreements: Lessons for GATS ‘Unfinished Business’?’ in Bartels.L. and Ortino, F. Regional Trade Agreements and the WTO System, 175, p. 190
68 Even in the case they do, domestic policy is usually more liberal on an MFN basis such that there seem to be no preferences to ASEAN Member Countries; Fink, supra note 64, p. 275
69 Eleven priority sectors are: Agro-Based Products; Electronics; Rubber-Based Products; Wood-Based Products; e-ASEAN (Telecommunications and IT services); Tourism; Automotive; Fisheries; Textiles and Apparels; Air Travel and Healthcare. These sectors are designated through the following agreements: the ASEAN Framework Agreement for the Integration of Priority Sectors together with the Roadmaps for the Integration of Priority Sectors signed by the ASEAN Leaders on 29 November 2004 in Vientiane, Lao PDR and the ASEAN Framework (Amendment) Agreement for the Integration of Priority Sectors signed by the ASEAN Economic Ministers on 8 December 2006 in Cebu, the Philippines.
70 Fink, supra note 64, p. 275
71 There are currently six sectoral working groups under the CCS; business services, construction, healthcare, maritime transport, telecommunication and IT services, and tourism sectoral working groups. There is also one caucus on education services. Despite the grouping, ASEAN Member Countries could also schedule liberalisation commitments in other services sector. In addition, there are sectoral bodies in transport, finance and investment respectively since 1999. Those are: the Air Transport Working Group (ATWG) under the purview of ASEAN Transport Ministers; the Working Committee on ASEAN Financial Services Liberalization under AFAS under the purview of ASEAN Finance Ministers; the Coordinating Committee on Investment (CCI) undertaking the services liberalisation procedures incidental to manufacturing, agriculture, fishery, forestry, and mining and quarrying under the framework of ASEAN Investment Area (AIA) Agreement; ASEAN Secretariat 2007, ASEAN Integration in Services, supra note 65, p. 4
negotiations pursuant to Article IV of AFAS and finalised the Seven Packages of Commitments under the AFAS.\textsuperscript{72} The AEC Blueprint provides the parameters that schedule packages of commitments for every round should follow.\textsuperscript{73} It is noteworthy that considering the targets and timelines provided by the AEC Blueprint, the liberalisation of trade in services is accelerated by undertaking consecutive rounds every two years beginning in 2008 and ending in 2015.\textsuperscript{74}

ASEAN continues to work on further expanding and deepening the negotiations to cover all sectors and all modes of supply. Steps are being taken to achieve a free flow of services by 2015 with flexibility through the ASEAN Minus X formula.\textsuperscript{75} Accordingly, two or more Members may conduct negotiations and agree to liberalise trade in services for specific sectors or sub-sectors while other Members may join at a later stage when they are ready.

Mutual Recognition Arrangements (MRAs) is a more recent development in ASEAN integration in services with a view to facilitate the flow of professional services providers within the region. An MRA enables professional service providers who are registered or certified in signatory Member Countries to be equally recognised in other signatory Member Countries. The ASEAN Coordinating Committee on Services (CCS)

\textsuperscript{72} Seven sets of schedules of specific commitments embodied in the Protocol to Implement the Initial Package of Commitments under the AFAS signed on 15 December 1997 in Kuala Lumpur, Malaysia; the Protocol to Implement the Second Package of Commitments under the AFAS signed on 16 December 1998 in Ha Noi, Vietnam; the Protocol to Implement the Third Package of Commitments under the AFAS signed on 31 December 2001; the Protocol to Implement the Fourth Package of Commitments under the AFAS signed on 3 September 2004 in Jakarta, Indonesia; the Protocol to Implement the Fifth Package of Commitments under the AFAS signed on 8 December 2006 in Cebu, the Philippines; the Protocol to Implement the Sixth Package of Commitments under the AFAS signed on 19 November 2007 in Singapore; and the Protocol to Implement the Seventh Package of Commitments under the AFAS signed on 26 February 2009, Cha-am, Thailand; see at: <http://www.aseansec.org/22221.htm>

\textsuperscript{73} AEC Blueprint, \textit{supra} note 55, para. 21(v), states that schedule packages of commitments for every round according to the following parameters:

\begin{itemize}
  \item No restrictions for Modes 1 and 2, with exceptions due to bona fide regulatory reasons (such as public safety) which are subject to agreement by all Member Countries on a case by-case basis;
  \item Allow for foreign (ASEAN) equity participation of not less than 51 per cent by 2008, and 70 per cent by 2010 for the 4 priority services sectors; not less than per cent by 2008, 51 per cent by 2010, and 70 per cent by 2013 for logistics services; and not less than 49 per cent by 2008, 51 per cent by 2010, and 70 per cent by 2015 for other services sectors; and
  \item Progressively remove other Mode 3 market access limitations by 2015\textsuperscript{74}
\end{itemize}

\textsuperscript{74} AEC Blueprint, \textit{supra} note 55, para.21(iii)

\textsuperscript{75} See for ASEAN Minus X formula in Section 2.2.2 Evolution of the ASEAN Charter
established an Ad-hoc Expert Group on MRA under its Business Services Sectoral Working Group in July 2003.\textsuperscript{76} However, MRAs would not necessarily be ASEAN-wide and could be concluded on a bilateral basis. The progress in MRAs is slow and no modalities for concluding MRAs have been issued.\textsuperscript{77}

The vision of a free trade area in services seems far from reality. First of all, perceptions on the merits of open services market could vary across ASEAN economies and across sectors even within one country.\textsuperscript{78} Further, regardless of different levels of openness in the economies of the ASEAN Member Countries, they generally have substantial restrictions placed on various service sectors.\textsuperscript{79} Stephenson and Nikomborirak argue that many barriers to cross-border flows of capital and labour remaining among ASEAN countries have served to protect local businesses and preserve employment among local nationals and while contributing to the inefficiency and non-competitiveness of the region’s service industries.\textsuperscript{80} Foreign trade barriers for services are mostly very sector specific and subject to domestic regulations, often taking the form of opaque regulatory measures. Consequently, the lack of progress towards regional service liberalisation under the AFAS can be attributed to the lack of political will and genuine commitment to opening up the service market in light of the desire by domestic services firms to maintain their protected status; weakness in the negotiating framework; and institutional limitations.\textsuperscript{81} Secondly, insufficient inter-ministerial coordination in some Member Countries arguably causes slow progress in services negotiations. Trade negotiators often do not have the authority to take decision on

\footnotesize{\textsuperscript{76} See the actions and schedules provided in AEC Blueprint, \textit{supra} note 55, para. 21  
\textsuperscript{77} Fink, \textit{supra} note 64, p. 275  
\textsuperscript{78} Fink, \textit{supra} note 64, p. 276  
\textsuperscript{79} \textit{Ibid.}; for example, Singapore, which hosts competitive service industries, will advocate services liberalisation but other Member Countries may not support as such due to the concerns that domestic services suppliers would lose out from greater foreign competition. Vietnam also welcomes greater foreign participation in the provision of health services to improve the quality and reach of services, but is reluctant to open up distribution services, fearing the displacement of traditional domestic retailers; Fink, \textit{supra} note 64, p. 276  
\textsuperscript{80} Stephenson and Nikomborirak, \textit{supra} note 58, p. 97  
\textsuperscript{81} \textit{Ibid.}, p.98}
services sectors that are under the purview of specialised ministries. Governments are unwilling to commit to changes in laws which usually require parliamentary approval, which adds to the lack of decision power during the negotiations.\(^\text{82}\) Thirdly, a defensive negotiating stance of ASEAN Members towards services liberalisation originates from the concern that regional commitment made under AFAS may increase the pressure on multilateral level negotiations in the WTO.\(^\text{83}\) AFAS has opted for a liberal rule of origin in services that any foreign-owned firm that is established and has substantial business interests in an ASEAN economy benefits from market-access conditions under AFAS.\(^\text{84}\) In order to sustain negotiating positions at the WTO, ASEAN Member Countries may not be willing to commit at the regional level particularly if the benefits of margin of preferences of AFAS commitments are small.\(^\text{85}\) The governments of the ASEAN Member Countries may be reluctant to schedule wider and deeper regional commitments until the completion of the services negotiations under the Doha Development Agenda.\(^\text{86}\) Fourthly, as the AFAS takes the GATS-plus approach, the issues inherent in the GATS negotiations will continue to pose obstacles to services trade liberalisation in the ASEAN region on top of its own internal problems. With regard to the commitment in specific sectors under the GATS, it has been said that the WTO members had difficulties in understanding the scope of the NT obligation even for

\(^{82}\) Fink, \textit{supra} note 64, p. 276
\(^{83}\) \textit{Ibid.;} to date, all ASEAN Member Countries except Lao PDR are WTO members.
\(^{84}\) The benefits of AFAS shall be denied to a service supplier who is a natural person of a non-Member Country or a juridical person owned or controlled by persons of a non-Member Country constituted under the laws of a Member Country, but not engaged in substantive business operations in the territory of Member Countries: AFAS Article VI on the denial of benefits; rules of origin in services determine the extent of preferences entailed in market opening commitments that countries undertake in FTAs. A liberal rule of origin enables service providers from non-member countries to benefit from improved market access negotiated under an FTA if service providers from non-members are established in at least one FTA member country first. If entry conditions in at least one member country are liberal, a non-restrictive rule of origin will de facto afford broad market access within the FTA territory to service providers from non-FTA countries. By contrast, if a restrictive rule of origin is chosen, only a subset of service providers established in an FTA area benefits from liberalisation commitments undertaken by member countries; Carsten Fink and Deunden Nikomborirak (2007) ‘Rules of Origin in Services: A Case Study of Five ASEAN countries’, \textit{World Bank Working Paper WIPS} 4130, p. 4
\(^{85}\) Fink, \textit{supra} note 64, pp. 276-277
\(^{86}\) Regarding the most recent development in services negotiations, see a draft services text in the annex of the report of the chair of the services negotiations issued on 26 May 2008, which can be downloaded at: \texttt{<http://www.wto.org/english/news_e/news08_e/serv_may08_e.htm>
scheduled sectors because of confusion created by the overlap between NT and the market access commitment. At any rate, each ASEAN Member Country has a different approach, with the result that the overall position is fragmented and not influential in services negotiations in the WTO. It is also problematic that ASEAN is not operating as a group in the GATS and hence does not have a single voice, and is consequently punching well below its considerable potential weight in dealing with its own trade matters at the WTO level.

Barriers to market access and equal treatment in services trade in the ASEAN region involves some form of investment restrictions, in particular with respect to foreign equity share in domestic enterprises, types of commercial establishment allowed, scope of services, and employment of foreign personnel. The rules that apply to the establishment of a commercial presence are similar to those stated in the national foreign investment laws, which apply to all foreign services suppliers, not just from ASEAN. Thus, ASEAN services suppliers receive no preferential treatment. Further, there is no freedom of movement of natural persons within the region to supply a service except for intra-corporate transferees. Overall, the AFAS seems to be ineffective and the benefits to be derived from it are limited. Most AFAS commitments do not go substantially beyond those scheduled under the GATS. In addition, the

87 NT obligation in GATS only applies to the scheduled services submitted by the WTO Member Countries. Market access commitment was particularly inserted considering discriminatory measures preventing new service suppliers from entering the market. Some evidence suggests that some WTO members may not have fully understood the scope of NT obligations for scheduled sectors, or may have inadvertently missed some measures. It was said that the confusions on the extent of the NT commitments for services came from the creation of market access commitment; Bosworth, M., (2002) ‘Most-favoured Nation and National Treatment’ in Stephenson, S., Findlay, C. and Yi S., Services Trade Liberalisation and Facilitation (The Australian National University; Asia Pacific Press), 18, pp. 23-25


89 Stephenson and Nikomborirak, supra note 58, p. 96

90 Intra-corporate transferees are defined as managers, executives and specialists who are employees of firms that provide services within an ASEAN country through a branch, subsidiary or affiliate established in the country and who have been in the prior employ of their firms outside the country for a period of not less than one year immediately preceding the date of their application for admission into the country; Lay Hong Tan and Anil Samtani (2002) ‘The Shifting Paradigm in Regional Economic Integration: The ASEAN Perspective’, paper presented at the International Business and Economics Research Conference, U.S.A. 22 August, 2002, p. 26; available at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=325484>
completion of the services negotiations under the Doha Development Agenda itself is way behind schedule. This indicates that relying on the GATS-plus principle will make ASEAN incapable in dealing with the major barriers with regard to the freedom of establishment and cross-border business activities in the ASEAN region.
4.2.3 Framework of ASEAN Investment Area

FDI constitutes a considerable share of the resource flows into ASEAN Member Countries as a major source of finance for economic development. ASEAN Member Countries have benefited from the extensive presence of FDI and multinational corporations (MNCs) in their respective economies. ASEAN adopted formal instruments to establish a single investment area that promotes and protects cross-border investment between nationals of Member Countries.

(1) ASEAN Agreement for the Promotion and Protection of Investments

The ASEAN Agreement for the Promotion and Protection of Investments (ASEAN IGA)\(^{91}\) is ASEAN’s first multilateral endeavour at enhancing investment cooperation. It evolves ASEAN’s contemporary investment regime, and also the procedural, cooperative, consultative and dispute processes and procedures that arose and largely embedded themselves in ASEAN’s subsequent investment agreements. However, the protocols of the agreement are confined to only three substantive areas: (i) stipulation of investor treatment, (ii) investor protections and compensation, and (iii) disputation mechanisms.\(^{92}\)

In the first area, Article IV of the ASEAN IGA sets a broad set of minimum standards that define the treatment of ASEAN nationals by specifying a ‘fair and

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\(^{91}\) Agreement among the government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments. Manila, 15 December 1987; it was signed in 1987 between the original six ASEAN countries (Indonesia, Malaysia, Philippines, Singapore, Thailand and Brunei Darussalam). It was amended in 1996 with the accession of Vietnam; the original text can be found at: <http://www.aseansec.org/12812.htm>, and the amending protocol at: <http://www.aseansec.org/6465.htm>

equitable’ treatment clause which is equivalent to MFN treatment. It also states that ASEAN nationals will receive protection in accord with those afforded a host country’s own nationals. However, the ASEAN IGA allows host states to withhold or confer NT on foreign investors on an ad-hoc basis. In the second area, there are two sets of investor protections identified under the ASEAN IGA: the repatriation of capital and earnings and compensation in the case of expropriation. As for the third area, the ASEAN IGA incorporated disputation mechanisms in the case of disagreement between contracting parties covered by the agreement. Provided a dispute cannot be settled within six months of its being raised, then either of the disputing parties can seek conciliation or arbitration. While the ASEAN IGA makes the disputation mechanisms binding on the extant party and vests in the arbitration court a binding authority clause, still no enforcement mechanism is specified. When the original ASEAN IGA was amended in 1996, Article 4 of the Protocol of the ASEAN IGA specifies that the ASEAN Protocol on Dispute Settlement Mechanism shall apply to the settlement of disputes under the agreement.

The impact of the ASEAN IGA is overall limited to intra-ASEAN investment flows due to its incapability of decoupling competitive national investment agendas

93 The ASEAN IGA, Art IV:2.
94 The ASEAN IGA, Art IV:1.
95 Jarvis, supra note 92, pp. 10 - 11; the ASEAN IGA Article IV: 4 states that ‘any two or more of the contracting parties may negotiate to accord NT’ but further adds that ‘nothing herein shall entitle any other party to claim NT.’
96 The ASEAN IGA, Art VI:1; Art. VII also includes the repatriation of proceeds through liquidation of assets, earnings accruing to employees and remittance of all forms of debt settlement by ASEAN nationals; Jarvis, supra note 92, p. 6
97 The ASEAN IGA, Art VI:1
98 ASEAN IGA, Art X:2; the nominated arbitration centres are the International Centre for Settlement of Investment Disputes (IGSID), the United Nations Commission on International Trade Law (UNCITRAL), the Regional Centre for Arbitration at Kuala Lumpur or any other regional centre for arbitration in ASEAN, whichever body the parties to the dispute mutually agree to appoint for the purposes of Conducting the arbitration.
99 Jarvis, supra note 92, p. 7
100 Protocol to Amend the Agreement among the government of Brunei Darussalam, the Republic of Indonesia, Malaysia, the Republic of the Philippines, the Republic of Singapore, and the Kingdom of Thailand for the Promotion and Protection of Investments, Jakarta, September 12, 1996; at <http://www.aseansec.org/1950.htm>
from broader objectives aimed at creating region-wide standards in the entry and treatment privileges afforded ASEAN nationals. There exists a tension between clauses stipulating equivalency standards in the treatment of ASEAN nationals and the broad exclusion clauses that seek to delimit the scope of equivalency treatment. The agreement also preserves national discretionary autonomy in respect of investment policy and investor treatment, particularly by leaving national requirements for foreign investors untouched which allows Member Countries to screen foreign investment and to shelter domestic investment from intra-regional investment competition. Further, it does not guarantee compensation or restitution and is not intended as an instrument of investor indemnity against civil unrest and or political risk.

(2) Framework Agreement on the ASEAN Investment Area

The Framework Agreement on the ASEAN Investment Area (AIA Agreement), signed in October 1998, was the first agreement to promote ASEAN as a single investment area, to increase regional cooperation on investment issues, and to provide guarantees of NT and transparency in investment regulations to investors. It became a part of the AEC Blueprint which calls for ‘a free and open investment regime’ that is designed to serve as a crucial step in attracting FDI to the ASEAN economies. The AIA agreement is the vehicle for this integration of ASEAN member investment regimes. The AIA Agreement, working in tandem with the ASEAN IGA, is still in force, pending the ratification of the new ASEAN Comprehensive Investment Agreement (ACIA) by all

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102 Jarvis, supra note 92, p. 10
103 See, for example, the ASEAN IGA, Art IV:1 regarding conferring NT or ASEAN IGA, Art VI:1 regarding the rights of expropriate foreign invested assets with the derogation on grounds of public provisos with a ‘fair market value’ compensation clause.
105 AEC Blueprint, supra note 55, Section II.A3.
ASEAN Members.

The AIA Agreement binds Members to eliminate investment barriers, liberalise investment rules and policies, grant national treatment and open up industries.\textsuperscript{106} In order to oversee implementation, a ministerial body, the AIA Council, and a Coordinating Committee on Investment was established. The AIA Agreement is significant in extending national treatment to ASEAN investors by 2010 and to all, including non-ASEAN investors by 2020.\textsuperscript{107} The removal of exceptions to free entry and national treatment for non-ASEAN investors was later brought forward to 2010 from 2020 for ASEAN-6 (Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore and Thailand), and to 2015 for the rest of the ASEAN Member Countries.\textsuperscript{108}

The AIA Agreement introduces the concept of ‘ASEAN investor’ and it covers investments\textsuperscript{109} from sources within and outside the ASEAN region. According to the agreement, an ‘ASEAN investor’ is immediately accorded national and MFN Treatment in respect of any investment in a Member Country. An ‘ASEAN investor’ is defined as either (i) a national of a Member Country; or (ii) any juridical person of a Member Country, making an investment in another Member Country, the effective ASEAN equity of which taken cumulatively across all other ASEAN equities fulfils at least the minimum percentage required to meet the national equity requirements and other equity requirements of domestic laws and published national policies, if any, of the host country in respect of that investment.\textsuperscript{110}

\textsuperscript{106} Art. 3 (a)(iv) of the AIA Agreement.
\textsuperscript{107} Art. 4 (C) of the AIA Agreement.
\textsuperscript{108} Joint Press Statement of the Fourth Meeting of the ASEAN Investment Area Ministerial Council, Ha Noi, 14 September, 2001; available at: <http://www.aseansec.org/6477.htm>
\textsuperscript{109} It covers all direct investments except portfolio investments and matters relating to investments covered by other ASEAN agreements; Art. 2 of the AIA Agreement; Art 1 of the Protocol to Amend the AIA Agreement; Article 12 of the AIA Agreement deals with ‘Other Agreements’ and affirms the existing rights and obligations under the 1987 ASEAN ATIGA and its 1996 Protocol; investment in services is covered through the separate services negotiations conducted under the Coordinating Committee on Services; see Section 4.2.2 ASEAN Framework Agreements on Services.
\textsuperscript{110} An ‘effective ASEAN equity’ in respect of an investment in an ASEAN Member Country means ultimate holdings by nationals or juridical persons in that investment. A ‘national’ means a natural person having the citizenship of a Member Country in accordance with its applicable laws. A ‘juridical person’ means any legal entity duly constituted or otherwise organized under applicable law of a Member.
In short, an ASEAN investor is equal to a national investor in terms of the equity requirements of the host country. However, each Member Country is allowed to identify a Temporary Exclusion List (TEL) and a Sensitive List (SL) of industries or measures affecting investments, in which it is unable to open up or accord national treatment to ASEAN investors.\textsuperscript{111} The TEL is subject to review every 2 years and was planned to be progressively phased out in 2010 by all Member Countries except Vietnam, which will phase it out by 2013, and Cambodia, Lao PDR, and Myanmar by 2015.\textsuperscript{112} By the Protocol to Amend AIA Agreement in 2001 (2001 Amended AIA protocol),\textsuperscript{113} the TEL phase-out for manufacturing was advanced from 2010 to 2003 for all Member Countries except Cambodia, Lao PDR, and Vietnam, which were to comply by 2010.\textsuperscript{114} However, in contrast to this acceleration for the phase-out schedule for the TEL, there is no mention about the phase out period for the SL, allowing national discretion in the nomination of sectors to the list and only suggesting that this would be periodically reviewed via the AIA council.\textsuperscript{115} In addition, looking at the 2008 FDI TEL and SL for ASEAN Member Countries in manufacturing, agriculture, fishery, forestry, mining and quarrying sectors or in services incidental to those sectors, investments were still either prohibited or subject to stringent conditionality clauses including ceilings on foreign equity participation, joint venture requirements, forced government business cooperation contracts (BCC), directed sourcing requirements, domestic market access restrictions or export only clauses, stipulated land use provisions, or various approvals and screening requirements that place discretionary authority for investment approval in

\begin{footnotes}
\item[111] Art 7 (2) of the AIA Agreement
\item[112] Art 7 (3) of the AIA Agreement
\item[113] Protocol to Amend the Framework Agreement on the ASEAN Investment Area Ha Noi, 14 September 2001; available at: <http://www.aseansec.org/6467.htm>
\item[114] Art. 2 of the Protocol to Amend the AIA Agreement; this means that since 1 January 2003, ASEAN investors have enjoyed national treatment in the manufacturing sector of the first seven Member Countries.
\item[115] Jarvis, supra note 92, p. 20
\end{footnotes}
the hands of regional and local agencies.  

Furthermore, as of the ratification of the 2001 Protocol to Amend the AIA Agreement, for the compliance requirements in terms of the phasing out of the TEL by 2003 (except for Cambodia, Lao PDR, Vietnam, 2010), some Member Countries have produced a flurry of re-classifications and re-designations in the TEL.

The 2001 Amended AIA protocol stipulated sector coverage exclusive to direct investments and services incidental to manufacturing, agriculture, fisheries, forestry, and mining and quarrying. It is lamentable that the AIA Agreement has not addressed the intra-regional investment liberalisation in strategic sectors, such as telecommunications, financial services, infrastructure, transportation, or print, electronic and broadcast media, where national conditionality clauses and protectionist restrictions remain strong. Concerns arise whether setting-up the exclusive sector coverage limits the extent of investment liberalisation only to these industries by contrast to the original AIA Agreement text which specifies ‘all’ industries.

Furthermore, while the ASEAN Secretariat thus dutifully carries the TEL and SL provided by its Member Countries, when cross-checked against the investment stipulations required at point of entry by the relevant national authorities, wide discrepancy appears to exist between the stated restrictions and conditionality requirements listed with the ASEAN Secretariat, which implies the ASEAN Member Countries’ under-reporting of investment conditionality clauses and restrictions. For example, while Indonesia did not publish a TEL in line with the 2003 phase-out

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116 2008 ASEAN FDI TEL and SL incidental to the manufacturing, agriculture, fisheries, forestry, and mining and quarrying sectors; available at: <http://www.aseansec.org/18657.htm>; Jarvis, *supra* note 92, pp. 20-21

117 See, for example, the TEL for the Opening up of Industries for manufacturing, agriculture, fisheries, forestry, and mining and quarrying sectors: Vietnam; at: <http://www.aseansec.org/18657.htm>; Jarvis, *supra* note 92, p. 22

118 Art. 1 of the AIA Agreement; 2008 ASEAN Foreign Direct Investment Temporary Exclusion List and Sensitive List incidental to the manufacturing, agriculture, fisheries, forestry, and mining and quarrying are available at: <http://www.aseansec.org/18657.htm>

119 Jarvis, *supra* note 92, pp. 18 and 20; see also Art. 3 (3) of the ASEAN Comprehensive Investment Agreement (ACIA), *supra* note 285

120 Jarvis, *supra* note 92, pp. 21-22
agreement under the 2001 Amended AIA protocol, it only published the Negative List under the Presidential Regulations that essentially circumvent the TEL. Similar trends are also apparent in the case of Malaysia and Thailand who no longer publish a TEL and claim ‘nil’ inclusion in terms of prohibited sectors, but have ramped up the SL or moved to a series of increasing conditionality clauses that range from restricted geographic zones and location clauses, equity restrictions, directed sourcing requirements or restricted market access and export quota requirements. Therefore, to what degree the AIA represents investment liberalisation is questionable. The Member Countries’ obligations under the AIA are ostensibly adhered to in terms of non-published investment restrictions or closed sectors and thus, all foreign investments are eventually subject to national approval or a permit approval process. Thailand, Malaysia and Singapore have each adopted this model, driven mostly by a desire to attract extra-regional FDI and appear ‘open for business.’ The AIA continues to display weakness that allow it to be outmanoeuvred by ASEAN Member Countries’ protectionist techniques to control foreign investments through investment screening, approval processes, compliance requirements and conditionality clauses.

(3) ASEAN Comprehensive Investment Agreement

121 See the Negative List in the Presidential Regulation No. 111 of 2007 and the Presidential Regulation No. 77 of 2007 concerning the list of business fields closed and open with conditions to investment; see supra note 304; according to the analysis of the Presidential Regulation No. 77 of 2007 by Jarvis, there were over 25 sectors ‘closed’ to foreign investment, 121 sectors ‘open to investment with conditions’ or reserved for domestic SMEs, 36 sectors where investment requires a domestic joint venture partnership, 129 sectors where capital ownership restrictions or foreign equity ceilings were imposed, 20 sectors where location restrictions were imposed, 26 sectors where ‘special permits’ were required, 48 sectors with 100 per cent domestic capital requirements and 17 sectors where combined foreign capital ownership ceilings and locality requirements were imposed; Jarvis, supra note 92, p. 22
122 Ibid., Jarvis, pp. 22-23
In 2008, ten years after the signing of the AIA Agreement and in support of the development of the AEC Blueprint, the AIA Council agreed to merge the AIA Agreement and the ASEAN IGA into a single ASEAN Comprehensive Investment Agreement (ACIA).\(^{125}\) Whereas the AIA Agreement had only comprised of liberalisation elements and ASEAN IGA had protection elements only, ACIA is a single investment agreement that provides clearer interaction of relevant provisions, encompassing the liberalisation of the national investment regimes and the facilitation of the increased investments, enhanced protection of investors and the joint promotion of the region as an integrated investment area.\(^{126}\)

First of all, unlike the AIA Agreement, Article 3 of the ACIA provides more detailed scope of application. It is noteworthy that ACIA covers portfolio investments, with reservations taken if necessary and as appropriate.\(^{127}\) ACIA provides definitions more comprehensive and clearer in line with international investment agreements than previous ASEAN investment agreements.\(^{128}\) ACIA grants immediate benefits to both ASEAN Investors and ASEAN-based foreign investors that are investing in other ASEAN Member Countries, thereby helping to accelerate the pace of intra-ASEAN investment and to enhance economic integration.\(^{129}\)

Whereas under the AIA Agreement or ASEAN IGA, there were no procedures on approval in writing, ACIA has clear and transparent procedures for obtaining specific approval in writing. Each Member Country compiles its reservation list which forms a Schedule to this Agreement to the ASEAN Secretariat for the endorsement of the AIA Council within 6 months after the date of signing of this Agreement.\(^{130}\) For a period of 12 months after the date of submission of each Member Country’s reservation


\(^{126}\) Art. 1 of the ACIA; there were no clear interaction between the AIA Agreement and ASEAN IGA.

\(^{127}\) Art. 4 (c) of the ACIA; cf. Art. 2 of the AIA Agreement; Art 1 of the 2001 Protocol to Amend the AIA

\(^{128}\) Art 4 of the ACIA.

\(^{129}\) Art. 3 (1)(b), Art. 5 (2) and Art. 6 of the ACIA; ASEAN Investment Report 2008, supra note 624, p. 16; the deadline to achieve to open and free investment environment has advanced to 2015.

\(^{130}\) Art. 9 (2) of the ACIA; however, the reservation lists are not publicly available yet.
list, a Member Country may adopt any measures or modify its reservation list, provided that such measures or modification shall not adversely affect any existing investors and investments.\textsuperscript{131} Therefore, similar to the AIA, the ACIA follows a negative list framework in which the provisions of the ACIA apply to all covered investments apart from the reservation lists of general and security exceptions, whereby measures that are needed to protect public morals, public order, the environment, protection of national treasures, and national security can be excluded. The reservation lists are likely to reflect current law in most ASEAN Member Countries, and to retain most of the reservations that existed under the AIA.\textsuperscript{132}

There are new articles on consultations mechanism among Member Countries on ACIA matters and its implementation, giving ASEAN countries an official platform to stay engaged on ACIA matters. The ACIA also incorporates a dedicated section for detailed provisions on Investment Disputes between an Investor and a Member Country which contains more comprehensive and detailed procedures than those in ASEAN IGA.\textsuperscript{133} In line with the goals of the AEC, ACIA consolidates the previous AIA Agreement and investment guarantee provisions and expands into a broader investment agreement that focuses on enhancing the investment environment and protection for investors. Because the ACIA has not yet entered into force, the reservation lists of the Agreement have not been made public.\textsuperscript{134} The impact on the investment liberalisation within ASEAN and intra-ASEAN investment remains yet to be seen.

\textsuperscript{131} Art. 10 (1) and (2) of the ACIA.
\textsuperscript{132} United States International Trade Commission, supra note 35, p. 2-20
\textsuperscript{133} Section B of the ACIA.
\textsuperscript{134} United States International Trade Commission, supra note 35, p. 2-20
4.3 Industrial Economic Cooperation in ASEAN

4.3.1 From ASEAN Industrial Projects to ASEAN Industrial Joint Ventures

(1) ASEAN Industrial Projects

The AIP, which was replaced by the AIC and the AIJV later, had been initiated at the Bali Summit in 1976. An agreement on AIP and an agreement on AIC in 1980 and 1981 respectively were signed in Kuala Lumpur on 6 March, 1980 and in Manila on 18 June, 1981.

The AIP scheme provided the framework for cooperation in the establishment of large-scale industrial, government initiated projects that meet regional requirements for essential products. The host Member Country would hold 60 per cent of the project’s equity; the four other Member Countries would share the remaining 40 per cent equally. The private sector in the host country could take up equity participation of up to 40 per cent. It was also agreed that up to 70 per cent of the infrastructure costs of the projects could be financed by foreign loans. The investor would be a ‘shareholder entity’ that ‘enjoys the support and guidance’ of its government. It was envisaged to permit maximum utilisation of potential scale economies and comparative advantages within the organisation. Among the projects, only the Urea Fertilizer Projects in Indonesia and Malaysia have survived as such. The poor performance of the AIP was because AIP projects were ill-conceived, hurriedly put together and not

135 <http://www.aseansec.org/1362.htm>
137 Soesastro, ibid., p. 292
138 Severino, Southeast Asia in Search of an ASEAN Community: Insights from the former ASEAN Secretary-General, supra note 2, p. 217
139 Mya Than, supra note 19, p. 28
subjected to careful feasibility studies so that the private sector avoided participation. It should not be the governments but the market who decide where industries should be located.\textsuperscript{140} ASEAN started to realise the role of the private sector and its economic ideology has changed since the failure of the AIP projects.\textsuperscript{141} The first package of five industrial projects included: urea for Indonesia and Malaysia, superphosphate for the Philippines, diesel engine for Singapore, and soda-ash for Thailand. The original idea was that one type of plant would be built in each country to serve the regional market, but, ultimately, only two of the five projects were implemented.\textsuperscript{142} A second package of AIPs included: heavy-duty rubber tyres for Indonesia, metal working machine tools for Malaysia, newsprint and electrolytic tin-plating for the Philippines, TV picture tubes for Singapore, and potash and fisheries for Thailand. These projects had also been identified for pre-feasibility study and none of these came off the ground.\textsuperscript{143}

A 1983 UNIDO study explicitly discussed the obstacles in the way of intra-ASEAN trade: First, the existing trade and production patterns have allowed only limited absorptive capacity in the ASEAN countries for each other’s major exports\textsuperscript{144} which are primarily destined to be consumed outside the region; secondly, the ASEAN economies have almost exhausted their commercial capacities in responding to the large and growing export markets of the developed countries; thirdly, the import-substituting policies together with the balance-of-payments difficulties faced by some ASEAN

\textsuperscript{140}East Asian Analytical Unit, Department of Foreign Affairs and Trade (1994) ASEAN Free Trade Area (Canberra: Commonwealth of Australia), p. 29; Mya Than, \textit{supra} note 19, p. 28

\textsuperscript{141}Severino, \textit{Southeast Asia in Search of an ASEAN Community: Insights from the former ASEAN Secretary-General}, \textit{supra} note 2, p. 218; see also, Fertilizer Focus (Hampton Hill, England: FMB Publications, Ltd., September-October 2004)

\textsuperscript{142}The Aceh fertilizer project in Indonesia was a national project that was turned into an AIP; Soesastro, ‘ASEAN in 2030’, \textit{supra} note 136, p. 292; see also, Severino, \textit{Southeast Asia in Search of an ASEAN Community: Insights from the former ASEAN Secretary-General}, \textit{supra} note 2, p. 217

\textsuperscript{143}Singapore originally contemplated a Hepatitis B vaccine project, which was cancelled due to economic reasons; Soesastro, ‘ASEAN in 2030’, \textit{supra} note 136, p. 292; see also, Severino, \textit{Southeast Asia in Search of an ASEAN Community: Insights from the former ASEAN Secretary-General}, \textit{supra} note 2, p. 217

\textsuperscript{144}Examples are rubber, tin, timber, palm-oil and coconut products. A notable exception is the Thai export of rice.
(2) ASEAN Industrial Complementation

ASEAN ventured into other ‘industrial complementation’ schemes. There was the ASEAN Industrial Complementation (AIC), a scheme formalised in an agreement signed by the foreign ministers in 1981, with the aim of dividing different production stages of an industry among ASEAN countries to avoid duplication of capacity in ASEAN and allow greater economies of scale. The scheme provided for the allocation of ‘complementary’ industrial products for manufacture in at least four ASEAN countries (unless fewer participants were approved by the economic ministers) and to be traded among them. Accordingly, the products of AIC packages were to enjoy exclusive privileges, that is, no AIC participant could manufacture the same product as the one allocated to another participant. Exclusivity for ‘existing’ products was to be for two years, and for ‘new’ products, three years. AIC products would qualify for preferences under the Preferential Trading Arrangements (PTAs) which includes a 50 per cent tariff margin of preference. In contrast to the AIP scheme, AIC sought detailed input from the private sector, taking the ASEAN Chamber of Commerce and Industry to identify and promote suitable projects.

The first AIC scheme was launched in 1983 targeting automobile industrial complementation. However, the total sale for this first scheme during 1982-1985 amounted to less than one per cent of the value of intra-ASEAN trade during that period. Considering the failure of the first AIC scheme, the second AIC scheme was

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145 United Nations Industrial Development Organization, Regional Industrial Cooperation: Experience and Perspectives of ASEAN and the Andean Pact, supra note 2, p.17. The paper was prepared by John Wong of the National University of Singapore as a UNIDO consultant in cooperation with the staff of UNIDO’s Regional and Country Studies Branch and originally issued by UNIDO in August 1983.

146 Mya Than, supra note 19, p. 28

147 Ibid.

148 Ibid.

149 Vinita Sukraset (1989) ASEAN in International Relations (Bangkok: Institute of Security and Strategic Studies, Chulalongkorn University), p. 49
ASEAN cooperation in the earlier years rested on two pillars: preferential trading arrangements and industrial complementation, both of which collapsed under the weight of unreconciled national interests. The PTA granted margins of preferences on tariffs on lists of products negotiated among the ASEAN Members rather than, as later arrangements would do, reducing tariffs on all products, with only a few exceptions, to minimal levels or abolishing them altogether. The problems of these projects were that it was the States who select certain industries or products enjoying the privileges which ended up as conflicts of national interests among Member Countries. ASEAN

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150 Severino, *Southeast Asia in Search of an ASEAN Community: Insights from the former ASEAN Secretary-General*, supra note 2, p. 219; even before the formal AIC agreement was concluded, the economic ministers had, in 1980, adopted two complementation packages, both involving automotive parts.


152 Mya Than, *supra* note 19, p. 28

153 Severino, *Southeast Asia in Search of an ASEAN Community: Insights from the former ASEAN Secretary-General*, supra note 2, p. 219; Yoshimatsu, supra note 151, p. 8

154 Yoshimatsu, *supra* note 151, pp. 9-11; see the lobbying the ASEAN Secretariat and the Member Countries of the local auto parts makers such as Denso Thailand, Malaysia and Indonesia with regard to the revision of the BBC. This seemed to influence the AICO scheme to pay attention to SME development.

moved away from trying to manage industrialisation and towards allowing individual
firms to decide their own responses to the market. Confronted with these realities,
ASEAN decided to take a different approach, namely to let private entities make trade
and investment decisions on the basis of market consideration. ASEAN realised that
integrating the regional market is more efficient than forcing certain state-selected
industries.156

(3) ASEAN Industrial Joint Ventures

A new program for ASEAN industrial cooperation was launched with the signing of the
Basic Agreement on ASEAN Industrial Joint Venture (AIJV Agreement) in 1983.157
For the purpose of replacing government-to-government AIP projects with more
flexible, private sector oriented initiatives, the scheme tried to provide a flexible and
decentralised framework.158 It also sought to promote industrial joint ventures in the
region through the effective consolidation of markets by granting AIJV products
preferred access to the markets of participating countries and other privileges. The AIJV
products had to have equity participation of at least two ASEAN countries and were to
enjoy a 50 per cent margin of tariff preference from the participating countries for the
first four years from the start of commercial production and market exclusivity for three
years, provided they were ‘new’ products. Afterwards, non-participating ASEAN
countries had to extend the same margin of preferences. Specific products covered had
to be approved by the economic ministers.159 In 1987, a revised AIJV Agreement was
signed, enlarging the margin of preference to 90 per cent and lowering the minimum

156 Ibid., pp. 220-221
157 Basic Agreement On ASEAN Industrial Joint Ventures, Jakarta, 7 November 1983; available at:
<http://www.aseansec.org/6378.htm>
158 Mya Than, supra note 19, p. 29
159 Art. 1 of the AIJV Agreement
ASEAN equity required from 51 to 40 per cent.\textsuperscript{160} However, the economic ministers had complained about the slow progress in the approval of AIJV projects in 1989.\textsuperscript{161} 75 per cent of its production was also destined for export outside ASEAN.

In the first decade of operation, 26 products have been granted AIJV status, including automotive components and parts, mechanical power rack and steering systems, chemical heavy equipment and some food products.\textsuperscript{162} However, unfortunately, due to poor promotion, cumbersome application procedures and its inconsistency with AFTA, the AIJV scheme has had little impact on intra-ASEAN trade and investment.\textsuperscript{163}

ASEAN began looking for a new form of industrial cooperation scheme to replace the AIJV and the BBC schemes. Learning from the shortcomings of these two schemes, the new scheme would retain some of the features of the BBC and AIJV scheme but would offer more in terms of tariff and non-tariff incentives. In 1991, the BBC Scheme was expanded to cover non-automotive items, but by then, the industrial complementation schemes were about to be superseded by the AFTA CEPT Scheme and the AICO.\textsuperscript{164}

4.3.2 ASEAN Industrial Cooperation Scheme

To further enhance industrial cooperation, the ASEAN Economic Ministers signed the Basic Agreement on the ASEAN Industrial Cooperation Scheme (AICO Agreement) in Singapore, 1996. The AICO Scheme is the latest industrial cooperation program of

\textsuperscript{160} Art. 1 of Revised Basic Agreement On ASEAN Industrial Joint Ventures, Manila, 15 December 1987; available at: <http://www.aseansec.org/6381.htm>
\textsuperscript{161} Severino, Southeast Asia in Search of an ASEAN Community: Insights from the former ASEAN Secretary-General, supra note 2, p. 220
\textsuperscript{162} East Asian Analytical Unit (1994) ASEAN Free Trade Area (Canberra: Department of Foreign Affairs and Trade), p. 30
\textsuperscript{163} Mya Than, supra note 19, p. 29; Severino, Southeast Asia in Search of an ASEAN Community: Insights from the former ASEAN Secretary-General, supra note 2, p. 229
\textsuperscript{164} Severino, Southeast Asia in Search of an ASEAN Community: Insights from the former ASEAN Secretary-General, supra note 2, p. 220
ASEAN to promote joint manufacturing industrial activities between ASEAN-based companies, and has superseded all the previous schemes, such as the AIJV and the BBC. There are three main features of the AICO: (i) it is open to all manufacturing sectors, which contrasts with the BBC which mainly targeted the automobile sector; (ii) it pays attention to the SME development; and (iii) it has an aspect of an advanced implementation of the CEPT under AFTA.

In the scheme, products traded between companies undertaking related operations in different ASEAN countries were immediately entitled to enjoy a preferential tariff rate in the range of zero to five per cent, which is the CEPT end-rate under AFTA. In order to enjoy this benefit, a minimum of two companies in two different ASEAN countries are required to form an ‘AICO Arrangement.’ An AICO Arrangement should involve not only the physical movement of products between the participating companies and countries but also resource sharing/pooling and/or industrial complementation. These specific arrangements, to be approved by the governments concerned and certified by the ASEAN Secretariat, cover what products are to be involved and the exact tariff duty on each. It is noteworthy that an AICO arrangement does not provide a legal entity but merely an ‘umbrella association’ under the scheme wherein the output of the participating companies will enjoy the preferential tariff rate.

The recognition of the ASEAN leaders of private sector involvement is a testimony to the critical role of the AICO. It was set up to encourage cooperative activities among companies based in various nations within ASEAN. One of its major

165 <http://actrav.itcilo.org/actrav-english/telelearn/global/ilo/blokit/asean.htm>
166 Yoshimatsu, supra note 151, p. 11; see the preamble to the AICO Agreement, supra note 25.
167 Art. 1 (6) and 5 of the AICO Agreement
168 Art. 1 (2) of the AICO Agreement
169 Art. 5 of the AICO Agreement; Yoshimatsu, supra note 151, p. 11
170 Severino, Southeast Asia in Search of an ASEAN Community: Insights from the former ASEAN Secretary-General, supra note 2, p. 228
171 <http://www.asean.org/6402.htm>
roles is to develop ASEAN Member Countries’ competitive advantage by means of integrating and developing regional supply chains through the reduction of specific intra-industry tariff rates.\textsuperscript{173} However, setting out on the journey of the AICO scheme was not easy, particularly before the 1997 Asian financial crisis. At the beginning, not only the number of applications was far smaller than expected but also the administrative process accepting the application was not implemented smoothly.\textsuperscript{174} This slow progress was firstly due to insufficient preparation and internal coordination caused by the ‘ASEAN Way’, i.e. agreeing on principles first and creating substance later through the consultation process.\textsuperscript{175} Other factors which impeded the progress of the scheme were the conflict between MNCs and local governments over conditions applying for the AICO, and the diverse stances of the ASEAN Member Countries on the scheme.\textsuperscript{176} Originally, the AICO was open to any ASEAN-brand company, which has a minimum 30 per cent ASEAN national equity.\textsuperscript{177} This national equity clause was the most controversial issue which foreign MNCs opposed strongly.\textsuperscript{178} In spite of strong opposition, the national equity provision was adopted with a list of waiver criteria, which differed country by country.\textsuperscript{179} However, since the 1997 Asian financial crisis, the ASEAN governments took into account AICO more seriously and agreed to relax the eligibility criterion and eventually agreed to waive the national equity

\begin{itemize}
\item[173] \textit{Ibid.}, p. 5
\item[174] For a year after the AICO began, only 17 applications were submitted. Toyota, Matsushita Electric, and Denso became the first applicants in December 1996, but they found little or no progress in the approval process in 1997; Yoshimatsu, \textit{supra} note 151, p. 12
\item[175] See for the ASEAN Way in Section 2.2.2 Evolution of the ASEAN Charter
\item[176] Yoshimatsu, \textit{supra} note 151, p. 12
\item[177] \textit{Ibid.}, p. 11
\item[178] \textit{Ibid.}, p. 13
\item[179] Art. 3 of the AICO Agreement regarding the eligibility criteria is as follows:
1. Companies wishing to benefit from the privileges of the AICO Scheme shall fulfill the following criteria:
   \begin{itemize}
   \item be incorporated and operating in an ASEAN Member Country;
   \item have a minimum of 30\% national equity. The equity condition may be waived after consultation by the Participating Countries in cases where the proposing companies meet the other criteria of this Article; and
   \item undertake resource sharing, industrial complementation or industrial cooperation activities.
   \end{itemize}
2. Each Participating Company of an AICO Arrangement must submit documentary evidence on resource sharing, industrial complementation or industrial cooperation activities such as joint ventures, joint manufacturing, technology transfer, training, licensing, consolidated purchasing and procurement, management service, sales and marketing agreement or other areas of cooperation.
\end{itemize}
There were further deregulations to facilitate the AICO applications.  

Severino says that the AICO scheme was relatively successful compared to other industrial programmes in terms of its quantitative use by companies with multinational operations. This is because AICO lets companies decide the products for which to seek tariff concessions, subject to the approval only of the governments immediately concerned, whereas in the earlier industrial programmes, the ASEAN States collectively decided on product coverage. Through AICO, companies have strategically located their operations and expanded intra-industry and intra-company trade. Moreover, in the case of the previous schemes, the concessions enjoyed by the products covered were margins of tariff preference, not necessarily low tariffs. Under those schemes, other ASEAN countries were barred from producing the same products as those approved for one participating country under the scheme, unless, in the case of the AIJV, 75 per cent of its production was destined for export outside ASEAN. On the other hand, AICO products enjoy the AFTA tariff end-rates, at present zero. Those products have no ‘exclusivity’ privileges and remain subject to competition. Their AICO status is granted only by the countries involved rather than having to be approved by all ASEAN Member Countries.

Despite the relatively high awareness of AICO among the business community in ASEAN, AICO may lose its relevance to companies as the CEPT rates have been

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180 Yoshimatsu, supra note 151, pp. 18-19
181 Ibid., pp. 19-20
182 Severino, Southeast Asia in Search of an ASEAN Community: Insights from the former ASEAN Secretary-General, supra note 2, p. 245; as of April 2005, 195 applications for AICO arrangements had been submitted, 129 of which had been approved; PriceWaterhouseCoopers, The Future of AICO Scheme: Enhancement and Alternatives, supra note 172, p. 15
183 PriceWaterhouseCoopers, The Future of AICO Scheme: Enhancement and Alternatives, supra note 172, p. 10; Yoshimatsu, supra note 151, pp. 18-20; ASEAN viewed AICO as a policy initiative to further promote the ASEAN region as an investment area: available at: <http://www.aseansec.org/11832.htm>
184 Severino, Southeast Asia in Search of an ASEAN Community: Insights from the former ASEAN Secretary-General, supra note 2, p. 228
185 See the exclusivity privileges of the products of AIC packages; see Than supra note19, p.28
186 Severino, Southeast Asia in Search of an ASEAN Community: Insights from the former ASEAN Secretary-General, supra note 2, p. 228
reduced to comparatively low levels with the implementation of AFTA.\footnote{187} Some AICO companies are already weighing the costs of complying with AICO against the tariff savings and may opt to utilise the CEPT scheme going forward.\footnote{188} From interviews with key executives of ten companies with significant presence within the ASEAN region conducted by PricewaterhouseCoopers, the operational issues encountered by companies using the AICO scheme are as follows: Firstly, unless two companies pursuing an AICO arrangement are related, it is not easy to establish the relevant contacts with their counterparts.\footnote{189} Secondly, the small and medium enterprises (SMEs) tend to face a higher barrier of entry to the AICO scheme in comparison to the large local enterprises and multinational companies (MNCs). In production chains, the roles of SMEs are either that of specialised product manufacturers or second tier suppliers but are too far down in the production chain to benefit from technology tie-in arrangements with MNCs.\footnote{190} Thirdly, some approving authorities among participating countries impose additional qualifying criteria based on their economical development, in particular, the trade balancing requirement on AICO companies.\footnote{191} The trade balancing requirement in the BBC scheme was seen as a critical impediment to promoting the

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\textit{\footnote{187}By 2002-2003, the CEPT tariff level for trade among the ASEAN-6 (Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore and Thailand) had been achieved. This rendered inoperative the edge that AICO participants enjoyed. To preserve that edge, and ‘to maintain the relevance of the AICO Scheme until 2010’, the year by which CEPT tariffs dropped to zero, the ministers, in April 2004, signed a new AICO Protocol that provided for new lower tariff rates for eligible AICO products. They decided to remove tariffs altogether on all AICO-eligible products, although, as exceptions, the Philippines could charge up to one per cent, Thailand up to three per cent, and Myanmar and Vietnam up to five per cent. These countries had to ‘work towards reducing’ tariffs on AICO imports to zero by the beginning of 2005, except for Vietnam, which had until 1 January 2006 to do so; Media Statement of the Tenth ASEAN Economic Ministers Retreat, Singapore, 21 April, 2004; <http://www.aseansec.org/16072.htm>}
\textit{\footnote{188}PriceWaterhouseCoopers, The Future of AICO Scheme: Enhancement and Alternatives, supra note 172, p. 15}
\textit{\footnote{189}Companies indicated that gathering of detailed trade statistics, documentation on product flows and information on their AICO partners, are very resource consuming as this information is not normally maintained for business purposes. Accordingly, even though an AICO arrangement is identified, companies take, on average, three to six months to prepare their application for the AICO scheme. Therefore, it is not surprising that AICO arrangements are usually initiated between two related companies; PriceWaterhouseCoopers, The Future of AICO Scheme: Enhancement and Alternatives, supra note 172, pp. 15-16}
\textit{\footnote{190}Ibid., p. 16}
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scheme, and thus, the AICO scheme intentionally removed this requirement in its Agreement. In practice, however, the concern that the government officials tended to regard increases in imports through the AICO as an encroachment of their home market by other countries led them to require trade balances under the AICO transaction strictly as a virtual criterion to accept an AICO application and approve it. A perfect trade balance can hardly be achieved under AICO arrangements because the value of exported AICO intermediate products, which are assembled or incorporated into AICO final products, would always be of lower value compared to imported AICO final products.

Fourthly, the lengthy time-consuming approval process in obtaining approvals from the participating countries is a major obstacle to an AICO application. The AICO Agreement indeed provides that the national authority shall indicate a decision on the tariff rate within 60 days of the receipt of the application from companies. However, some governments even refused the applications because of these time constraints. Companies expressed frustration over the inconsistencies in treatment of AICO applications across ASEAN. Lastly, further implementation problems were highlighted by these companies. For instance, the companies noted the disconnection between the trade policy and the actual implementation at Customs. This means that a company can experience difficulty in obtaining the Customs Memorandum Circular in a participating country that would enforce the Certificate of Eligibility (COE)

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192 Yoshimatsu, supra note 151, p. 14
193 In order to fulfil this criterion, companies include duty free products under AICO scheme to meet the trade balancing export quota or companies could be required to balance off by way of non-AICO product exports: PriceWaterhouseCoopers, The Future of AICO Scheme: Enhancement and Alternatives, supra note 172, pp. 16-17
194 Ibid., p. 17; the average time for an AICO application, from submission to approval from participating country, was about eight to nine months; Edmund Sim highlighted the same point as an obstacle for the performance of the AICO scheme; interview with Edmund Sim on 26 March 2009.
195 Art. 7 (2) of the AICO Agreement
196 Companies submitted an AICO proposal to the participating countries simultaneously but the dates that each government received the proposal or the dates of issuing approvals for the same proposal differ greatly; Yoshimatsu, supra note 151, pp. 16-17
197 The time gap between the issuance of Certificate of eligibility (COE) and legal enactment of preferential tariffs for the AICO arrangement was also mentioned as an obstacle to the approval process. Some companies raised delays in the issuance of approval letter and COE as well; PriceWaterhouseCoopers, The Future of AICO Scheme: Enhancement and Alternatives, supra note 172, p. 17
of the AICO.\textsuperscript{198} In addition, the unilateral actions taken by ASEAN Member Countries to impose MFN rates or penalties on the imported products which were in excess of the volume or value of trade projected under the AICO scheme, caused problems relating to the execution of the AICO scheme.\textsuperscript{199}

Most of the AICO participants were from limited sectors, such as the automotive or electronic industries, involving mostly foreign MNCs.\textsuperscript{200} Only a handful of AICO companies were indigenous to ASEAN. Further, among the ASEAN Member Countries, only Indonesia, Malaysia, the Philippines and Thailand have participated extensively in AICO.\textsuperscript{201} It is notable that despite the high tariff differential between AICO and CEPT rates, the CLMV countries were not active in AICO arrangements.\textsuperscript{202}

There is little future prospect for AICO and for its broader and more encompassing vision of industrial complementation envisaged in the AICO Agreement.\textsuperscript{203} In the case of automotive industries, automotive manufactures had emerged as a prominent beneficiary of a series of regional agreements from the AIC followed by the BBC scheme and the AICO scheme. This was because automotive manufactures invested in various production plants across the region specialising on parts and CBU models. However, car companies in ASEAN produce a type of model in more than one ASEAN country creating intra-ASEAN competition rather than cooperation.\textsuperscript{204} This operation in the automobile industry also indicates that integration in ASEAN has been constrained and that labour has not been efficiently distributed to

\textsuperscript{198} Additionally, the lack of official notification on the new tariff reduction was mentioned to create uncertainties which deter companies from adding new products to existing AICO arrangements; \textit{ibid.}, pp. 17-18

\textsuperscript{199} \textit{Ibid.}, p. 18

\textsuperscript{200} Example of the AICO companies are such well-known companies as Denso, Toyota, Honda, Volvo, Sony, Isuzu, Matsushita, Nissan, Ford, Mitsubishi, Yamada and Samsung.

\textsuperscript{201} Singapore and Vietnam were not active in participation; Severino, \textit{Southeast Asia in Search of an ASEAN Community: Insights from the former ASEAN Secretary-General}, supra note 2, pp. 228 - 229

\textsuperscript{202} PriceWaterhouseCoopers, \textit{The Future of AICO Scheme: Enhancement and Alternatives}, supra note 172, p. 14

\textsuperscript{203} \textit{Ibid.}, p. 15

\textsuperscript{204} \textit{Ibid.}, p. 23; United States International Trade Commission, \textit{supra} note 35, p. 7-9

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this purpose.\textsuperscript{205} This is firstly because ASEAN countries are inclined to promote their own industries, which is an important factor in slowing down regional integration. Malaysia and Indonesia, in particular, adopted policies of promoting their national auto industries with some degree of local ownership and relatively higher tariffs on automobiles and some parts.\textsuperscript{206} Secondly, national preferences for vehicle types remained significantly different among the ASEAN countries, which prevented an effective division of labour. Note that intra-ASEAN trade volumes in automobile components have been relatively small compared to other extra-regional trade. Among the four main ASEAN vehicle producer countries, namely Malaysia, Indonesia, Thailand and the Philippines, only a small share of total component exports were directed towards the other ASEAN vehicle producing countries.\textsuperscript{207} Singapore receives higher exports compared to other ASEAN countries but a higher level of exports to Singapore might be re-exported.\textsuperscript{208} Consequently, it will be a challenge to encourage greater regional industrial integration for the automotive companies which produce a single model in two or more ASEAN countries.\textsuperscript{209} Because of the high degree of uncertainty with regards to the procedures and processes for the importation of automobiles within ASEAN as automobiles are subject to complicated customs valuation and origin rules as well as varying technical standards compliance requirements, automotive manufactures establish small and inefficient assembling operations in each ASEAN market to ensure market access.\textsuperscript{210} The push by respective

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\textsuperscript{205} PriceWaterhouseCoopers, \textit{The Future of AICO Scheme: Enhancement and Alternatives}, \textit{supra} note 172, p. 23
\textsuperscript{208} Humphrey and Memedovic, \textit{supra} note 206, pp. 15-16
\textsuperscript{209} PriceWaterhouseCoopers, \textit{The Future of AICO Scheme: Enhancement and Alternatives}, \textit{supra} note 172, p. 24
\textsuperscript{210} \textit{Ibid.}, pp. 24-25
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ASEAN countries to promote their own industries rather than teaming up with the region dilutes the drive to integrated manufacturing operations under the AICO scheme and also largely failed to promote a regional division of labour.\textsuperscript{211} Additionally, in the case of electronics industries, it was expected that electronics investment could be promoted by expanding the framework of the AICO. However, AICO has had little impact on the computer components industry because the incentives offered under the AICO were limited to duty waivers.\textsuperscript{212} Most of all, products and goods that are eligible for this scheme, are no different from those products that make use of the CEPT.\textsuperscript{213} Companies avail of the AICO scheme mainly because of the lowered tariff rate and the savings that comes with it. However, as the margin of tariff preference under the AICO scheme diminishes, it may no longer justify the compliance costs associated with participation in the scheme. In 2004, even if CEPT rates were higher than that of the AICO, CEPT was still commonly used. Businesses found the use of CEPT more straightforward and easy to avail of than the AICO Scheme.\textsuperscript{214}

4.4 Conclusion

In this chapter, I explored two areas of the ASEAN economic cooperation towards the promotion of intra-ASEAN trade. The first area was the initiatives of AFTA, AFAS and AIA which have now become the principal components of the AEC. The second area was the ASEAN industrial economic cooperation programmes which are represented by AICO. I presented several findings regarding the development of the mechanisms for enhancing ASEAN cross-border business activities to increase intra-ASEAN trade and

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\textsuperscript{211} Ibid., p. 25  \\
\textsuperscript{212} United States International Trade Commission, supra note 35, p. 3-9  \\
\textsuperscript{213} All products, other than those that are included in Article 9 or the General Exception of the Agreement of the CEPT Scheme, are eligible for the AICO scheme; PriceWaterhouseCoopers, \textit{The Future of AICO Scheme: Enhancement and Alternatives}, supra note 172, p. 22  \\
\textsuperscript{214} Ibid., p. 20
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First of all, ASEAN Member Countries have gradually realised the weakness of heavy government intervention and moved towards greater reliance on private sector participation, particularly, during the evolution of ASEAN industrial economic cooperation. This is because the private sector knows the market, is cognisant of its needs, and is quicker to respond to potentials and opportunities in the region.\textsuperscript{215} Progressive reduction in state involvement, a more ‘hands off’ approach, has led to greater effectiveness. It is a crucial point that must be reflected in the proposals put forward in this thesis.

Secondly, the developments so far in both areas have mainly focused on tariffs, either removing tariff barriers to trade within the region or giving benefits of product-based preferential tariffs for participating companies of AICO. However, in addition to tariffs, quantitative restrictions and other NTBs are significant barriers to trade to be eliminated within ASEAN. The major barriers in cross-border business activities within ASEAN based on ASEAN Member Countries’ protectionist techniques to control foreign inward investments identified in Chapter 3 are perceived as NTBs. The operational difficulties experienced by the AICO participating companies are of the same kind. The AEC instruments, in particular the AIA, display weakness in dealing with those NTBs such as investment screening, approval processes, compliance requirements and conditionality clauses.\textsuperscript{216} Further, the ASEAN database on non-tariff barriers is incomplete and outdated.\textsuperscript{217} In building the AEC, the biggest challenge lies in eliminating the various NTBs that exist in ASEAN.\textsuperscript{218} Establishing an ASEAN single market requires more than removing tariff barriers.

\textsuperscript{215} ASEAN Secretariat, ASEAN: Economic Co-operation, Transition & Transformation, supra note 1, p. 85
\textsuperscript{216} See Jarvis supra note 92, p.23
\textsuperscript{217} United States International Trade Commission, supra note 35, p. 4-7; the ASEAN Non-tariff Measure database is available at: <http://www.aseansec.org/16355.htm>
\textsuperscript{218} Interview with Denis Hew on 13 April, 2009; PriceWaterhouseCoopers, The Future of AICO Scheme: Enhancement and Alternatives, supra note 172, pp. 9-10
The 1997 Asian financial crisis may have played a big role in launching the AICO scheme by enhancing the political will of the ASEAN Member Countries in their economic cooperation. The current crisis also drew more attention to the relationship between the intra-ASEAN trade and the regional resilience.\textsuperscript{219} ASEAN Member Countries endorsed ACIA to encourage further development of intra-ASEAN investment.\textsuperscript{220} The share of intra-ASEAN trade has increased substantially from the 19 per cent share it held when AFTA entered into effect in 1993. However, during the first decade of the 2000s, it remained around 25 per cent of ASEAN’s global trade without any notable increase.\textsuperscript{221} In order to increase intra-ASEAN trade, it is necessary for policy makers in ASEAN countries to focus on developing a more pro-active role as a business partner rather than a mere administrator of lower tariffs.\textsuperscript{222} ASEAN Member Countries need to be more attuned to the needs of companies and open to providing assistance and guidance as to which business model would best suit the operations of current and prospective investors.\textsuperscript{223} It was clear that, through the implementation of parts complementation schemes such as BBC and AICO, automotive industries have experienced operational difficulties.\textsuperscript{224} However, all the ASEAN economic cooperation initiatives from PTA to AICO never directly act as a vehicle to facilitate cross-border business cooperation and corporate collaboration in the region which will affect the growth of intra-ASEAN trade.

For the operational aspects to establish the AEC, ASEAN has mainly adopted the framework of the WTO by focusing on three core areas of goods, services and investments and adopted agreements for each area, i.e. AFTA, AFAS and AIA, to break

\textsuperscript{221} United States International Trade Commission, supra note 35, p. 2-12
\textsuperscript{222} PriceWaterhouseCoopers, The Future of AICO Scheme: Enhancement and Alternatives, supra note 172, pp. 9-10
\textsuperscript{223} Ibid., pp. 9-10
\textsuperscript{224} Staples, supra note 32, p. 191
down national barriers. As in the WTO, ASEAN took the sector specific liberalisation methodology throughout the AEC instruments by making its Members commit themselves to different levels of schedules with flexibility and gradualism depending on the economic development stage of the Members. However, at the expense of easing agreement negotiations, there have been abuses and backtracking of ASEAN Member Countries from those commitments, which have led to a slow-down of the liberalisation process. A regional grouping is allowed under the WTO on the premise that its members have agreed to eliminate substantially all tariffs and other restrictive regulations of commerce on trade between its members. However, so far, it is difficult to say that ASEAN Member Countries have achieved wider and deeper liberalisation. Added to this, ASEAN does not even have a functioning Dispute Settlement Mechanism, as opposed to the WTO. Whereas services liberalisation is undergoing difficulties in negotiations under the WTO, the EU has achieved free movement of persons to do business across frontiers within the region in a single internal market. In addition, despite the antagonism towards supranationalism, ASEAN has always paid particular attention to the economic integration and its mechanisms under the EU from the start to the idea of building an AEC, i.e. an ASEAN single market. The European experience in economic integration provides ASEAN with a useful insight to whatever long-term cooperative arrangement ASEAN is leading to.
Chapter 5  EU Corporate Mobility Mechanisms

5.1 Introduction

In the previous chapters, I have looked at the limitations and barriers to cross-border business activities in Southeast Asia and how ASEAN has perceived and dealt with those problems under its framework of establishing the AEC and the ASEAN industrial economic cooperation schemes. Now, I will turn to the EU’s experience in enhancing cross-border business activities on its way to develop the internal market with a view to see if any of the European mechanisms would be useful to overcome the obstacles mentioned in the Southeast Asian context.

At the inception of the EU in the 1957 Treaty of Rome, the common market\(^1\) that was to emerge was, as far as possible, to have the characteristics of a single market within which citizens and their business organisations were free to carry on their trade without restrictions on their movement, and where internal customs duties and similar restrictions were to disappear.\(^2\) Despite the achievement of the abolition of tariffs and quotas by 1968 which was then ahead of schedule, the late 1970s and early 1980s were marked by periods of stagnation in the European integration.\(^3\) The reality of the single market integration appeared to fall behind its agenda, which generated a feeling of

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\(^1\) See for the concept of the ‘common market’ in Case 15/81, *Gaston Schul Douane Expediteur BV v. Inspecteur der Invoerrechten en Accijnzen, Roosendaal* [1982] ECR 1409, para. 33; the ‘common market’ is a stage in the multinational integration process aims to remove all the barriers to intra-EU trade with a view to the merger of national markets into a ‘single market’ giving rise to conditions as close as possible to a genuine ‘internal market.’ It is noteworthy that the Lisbon Treaty replaced the words ‘common market’ of the Treaty of Nice by the end result of this stage of the integration process, the ‘internal market,’ according to Article 26 TFEU; the concepts of the common market, single market and the internal market are largely synonymous; see further in Catherine Barnard (2010) *The Substantive Law of the EU: The Four Freedoms* (3rd) (Oxford: OUP), pp. 11-12
\(^2\) Completing the Internal Market: White Paper from the Commission to the European Council, Brussels, 14 June, 1985, COM (85) 310 (the 1985 White Paper), para. 4; available at:  
pessimism. Loss of confidence in its prospect reduced the cross-border investment as well. The startling rise of the oil price in 1974 also pushed the European economies into recession and resulted in a negative rate of growth in 1975. The recession led national governments to confront their relative economic decline and prompted a relaunch of the integration process in 1980s. The failure to create a genuine internal market was deemed to be a major cause of slow growth in the economies. In particular, there was growing awareness of the fact that the common market was undermined by non-tariff barriers (NTBs) to trade. The 1985 White Paper, published by the EU Commission, set out a long list of barriers which had to be removed before a deadline of 1992. The Single European Act (SEA) represented a political commitment to this deadline by the Member States. It is noteworthy that the process of integration was actually revived by the SEA in terms of strengthening the decision-making powers and launching a programme aiming at the completion of the internal market.

The move to the single market of the EU represents by far the most extensive and successful example of the elimination of barriers between national markets, which has transformed the conditions under which cross-border business is carried out. The share of intra-EU trade in gross domestic product (GDP) had nearly tripled between 1960s and 1990s. In 1996, the Commission undertook a wide-ranging study on the

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8 Perry, supra note 6, p. 13
9 Centre for Economic Policy Research, Flexible Integration: Towards a More Effective and Democratic Europe, supra note 3, 24; Completing the Internal Market: White Paper from the Commission to the European Council, supra note 2, para. 6
10 Completing the Internal Market: White Paper from the Commission to the European Council, supra note 2
11 Art. 7a EEC (of the SEA) set out the internal market aim of progressively establishing the internal market over a period expiring on 31 December 1992; this has been removed from Art. 26 TFEU.
12 Craig and de Búrca, supra note 4, p. 13; Centre for Economic Policy Research, Flexible Integration: Towards a More Effective and Democratic Europe, supra note 3, p. 24
13 Ibid., p. 24
impact and effectiveness of the single market which demonstrated positive results.\textsuperscript{14} For example, lifting trade barriers had increased trade volumes between the EU Member States by 20-30 per cent in manufactured products. It has to be highlighted that the growth of intra-EU trade was not at the expense of extra-EU trade.\textsuperscript{15} On the contrary, the creation of the European single market has also led to an important increase in trade and in the EU’s share of foreign direct investment at world level. The EU absorbed 44 per cent of the global foreign investment flows in the early 1990s, compared to 28 per cent in the middle of the 1980s. It seemed to have a particularly strong impact on the financial services sector.\textsuperscript{16} Fears expressed that the European single market would be less open to foreign suppliers have turned out to be groundless. The European single market has made the EU more attractive as a location for foreign investments. However, despite the success of the European single market programme, there were many obstacles to trade and problems in the path leading to the achievement of the single market.

Although it is still unclear whether the ultimate goal of the AEC is a free trade area (FTA) or a customs union (CU), what is clearly mentioned under the AEC Blueprint is that the AEC aims at building a single market and production base in ASEAN.\textsuperscript{17} In this chapter, first of all, I will deal with problems in the path of developing the European single market in the context of the area of cross-border business collaboration and corporate mobility within the EU. Particular attention will be paid to the obstacles that emerged during the process from the inception of the EU in 1957 prior to the completion of the common market in 1992.\textsuperscript{18} Secondly, various EU


\textsuperscript{15} Ibid.; for example, extra-EU manufacturing imports have increased their share of consumption over the period 1980-93 from 12 to 14 per cent.

\textsuperscript{16} Ibid.

\textsuperscript{17} See Section 2.2.1 Establishment of ASEAN Economic Community

\textsuperscript{18} The shift from the EEC to the EU by the 1992 Maastricht Treaty influenced the signing of the Framework Agreement on Enhancing ASEAN Economic Cooperation in 1992; see Section 2.2.1 Establishment of ASEAN Economic Community
mechanisms in the relevant area will be explored to see how they have tackled those problems and to find out the possibility for those mechanisms to be applied in the ASEAN context in similar ways, in the following chapter.

5.2 Barriers for Corporate Collaboration and Cross-Border Mobility within the EU

Most contemporary accounts of European integration begin with the aftermath of the Second World War and the desire for a lasting peace in Europe. The hope for a new model of political cooperation in Europe emerged from the war years preceded by a climate of nationalism. Since the AEC was inspired by the development of the EEC in the 1950s, I will start by looking at the aims of the 1957 Treaty of Rome that the EEC espoused, which is the inception of the EU. After a conference of foreign ministers of the six founding Member States in Messina, Italy in 1955, there was an agreement on moving in the direction of economic integration while setting back the integration process as a political union. Therefore, the purpose of the Treaty was almost exclusively devoted to a discussion of economic goals. According to Article 2 of the Treaty which states the objectives that bind the EEC legally, it was specified that the task of the EEC was “to promote throughout the EEC a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between its Member States.” It proposed to do this by “establishing a common market and progressively

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19 Craig and de Búrca, supra note 4, pp. 3-4.
20 See The Singaporean Prime Minister Goh Chock Tong first proposed the idea of the AEC similar to the EEC of the 1950s at the Eighth ASEAN Summit in 2002; see at: <http://www.aseansec.org/12321.htm>
22 These are France, West Germany, Italy and the Benelux countries (Belgium Luxembourg, the Netherlands) which signed the ECSC (European Coal and Steel Community) Treaty.
23 Craig and de Búrca, supra note 4, p.6.
approximating the economic policies of Member States.” Article 3 of the Treaty then summarised eleven specific activities which shall be included as provided in this Treaty and in accordance with the timetable set out therein in order to achieve the goals outlined in Article 2 of the Treaty. Among the activities under Article 3 of the Treaty, there are: (a) the elimination, as between Member States, of customs duties and of quantitative restrictions on the import and export of goods, and of all other measures having equivalent effect; (b) the establishment of a common customs tariff and of a common commercial policy towards third countries; (c) the abolition, as between Member States, of obstacles to freedom of movement for persons, services and capital; and (h) the approximation of laws of Member States to the extent required for the proper functioning of the common market. It was clearly seen that in contrast to an FTA and a CU which focus on the free movement of products, a common market allows for free movement of production factors, e.g. workers and capital, as well as products.

The establishment of a common market and the gradual approximation of the Member States’ economic policies were expected to create a bigger market for business enterprises. This will create higher revenues, which would, in turn, allow enterprises to reach optimal size and become more competitive on the world market because of increased productivity. Efficiency originated from the enterprises’ productivity would be able to increase their output and competitiveness to lower their prices. However, there were many obstacles in the path leading to the achievement of those goals. The Member States had until comparatively recently been at war with each other. The laws, backgrounds, philosophies and cultures of these countries were very different.

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24 Art. 2 of the 1957 Treaty of Rome; the common market was to be established over a transitional period of several stages; Craig and de Búrca, supra note 4, p. 6; see further in the Resolution adopted by the Ministers of Foreign Affairs of the Member States of the ECSC (European Coal and Steel Community) at their meeting at Messina, 1 to 3 June, 1955.
25 Art. 3 (a), (b), (c) and (h) of the Treaty of Rome
ability of workers and entrepreneurs to move into or to carry on business in another country was restricted, and the differences in the national laws were felt to have an inhibitory effect on trade between the Member States.

Prior to 1986, the single market integration had been advanced mainly by two means: the first is the legislative means, i.e. the harmonisation of laws in order to deal with the divergences in national laws; the second is the judicial means via the jurisprudence of the Court of Justice in interpreting the EU law. The judicial doctrines established by the Court, such as in Cassis de Dijon, were important in breaking down barriers to intra-EU trade by invalidating trade barriers, even if they were not discriminatory, unless they could be justified on certain limited grounds. Notwithstanding these efforts, the progress was so slow as to bring pessimism to the single market integration in late 1970s and early 1980s. NTBs were so substantial that the genuine single market was no closer although there was freedom of physical goods. However, after the recession in 1980-1981, the political will was reinvigorated by the perception that the failure to achieve the European single market brought persistent economic underperformance. Compared to the European market, the US and Japan were large, cohesive and relatively unified markets. Notably, market fragmentation generated unnecessary costs and lost opportunities for European industries limiting their competitive capacity, particularly, in the global market. It was also perceived that the NTBs cannot be removed if unanimity was required in making decisions. It is noteworthy that even in the 1970s, the rise of the NTBs was seen as a

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28 Craig and de Búrca, supra note 4, p. 606
29 Case 120/78, Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein (Cassis de Dijon) [1979] ECR 649; see supra note 53 of Chapter 2 and also further development in Section 2.2.1 Establishment of ASEAN Economic Community of Chapter 2.
30 Craig and de Búrca, supra note 4, p. 606
31 Ibid., pp. 606-607
32 Weatherill, Cases and Materials on EU Law, supra note 5, p. 266
33 See Completing the Internal Market: White Paper from the Commission to the European Council, supra note 2, paras. 5 and 7
35 Ibid.; see also Cecchini, supra note 4, pp. xiii-xiv
serious problem. The protectionism in Europe was seen to originate from governments’ approach to take a more interventionist path based on their desire to increase economic growth and from the governments’ anxiety which caused the arteriosclerosis of the market such as in the labour market. Finally, the 1985 White Paper on completing the internal market drew up a detailed single market programme and provided a policy agenda of approximately 300 measures which needed to be adopted to remove NTBs by the end of 1992. It was a blueprint for the European single market programme by 1992 in order to secure the reinvigoration of the EU.

The White Paper touched the matters where they have a direct bearing on the working of the internal market. The measures to be removed were classified into three categories: physical barriers; technical barriers; and fiscal barriers. The physical barriers are the barriers that are triggered by crossing a border. The most obvious example of these is customs-related costs, such as customs control, border stoppages and the associated paperwork and red-tape. The White Paper understood the notion of ‘border’ in a practical sense rather than in a geographical sense. From the point of view of businesses, the paperwork and red-tape related to the administrative formalities linked to border control are most obstructive. The technical barriers result from national legislation which, in practice, hampers free movement even if it does not refer to border crossings from a legal point of view, and which is indistinctly applied to foreign and indigenous goods, persons, services and capital. The notion of the

36 Perry, supra note 6, p. 42
37 Cecchini, supra note 4, p. 3
38 Weatherill, Cases and Materials on EU Law, supra note 5, p. 266
39 For the definition of these barriers, see Completing the Internal Market: White Paper from the Commission to the European Council, supra note 2, paras. 10-14; the division of the White Paper was in three parts dealing with these barriers.
41 Ibid., p. 90
42 Cecchini, supra note 4, p. 8
43 Schmitt von Sydow, supra note 40, p. 91
‘technical barriers’ under the White Paper is very broad. Those barriers can risk obstructing free movement and annihilating the benefits of the removal of physical barriers. Examples are divergent national product standards, different technical regulations and conflicting company and business laws. The elimination of technical barriers was expected to enable industries to make economies of scale and to become more competitive. The fiscal barriers appear in both forms, as physical and as technical barriers. Examples are different tax regimes or accounting standards. Companies willing to engage in cross-border trade or business activities had to deal with all the barriers mentioned in the White Paper, such as border controls and customs red-tape, divergent standards, technical regulations, conflicting business laws, protectionist procurement practice or fiscal regimes. They often suffer from a significant amount of red-tape and administrative costs in order to sell their products across borders or from additional costs of coping with changing standards across borders and of the duplication of product development related to them. SMEs were the prime victims of this sort of NTBs since they suffer severely from the additional costs associated with market fragmentation as the costs of engaging in cross-border trade represented a higher proportion of their volume of business, and thus, often prevented their cross-border expansion. At any rate, the 1985 White Paper had begun to remove the market rigidities and barriers to mobility, which, in the mid-1980s, gave rise to the European economy as reflected in rising employment and increased competitiveness. It was reinforced by the SEA, the first significant Treaty amendment after the Treaty of Rome, through setting out the internal market aim of ‘progressively establishing the internal market over a period expiring on 31 December 1992.’ The SEA defined the

44 Ibid.; Completing the Internal Market: White Paper from the Commission to the European Council, supra note 2, para. 13
45 Completing the Internal Market: White Paper from the Commission to the European Council, supra note 2, para. 13
46 Schmitt von Sydow, supra note 40, p. 91
47 Rodríguez-Pose, supra note 34, p. 17
48 Cecchini, supra note 4, p. xviii
49 Cecchini, supra note 4, p. 8; Rodríguez-Pose, supra note 34, pp. 16-17
internal market as ‘an area without internal frontiers in which the free movement of
goods, persons, services and capital was ensured.’\textsuperscript{50} There were also institutional
reforms to realise this objective. Most importantly, the legislative procedure was
prompted by adopting the qualified majority voting (QMV) by the EU Council into a
range of areas which had previously required unanimity.\textsuperscript{51} By the end of 1992, almost
95 per cent of the measures contained in the White Paper had been enacted and 77 per
cent had entered into force in the Member States.\textsuperscript{52} The SEA, together with the White
Paper, actually brought about a more optimistic assessment to the achievement of the
internal market.\textsuperscript{53}

The positive perception of the single market programme set by the White Paper
and the SEA was confirmed by European businesses, which clearly saw that the
programme had removed a serious of obstacles to cross-border transactions and had
increased market opportunities.\textsuperscript{54} The basic economic aim of setting out free movement
of goods, persons, services and capital under the internal market is the optimal
allocation of resources for the EU as a whole. This would be enabled by allowing the
factors of production to move to the area where they are most valued.\textsuperscript{55} Companies can
convert increased market opportunities through the completion of the internal market
into economic success with price reductions, by the lowering of production costs and
with productivity gains in the factors of production through more efficient allocation of
resources or industrial restructuring or improved internal business organisation.\textsuperscript{56}

\textsuperscript{50} Art. 8a EEC; now Art. 26 TFEU (ex. Art. 14 EC)
\textsuperscript{51} Art. 100a EEC; now Art. 114 TFEU (Art. 95 EC); it is noteworthy there were twelve Members when
QMV was introduced under the SEA; see Section 2.2.2 Evolution of the ASEAN Charter
\textsuperscript{52} Commission of the European Communities (1993) Twenty Sixth Report on the Activities of the
European Communities 1992 (Luxembourg: Office for Official Publications of the European Communities), p. 35; Chalmers \textit{et al}., \textit{supra} note 7, p. 21; Barnard, \textit{The Substantive Law of the EU: The
Four Freedoms}, \textit{supra} note 1, p. 528
\textsuperscript{53} Craig and de Búrca, \textit{supra} note 4, p. 13
\textsuperscript{54} See the results of the business surveys under section 3.2. of Communication from the Commission to
the European Parliament and the Council: The Impact and Effectiveness of the Single Market, \textit{supra} note 14
\textsuperscript{55} Craig and de Búrca, \textit{supra} note 4, p. 605
\textsuperscript{56} Cecchini, \textit{supra} note 4, p. 96
Because they are always looking for markets whose conditions best suit their own commercial needs, they cross frontiers to operate outside their original jurisdiction. Particularly, groups of companies, such as multinational corporations, when considering the establishment of a new component, will have to make a choice between different places for this venture, taking into account the quality of the workforce and the infrastructure as well as the advantages of the fiscal and legal environment.\(^57\) In the light of the successful single internal market idea, EU law enables companies to do business across frontiers within the European internal market and enables third parties to deal with them secure in the knowledge that they do so within a framework of common standards.\(^58\) These companies cross frontiers not only by establishing subsidiaries or branches but also by the total transfer of an enterprise from one country to another within the EU.\(^59\)

As a creation of national law, the nationality of companies is determined by the law of a Member State.\(^60\) Thus, when companies cross national boundaries to operate outside their original jurisdiction, this can bring problems of several different kinds. Due to the situation where the facts of a case involve a ‘foreign’ element, a domestic court dealing with such a company may have to ascertain which law is, or should be, the law which regulates its affairs.\(^61\) The determination of the governing national legal system under which recognition is to be made is important because it also regulates the company’s validity, legal formation, function, dissolution and winding-up, internal


administration, external administration and its nationality. The legal status of foreign companies and their cross-border manoeuvrability used to belong to the domain of private international law specialists. Their attempts to define and recognise ‘foreign’ companies and the rights conferred upon them culminated in two opposing theories, commonly referred as ‘place of incorporation’ theory and ‘real seat’ theory. According to the place of incorporation theory, a company is governed by the law of the country where it is incorporated or registered; whereas, according to the real seat theory, a company is governed by the law of the country where its real seat or centre of administration is. In Europe, for the purpose of deciding the governing law of a company, there are jurisdictions which use the place of incorporation theory and those which use the real seat theory. Some jurisdictions take a variety of half-way positions in this debate. It was traditionally recognised that the United Kingdom and the Netherlands adhere to the place of incorporation theory and that Belgium, France, Germany, Poland and Spain follow the real seat theory. However, it is noteworthy that Germany abandoned the real seat requirement for private companies in 2008 in order to facilitate the formation of companies and make the GmbH more competitive against its European counterparts. As a reaction to the fact that thousands of businesses opted for the English private limited company and run through the entire European internal

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63 Rammeloo, supra note 59, p. 9
64 These theories originated from the philosophies of company existence; for further details of the philosophies of company existence, see chapter 1 of Dine, supra note 61
65 According to European Commission, Commission Staff Working Document: Impact assessment on the Directive on the cross-border transfer of registered office, SEC (2007) 1707, Brussels, 12.12.2007, pp. 9, the countries applying the place of incorporation theory were the United Kingdom, the Netherlands, Ireland, Denmark, Sweden, Finland, Slovakia, Hungary, the Czech Republic, Malta and Cyprus; many other continental law system countries such as Greece, France, Belgium, Spain, Luxembourg, Portugal, Poland, Estonia, Slovenia, Latvia, Norway (non-EU Member) applied the real seat theory; Italy adopted mixed system.
67 Ibid., p.33; the new wording of s. 4a GmbHG no longer mention the obligation to have the registered office at the same place as the head of management; Christoph Teichmann (2011) ‘European Company Law – Common Principles or Competition between Legislators?’ in Schulze, Reiner and Schulte-Nölke (eds.), European Private Law – Current Status and Perspectives (Munich: Seller), 145, pp. 168-169; see further for the main features of the reform in ChristophTeichmann (2010) ‘Modernising the GmbH: Germany’s Move in Regulatory Competition’ 7 (1) European Company Law, 20, p. 20 et seq.
market, Germany permitted a *GmbH* to locate its central management outside of Germany.\(^{68}\)

The combined use of the real seat theory was actually reinforced by concerns to regulate the protection of minority shareholders, employees and creditors in the national company law of the state where the corporation conducts its business.\(^{69}\) However, defining a company’s seat is problematic, particularly, in a world of multi-state activities of a company, where the definition of centre of administration implies a certain degree of imprecision.\(^{70}\) It is difficult to determine where a company actually has its real seat in a globalised business world since the real seat theory is focused on control. Furthermore, business undertakings cannot be expected to operate in only one market on a continuing basis.\(^{71}\) The difficulties arise when a company transfers its central administration, or elements of this to a jurisdiction other than that in which it was incorporated.\(^{72}\) A company could even be confronted with nullity, when it is incorporated under the law of one country, but has its management and control centre in another country, whose legal order, adhering to the real seat theory, denies its existence.\(^{73}\) Consequently, the economic mobility of companies, planning to move their headquarters to another country, is seriously prevented, because cross-border transfers entail a compulsory change in the proper law of the company.\(^{74}\) By contrast, according to the incorporation theory, regardless of whether an existing company decides to transfer its real seat to the incorporation country while maintaining its status, or whether


\(^{69}\) Teichmann, ‘European Company Law – Common Principles or Competition between Legislators?’*, *supra* note 67, p. 155.


\(^{71}\) Rammeloo, *supra* note 59, p. 14

\(^{72}\) Drury, ‘The Regulation and Recognition of Foreign Corporations: Responses to the “Delaware Syndrome”’, *supra* note 61, p. 165; see also Dine, *supra* note 61, p. 67

\(^{73}\) Rammeloo, *supra* note 59, p. 15

\(^{74}\) *Ibid*. 

199
the company is duly established under a foreign system of law, the company is recognised as long as the company has met the formation requirements according to the system of law chosen.\textsuperscript{75} Due to the formal nature of the decisive factor, it offers high legal certainty and predictability.\textsuperscript{76} In general, the countries applying the place of the incorporation theory allow a company to transfer its head office to another Member State without dissolution and without a change of the legal regime of the company.\textsuperscript{77} Thus, the place of incorporation theory accepts that a company’s nationality and residence may be severed similar to those of natural persons.\textsuperscript{78} However, the cross-border transfer of the registered office from the incorporation country results in a change of the applicable company law to that company and requires the dissolution of the company in the home State and its reincorporation in the host State.\textsuperscript{79} When the host State refuse to recognise the corporate status of the company, the effect may be that shareholders incur personal liability for the company’s debts, that the company may be treated differently for tax purposes, and that the company will be unable to enter into contracts, own property or bring legal proceedings in its own rights.\textsuperscript{80} This conflict of laws problem regarding the recognition of foreign companies has made it practically difficult for the companies to move the head office or registered office to another Member State within the EU.\textsuperscript{81} For example, Germany would not like to recognise foreign European companies which are not bound by German mandatory rules such as two-tier board structure or codetermination and employee participation and also,

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\item \textsuperscript{75} Ibid., p. 16
\item \textsuperscript{76} Rammeloo, supra note 59, p. 17; Drury, ‘The Regulation and Recognition of Foreign Corporations: Responses to the “Delaware Syndrome”, supra note 61, p. 168
\item \textsuperscript{78} Vanessa Edwards (1999) EC Company Law (Oxford: OUP), p. 335
\item \textsuperscript{80} Edwards, EC Company Law, supra note 78, p. 374
\item \textsuperscript{81} Ibid., p.10; see Case C-210/06, Cartesio Oktató és Szolgáltató Br [2008] ECR 5483, para. 124 ; see also the development of the Proposal for a Fourteenth Company Law Directive on the transfer of the registered office of a company from one member state to another with a change of applicable law, 20 April 1997, doc. XV D/2602/97, en-Rev 2 and the SE (Societas Europea) the Statute for a European Company (Societas Europea (SE)) [2001] OJ L 294/1; see further in Section 5.3.2 (2) EU Company Law Directives and Section 5.3.4 (1) European Company or Societas Europea.
\end{itemize}
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conversely, to see German companies transfer their seats into other EU Member State to avoid those German rules.\textsuperscript{82} It is noteworthy that it is still necessary for the registered office of an SE (Societas Europea) to be located in the same Member State as its head office.\textsuperscript{83} The question whether the registered office and the central administration or principal place of business of the EPC have to be in the same jurisdiction, is a central issue for the national law strategy of Member States to protect their mandatory rules against the EPC.\textsuperscript{84} The choice between the real seat theory and the place of incorporation theory is significant for the legal strategy of identifying the rules applicable to the EPC by reference to the laws of the State in which the EPC is registered unless the rule on a particular matter is determined in the EPC Statute itself, either because a mandatory rule on the topic is laid down in the statute or because the statute empowers the EPC to fashion the rule in its articles of association.\textsuperscript{85} Reflecting the difficulty of the issue, the EPC proposal added the qualification that for two years from the date of adoption of the statute coincidence of registered office and central administration would be a requirement of the statute but after that, it would be a matter of member state choice.\textsuperscript{86}

To certain extent, similarly as in ASEAN, the disparities in company laws pose obstacles for the performance of cross-frontier business activities in Europe. The different company law regimes of the EU Member States are due to the fact that the authorities of the States take different positions: each seeks to balance the goal of

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\textsuperscript{83} Art. 7 of the Statute for a European Company (Societas Europea (SE) (SE Regulation) [2001] OJ L 294/1; see further in Section 5.3.2 (2) EU Company Law Directives and Section 5.3.4 (1) European Company or Societas Europea.


\textsuperscript{85} Ibid.; see further on the governing law of the EPC and the APC in Section 5.3.4 (3) European Private Company or Societas Privata Europea; and Section 6.4.2 (2) Governing Law.

\textsuperscript{86} Art. 7 of ‘A Revised Presidency compromise proposal for a Council Regulation on the Statute for a European private company’ (the EPC Proposal) is a Council document: 16115/09 DRS 71 SOC 711 ADD1, Brussels, 27, November, 2009 (Inter-institutional file 2008/0130 (CNS)) which can be found at: <http://www.europeanprivatecompany.eu/legal_texts/download/Council-November09-en.pdf>
stimulating economic growth by welcoming foreign investors against other aims such as creditor protection, codetermination and employee participation, fair and equal competition on domestic markets, tax revenue policies, etc.\(^{87}\) When each Member State makes choices among these goals, it is difficult for the costs and benefits to society to be balanced: a state which is overly generous to the foreign companies conducting business activities on its territory may have an influx of foreign investors, but this benefit might also be outweighed by costs, such as abuses or fraud committed by those in charge of the foreign company’s management.\(^{88}\) At any rate, there have been clashes between the EU Member States to control the activities of companies that are active within their jurisdiction, either by the application of real seat theory or by imposition of taxation, and the principles of freedom of establishment for companies and non-discrimination on national grounds.\(^{89}\)

The aim of developing European company law is the establishing of the European internal market where freedom to conduct business across borders without restrictions is realised. However, European company law clearly bears signs of the influence of national laws of the Member States, as is noticeable in the process of its harmonisation.\(^{90}\) For example, French law influenced the third and sixth company law directives,\(^{91}\) i.e. for merger and splitting up.\(^{92}\) However, the beginning of the company law harmonisation was marked particularly by German influence. However, German ideas on the group of companies and also on codetermination and employee participation in a two-tier board system have been regarded as too strict for other

\(^{87}\) Rammeloo, supra note 59, p. 4

\(^{88}\) Ibid, p. 4

\(^{89}\) Dine, supra note 61, p. 101


\(^{92}\) Hopt, ‘Company Law in the European Union: Harmonization and/or Subsidiarity’, supra note 90, p.45
Member States to accept. This is well reflected in the failure of adoption of the fifth and the ninth company law directives. Codetermination and employee participation on supervisory boards is a politically sensitive issue with a long development history in Germany. The one-tier board model which was taken by the Anglo-Saxon and many other Southern European countries was firmly rejected by the majority of German business leaders as well as German academics. Abandoning either the two-tier board structure or codetermination would not happen in Germany in the near future. It took almost thirty years to adopt the Statute for a European Company (Societas Europea, SE) and these controversial matters, before the establishment of an SE, still belong to long negotiations to reach an agreement on arrangements on employee involvement of the SE. German enterprise associations feared that the SE would be a form not available for German companies if foreign companies would hesitate to agree to come under the German codetermination rules.

With regard to the corporate law protection on creditors, traditionally, the continental European countries placed emphasis on the statutory minimum capital

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93 Ibid.
94 The proposal for Fifth Council Directive based on Article 54 (3) (g) of the Treaty on the structure of public limited companies and the powers and obligations of their organs COM (72) 887 final, 18 July, 1972 [1972] OJ C131/49; an amended Proposal for this directive was submitted in 1983; COM (83) 185 final, 12 August 1983; [1983] OJ C240/2; Preliminary Draft of a Directive based on Article 54 (3) (g) of the Treaty on Harmonisation of Groups of Companies, Doc XI/328/74 (Part I) and Doc XV/593/75 (Part II); see further in Section 5.3.2 (2) EU Company Law Directives.
95 Teichmann, ‘European Company Law – Common Principles or Competition between Legislators?’, supra note 67, p.162; for the history of codetermination in Germany, see Duplessis and Sandrock, supra note 82, p.68 et seq.; it is noteworthy that the introduction of German codetermination system was initially motivated by considering the interests of shareholders.
97 Duplessis and Sandrock, supra note 82, p.78; a draft reform of codetermination was adopted and published in Germany in 2009, which is unlikely to be implemented due to political intransigence; Teichmann, ‘European Company Law – Common Principles or Competition between Legislators?’, supra note 67, p.162
99 Teichmann, ‘European Company Law – Common Principles or Competition between Legislators?’, supra note 67, p.160; see further details in Section 5.3.4 (1) European Company or Societas Europaea.
100 Hopt, ‘Company Law in the European Union: Harmonization and/or Subsidiarity’, supra note 90, pp. 50-51
whereas the Anglo-Saxon countries characteristically focused on the disclosure obligations.\textsuperscript{101} The implementation of the second company law directive\textsuperscript{102} which prescribed a minimum capital for public companies and dealing with the questions of maintenance and alteration of capital brought some fundamental changes to British company law.\textsuperscript{103} By contrast, the second company law directive hardly required any amendments in German company law because the capital protection under the directive originated from the German model.\textsuperscript{104} However, Germany conversely had considerable difficulties in the effective implementation of disclosure obligations under the first and the fourth company law directives\textsuperscript{105} because German companies resisted effecting the compulsory disclosure and also the German legislator refrained from providing appropriate penalties for the failure.\textsuperscript{106} This deficiency was ultimately rectified only by the introduction of the electronic commercial register in 2006.\textsuperscript{107}

There are a quite number of traces of Anglo-Saxon influence in European

\textsuperscript{101} Teichmann, ‘European Company Law – Common Principles or Competition between Legislators?’, su pra note 67, p.162
\textsuperscript{102} Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [1977] OJ L 26/1.
\textsuperscript{104} Teichmann, ‘European Company Law – Common Principles or Competition between Legislators?’, su pra note 67, p.153
\textsuperscript{107} Teichmann, ‘European Company Law – Common Principles or Competition between Legislators?’, su pra note 67, p.153; a survey by Carsten Theile and Jenifer Nitsche (2006) ‘Praxis der Jahresabschlusspublizität bei der GmbH’, Vol.59 No.18 Die Wirtschaftsprüfung, 1141, p.1141, revealed that even in 2002, 70 per cent of German private companies did not disclose their annual accounts, and only since the introduction of the electronic commercial register in 2006, the competent authorities regularly follow up latecomers, which apparently has considerably improved compliance with the disclosure obligations.
company law, such as the true and fair view of the fourth company law directive, transparency and the duties of disclosure, the market approach in company law matters, particular vigilance relating to conflicts of interests, the danger for the independence of chartered accounts, and the importance attributed to fairness in take-over bids and insider dealing.\textsuperscript{108} However, the British company law had to go through considerable intervention and even structural changes under the European company law development, such as the introduction of the continental system of fixed capital as mentioned above and also giving up the traditional \textit{ultra vires} doctrine.\textsuperscript{109}

To what extent the company law harmonisation from the point of view of both European policy and European law would be necessary for the realisation of the internal market is related to the question of subsidiarity. Member States might argue that some of the objects of legal harmonisation could be achieved nationally without any action being taken by the EU.\textsuperscript{110} In other words, it is called into question whether the objectives of the proposed action cannot be achieved sufficiently by Member States, but can rather be better achieved at EU level by reason of the scale or effects of the proposed action.\textsuperscript{111} For example, the development of the thirteenth company law directive on take-over was involved in the subsidiarity objection before its adoption.\textsuperscript{112} There has been some degree of convergence of national corporate laws achieved by the European company law harmonisation. There are some trends towards the coming together of Anglo-Saxon and Continental law as well. However, these trends are not so much due to the EU’s harmonisation process efforts but more to market-driven

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\item \textsuperscript{108} Hopt, ‘Company Law in the European Union: Harmonization and/or Subsidiarity’, \textit{supra} note 90, pp. 46-47
\item \textsuperscript{109} \textit{Ibid.}, p. 47; Teichmann, ‘European Company Law – Common Principles or Competition between Legislators?’, \textit{supra} note 67, p.154; see Companies Act 2006 s31 and s41 relating to the change of the traditional \textit{ultra vires} doctrine.
\item \textsuperscript{110} Hopt, ‘Company Law in the European Union: Harmonization and/or Subsidiarity’, \textit{supra} note 90, p. 48
\item \textsuperscript{111} Art 5 (3) TEU (ex Art.5 EC); Gareth Davies (2006) ‘Subsidiarity: the Wrong Idea, in the Wrong Place, at the Wrong Time’ \textit{43 Common Market Law Review}, 63, p. 67
\end{enumerate}
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approximation.\textsuperscript{113} The gap between the national company laws in the EU is still significant, particularly in the areas of transfer of seats, creditor protection, management board structure and employee participation. This has placed obstacles in developing cross-border mobility mechanisms within the EU, in particular, with regard to developing EU supranational corporate vehicles, e.g. SE, EEIG, EPC. The dilemma is this: on the one hand, creating an EU-wide uniform corporate form which covers the controversial areas would meet with strong opposition from Member States. On the other hand, leaving those areas open by referring national laws of Member States to fill the uncovered gaps of its applicable law, would weaken the uniform corporate form for corporate cross-border mobility and the problem of company law difference would not be resolved. The divergence in national company laws will impose administrative burdens and compliance costs on corporate decisions to expand across frontiers.\textsuperscript{114} It is noteworthy that compared to larger companies, SMEs, despite the recognition that they are the engines of economic growth, have suffered more from compliance costs originating from disparities of company law regimes, which discouraged the cross-border mobility of the SMEs.\textsuperscript{115} However, it is difficult to say that there is a determined drive to harmonise the law on SMEs across the EU and also, the adoption of the EPC Proposal has not been realised.\textsuperscript{116}

Since the inception of the EU in 1957, it has been always believed that the integrated economy of a large, expanding and flexible market would bring greater progress, greater prosperity and higher level of employment to the EU. On the way to the completion of the internal market, the main barriers in the area of facilitation of

\textsuperscript{113} Hopt, ‘Common Principles of Corporate Governance in Europe?’, supra note 96, p.106
\textsuperscript{114} Edwards, EC Company Law, supra note 78, p. 3
\textsuperscript{115} Even after the completion of the single market programme under the 1985 White Paper, compliance costs are a big problem for most SMEs according to the survey result; section 3.2 of Communication from the Commission to the European Parliament and the Council: The Impact and Effectiveness of the Single Market, supra note 14; Cecchini, supra note 4, p. 10
\textsuperscript{116} Teichmann, ‘European Company Law – Common Principles or Competition between Legislators?’, supra note 67, p. 152; see the current status of the EPC Proposal in Section 5.3.4 (3) European Private Company or Societas Privata Europea
business and corporate collaboration and cross-border corporate mobility within the EU essentially are NTBs, conflict of law problem and company law differences. The EU Commission was convinced that the completion of the internal market will provide an indispensable base for increasing the prosperity of the EU as a whole.\textsuperscript{117} There was the strong political will that the difficulties faced by individual Member States and their oppositions originated from the company law differences, can be recognised, and to some degree, be accommodated, but they should not be allowed permanently to frustrate the economic integration.\textsuperscript{118} The success of the single market programme by 1992 and its impact on the increase in intra-EU trade was due to the strong political will in the EU. The starting point of the whole process of economic gains was the removal of NTBs.\textsuperscript{119} Still, there are cross-border barriers, such as bureaucratic obstacles, which add to lack of efficiency and unnecessary costs, and thus, prevent businesses from benefiting from the single market. Therefore, strengthening the single market in the EU continues even after the success of the 1992 single market programme.\textsuperscript{120} Now, I will look at the instruments that have been developed under the EU in order to tackle the obstacles to cross-border business activities, which have contributed to develop the internal market and increase intra-EU trade.

5.3 EU Mechanisms on Corporate Collaboration and Cross-border Mobility

\textsuperscript{117} Completing the Internal Market: White Paper from the Commission to the European Council, supra note 2, para. 21
\textsuperscript{118} Ibid., para. 15
\textsuperscript{119} Cecchini, supra note 4, p. xviii
\textsuperscript{120} Companies have to pay up to EUR 2000 in additional legal costs when they want to have a legal judgment recognised in another EU country. This costly and cumbersome exequatur process burdens companies without providing any additional legal security. In more than 90 per cent of the cases, this procedure is a pure formality. Viviane Reding, Vice-President of the European Commission responsible for Justice, Fundamental Rights and Citizenship, ‘Making the Most of the Internal Market: Concrete EU Solutions to Cut Red Tape and to Boost the Economy’, SPEECH/10/42, Brussels, 24 February 2010
5.3.1 Removal of Tariff and Other Barriers to Trade

According to Article 28 TFEU (ex Article 23 EC), the EU is based on a customs union (CU) which covers all trade in goods and which involves the prohibition between Member States of customs duties on imports and exports and of all charges having equivalent effect, and on the adoption of a common customs tariff in their relations with third countries. The customs union of the EU covers ‘all trade in goods.’ This means that products coming from a third country can move freely within the EU if the import formalities have been complied with and any customs duties or charges having equivalent effect, which are payable, have been levied in the importing Member State.\textsuperscript{121}

The creation of a common market has lain at the heart of the EU since its inception by the 1957 Treaty of Rome.\textsuperscript{122} A common market presupposes an accomplishment of a CU and free movement of persons, services and capital in the region.\textsuperscript{123} Under the Treaty of Rome, customs duties and charges having equivalent effect to customs duties on imports were to be progressively abolished during the twelve-year transitional period from 1 January 1958 to 31 December 1969.\textsuperscript{124} Although the Treaty gave the Member States the option of varying the rate of reduction of customs duties according to product should a sector have difficulties, the reduction was constant and progressive. The rate of tariff dismantling was completed on 1 July 1968, 18 months ahead of schedule. One consequence of this programme was that many of the previously protected industries were obliged to renovate or shut down, but many new industries were created or expanded on a sound basis. Also, the accelerated completion of the tariff union manifested that tariff dismantling caused no major problems to the

\textsuperscript{121} Art. 29 TFEU (ex Art.24 EC)
\textsuperscript{122} See Art. 2 of the Treaty of Rome; Art. 3 (3) TEU under the Lisbon Treaty continues to provide that the Union shall establish an internal market.
\textsuperscript{123} See Art. 3 of the Treaty of Rome
\textsuperscript{124} Articles 13 and 14 of the Treaty of Rome
industries of the Member States, as any country’s objection would have prevented the change of schedule provided by the Treaty.¹²⁵

Although, as of 1 July 1968, intra-EU trade was freed of customs duties and quantitative restrictions on imports and exports, other trade obstacles, such as charges having equivalent effect to customs duties and measures having equivalent effect to quantitative restrictions had to be removed for the proper functioning of the tariff union by the end of the transitional period.¹²⁶ The Treaty of Rome also expressed the necessity of ‘reducing formalities imposed on trade as much as possible.’¹²⁷ However, when the tariff disarmament was accomplished, the competition for various restrictive practices on formalities was stepped up between Member State administrations anxious to protect national production and prevent the decrease of their own functions and powers.¹²⁸ Those formalities may be required for cross-border trade with the aim of preventing the import of products not conforming to national regulations, but they raise costs for European businesses preventing the interpenetration of national product markets. Their restrictive effects were often more damaging than customs duties and quantitative restrictions. Many of those trade barriers were embedded in regulations, such as consumer or environment protection standards, different across the States. The elimination of NTBs to trade proved to be much more difficult than that of customs barriers.¹²⁹

Over all, free movement of goods is one of the success stories of the European project.¹³⁰ Already in 1968, the economic results of the free circulation of goods achieved by it were indisputable. From 1958 to 1972, while trade between the six

¹²⁶ Article 12 of the Treaty of Rome states that Member States shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other.
¹²⁷ Art. 10 of the Treaty of Rome
¹²⁸ Moussis, supra note 125, p.73
¹²⁹ Perry, supra note 6, p. 38
founding Member States and the rest of the world had tripled, intra-EU trade had been increased. The stimulating effect of the wider market created a feeling of business confidence, which resulted in investment growth. Supply was much more diverse and products cheaper than before tariff dismantling which benefited consumers. The welfare objective of European integration was undoubtedly well pursued through the CU. Considering that such exceptional trade growth by tariff dismantling was a key factor in economic development, while raising the standard of living in the original EEC Member States, it is understandable that the economic integration under ASEAN has been focused on tariff reduction. However, as was seen in the development of the internal market in the EU, a more difficult task lies in the elimination of the remaining problems of removing NTBs in order to benefit from either a customs union or a free trade area.

5.3.2 Harmonisation of Company Laws

(1) Harmonisation Approach

There are two principal techniques that can be used to attain a single market. One is negative integration which is a deregulatory approach by which the EU law prohibits national rules that hinder cross-border trade. The Treaty articles concerning the four freedoms operate in this way. The other is positive integration which deals with problems caused by divergences in national rules which can create barriers to trade. These types of barriers can be overcome either by mutual recognition by the Member States or by harmonisation of diverse national laws by means of secondary EU

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131 For example, the AFTA and the AICO; see further in chapter 4.
132 Note that it is not decided yet whether the end goal of the AEC is a free trade area or a customs union; see chapter 2.
legislation such as EU directives or regulations. The legal harmonisation approach through the adoption of the EU company law directives has been used extensively in the area of the EU corporate law.

The role of harmonisation had been envisaged by the Treaty of Rome, which set the aim at the establishment of a common market and the gradual approximation of the Member States’ economic policies. Article 100 of the Treaty opened up a wide area of discretion for secondary EU legislation. It can justify the issuance of any directive ‘for the approximation of such provisions laid down by law, regulation or administrative action as directly affect the establishing and functioning of the common market.’ The restriction put forward by the ‘directly affect’ demand is symbolic, as is the case with the restriction of Article 3 (h) of the Treaty where it stated that the approximation of laws of Member States would be pursued ‘to the extent required for the proper functioning of the common market.’ However, it was recognised that the unanimity voting requirement in the EU Council under Article 100 of the Treaty, when adopting directives to approximate national measures affecting the establishment of the common market, had been a serious obstacle to the passage of harmonisation measures. The unanimity voting in the EU Council hindered adopting a large number of often controversial measures deemed necessary to complete the internal market. Therefore, the SEA introduced a new legal basis of Article 100a EEC, which provided the QMV when enacting measures for the approximation of Member States laws which have as ‘their object the establishment and functioning of the common market.’ It was a

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133 Craig and de Búrca, *supra* note 4, p. 606
134 Art. 2 of the Treaty of Rome
135 Similar text to Art. 100 of the Treaty of Rome can be now found in Art. 115 TFEU (ex. Art. 94 EC); Barnard, *The Substantive Law of the EU: The Four Freedoms, supra* note 1, p. 603
137 Art. 3 (h) of the Treaty of Rome
138 Now, the legal bases for this requirement can be notably found in Art. 115 TFEU (ex. Art. 94 EC) and Art. 352 TFEU (ex. Art. 308 EC).
139 Craig and de Búrca, *supra* note 4, p. 13; Completing the Internal Market: White Paper from the Commission to the European Council, *supra* note 2, paras. 13 and 61
140 Barnard, *The Substantive Law of the EU: The Four Freedoms, supra* note 1, p. 11
significant step to the harmonisation approach in the EU, emphasising that the single market was essentially a law-making project.141

One of the justifications of the internal market is to enable enterprises to allocate resources more efficiently.142 The creation of an EU legislative framework for cross-border activities by enterprises and for cooperation between enterprises from different Member States will make it easier for European enterprises to pool the resources that are available in several Member States and hence, be competitive not only in Europe, but also in the world at large. Increased competition in a larger market will lead to corporate restructuring and the restructuring of business strategies as well. It is no longer the mere alignment of domestic laws that is being sought, but the creation of a truly European company law.143 Appropriate measures are needed under the EU to provide for legal structures which facilitate cross-border establishment and investment, and to smooth discrepancies between national systems of company law which discourage these activities.144 Accordingly, the proposals on company law directives became an integral part of the single market legislative programme.145

The British system sees stake-holders rights as mainly lying outside the framework of company law, which is predominantly concerned with the position of shareholders and, to lesser extent, creditors, whereas the French and Belgian systems put much emphasis on the protection of creditors.146 Whereas German and French law pursue creditors’ protection by setting up minimum capital standards and providing

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141 Ibid.; see the meaning of adopting the QMV and its development in the EU in Section 2.2.2 Evolution of the ASEAN Charter.
142 Commission of the European Communities, Communication from the Commission to the Council: Making the Most of the Internal Market: Strategic Programme, Brussels, 22 December 1993, COM (93) 632, p. 33
143 Commission of the European Communities, Conditions for Business Cooperation. Public Procurement, Brussels 1992, p. 4
144 Commission of the European Communities, Communication from the Commission to the Council: Making the Most of the Internal Market: Strategic Programme, supra note 142, p. 33
145 Commission of the European Communities, Conditions for Business Cooperation. Public Procurement, supra note 143, p. 4
rules, British law relies on instruments like information requirements, some state supervision over company behaviour and, under certain conditions, liability rules concerning members of the company and of management.\footnote{Roth, supra note 70, p. 201} However, it turned out that minimum capital standards may not be the most efficient instrument for creditors’ protection.\footnote{Many countries have either abolished or reduced the minimum capital requirement for the incorporation of their national corporate forms due to the regulatory competition; Drury, Robert R. (2005) ‘The ‘Delaware Syndrome’: European Fears and Reactions’, \textit{Journal of Business Law}, 709, pp. 724 and 729; Roth, supra note 70, p. 201} For example, France has effectively removed the minimum capital requirement for the \textit{SARL}.\footnote{France has reduced the minimum capital to one euro; see Article L. 223-2 C. Com, as amended by Art. 1 of the \textit{Loi pour l’initiative économique n°2003-721 du 1er août 2003}, \textit{Journal Officiel}, 5 August 2003; Eddy Wymeersch (2007) ‘Is a Directive on Corporate Mobility Needed?’ \textit{8 European Business Organization Law Review}, 161, p. 164; Drury, ‘The ‘Delaware Syndrome’: European Fears and Reactions’, supra note 148, p. 729} In Germany, legislation modernising the law concerning the \textit{GmbH} and combating its abuse\footnote{\textit{Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG)} is drafted in May 2006 and came into force on 1 November 2008.} has cut it down moderately.\footnote{Frank Wooldridge and Liam Davies (2010) ‘Recent reforms of the German GmbH’ \textit{31 (2) Company lawyer}, 62, p. 62} The debate has accelerated whether the minimum capital rule is the right approach to offer protection to creditors and other third parties and has called for research on alternative creditor protection techniques.\footnote{See Report on the ‘Conference on Efficient Creditor Protection in European Company Law’, Ludwig Maximilians Universität München, Munich, 1–3 December 2005, in \textit{7(1) European Business Law Review} (2006); Wymeersch, ‘Is a Directive on Corporate Mobility Needed?’, supra note 149, pp. 162-163} 

Adding to this, the German system incorporates workers’ codetermination in the processes of governance and control within companies.\footnote{Van den Bergh, supra note 146, p. 457; Roth, supra note 70, pp. 199-200} Consequently, it was not easy to achieve the aim of the creation of an EU legislative framework to enable companies and other commercial undertakings to operate through the EU as effectively as they can within a single Member State. This was due to the special features of company laws across the EU, e.g. the underlying theories of the place of incorporation and the real seat; the link between the company and State of incorporation, and the structures of companies and other commercial undertakings which differed greatly
among Member States. Nevertheless, a substantial amount of harmonisation has been accomplished in European company law, particularly by means of the directives in the EU legislation.

(2) EU Company Law Directives

The EU Treaty basis for the company law harmonisation programme can be found under Article 50 (2) (g) TFEU (ex Article 44 (2) (g) EC) in respect of abolishing barriers to the freedom of establishment. In order to attain freedom of establishment, the task of adoption of legislation designed to “coordinate to the necessary extent the safeguards which, for the protection of the interests of member and others, are required by Member States of companies and firms within the meaning of the second paragraph of Article 54 TFEU (ex Article 48 EC) with a view to making such safeguards equivalent throughout the Union” devolved upon the EU institutions. The Court of Justice has emphasised that such legislation must remove barriers to cross-frontier business activity or eliminate appreciable distortions of competition. They should also aim to reduce the transaction costs involved in cross-border business activity, and thus, to contribute to the overall competitiveness of the European market.

The first company law directive deals primarily with the uniformity of minimum disclosure provisions for company information, both as provided in the commercial register and in the press. It concerns publicity requirements relating to

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156 Arnall et al, supra note 154, p. 864
companies, the circumstances in which company transactions would be valid, and the rules relating to nullity of companies.\textsuperscript{158} It has contributed to enhancing the need for transparency and to guaranteeing legal certainty in dealings between companies and third parties.\textsuperscript{159} The second company law directive 77/91/EEC\textsuperscript{160} deals with the formation of public limited companies and equivalent forms,\textsuperscript{161} and the maintenance and alteration of their capital. It aims to coordinate conditions of establishment and to provide for the maintenance of the company’s minimum or stated capital.

The third company law directive on mergers of public companies\textsuperscript{162} imposes on the Member states a duty, for one thing, to have rules on mergers in their national legislation, for another to have a detailed regulation of the merger procedure, namely via provisions on preparation of merger plans, publication, general meeting approval, merger report, examination of merger terms made by independent experts, securing of employee rights on business transfers in accordance with Directive 77/187,\textsuperscript{163} creditor scrutiny, security of shareholders and holders of securities with special rights, determination of the time of effect of the merger, an obligation to provide liability terms, limitation of the effect of invalid mergers, etc.\textsuperscript{164} The sixth company law directive\textsuperscript{165} applies where a company transfers all its assets and liabilities to more than one other

\begin{footnotes}
\item[158] Arnell \textit{et al.}, supra note 154, p. 865
\item[159] Case 32/74, Friedrich Haaga GmbH [1974] ECR 1205, para. 6
\item[160] Second Council Directive 77/91/EEC of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent [1977] OJ L 26/1.
\item[161] Article 1 (1) of the Second Directive, for example, stock corporations. Article 1 (2) of the Second Directive permits Member States not to apply this Directive to investment companies with variable capital and to cooperatives incorporated as a public company provided that such companies identify themselves as such in all letters and order forms. This exceptions were designed for France and Italy; Edwards, EC Company Law, \textit{supra} note 78, p. 54
\item[164] Erik Werlauff, \textit{EU Company Law, Common business law of 28 states} (2\textsuperscript{nd}) (DJØF Publishing; Copenhagen, 2003), p. 84
\end{footnotes}
company (already existing or newly formed), which issues shares to the shareholders of the transferring company which is then dissolved.\footnote{Articles 2 and 21 of the Sixth Directive} The third directive on mergers of public companies and the sixth company law directive on divisions of public companies derive from a single Proposal,\footnote{COM (70) 633 final, 12 June, 1970; [1970] OJ C 89/20} originally intended to regulate both types of operation. However, shortly before the third company law directive was adopted, the Council decided that further work on divisions was needed in view of the extra risks involved in one company’s assets being distributed among several others, and such transactions were made the subject of the separate and subsequent sixth company law directive.\footnote{Edwards, EC Company Law, supra note 78, pp. 90-91 and 99-100} Cross-border mergers can only be executed by a relatively lengthy and costly procedure and are therefore likely to remain the exception whereas the acquisition of shares will be the rule. With the exception of France where favourable taxation traditionally stimulates acquisition by way of merger, mergers seem to be mostly used for restructuring within a group of companies in other Member States.\footnote{However, the Third Directive allows for a simplified procedure for such situations; Dorresteijn, Kuiper and Morse, supra note 136, p. 183} However, corporate restructuring in the United Kingdom is more commonly effected by way of take-over, whereby one company acquires another by purchasing shares in it from the latter’s shareholders in return for either cash or shares in the former company. This type of transaction is not covered by the third company law directive. Thus, that is why the operations to which the third and the sixth company law directives apply are little used in the United Kingdom. The fact that national rules on mergers vary in many respects in Member States may cause obstacles particularly when it comes to cases of cross-border mergers.\footnote{Ibid., p. 182}

annual accounts and reports, the valuation methods used therein as well as the auditing and publication of these documents. The fourth company law directive, together with the seventh company law directive on consolidated annual accounts\(^\text{172}\) and the eighth company law on audit,\(^\text{173}\) forms a European accountancy code.\(^\text{174}\) They aimed at harmonising financial information published by limited companies with a view to making it equivalent and comparable.\(^\text{175}\) The Commission set out a vision for simplifying EU rules in accounting and auditing,\(^\text{176}\) which shows the rules in company law have overspread.

The legislative framework in the area of EU company law underwent important developments during the seventies and eighties. However, with the enlargement of the Member States, the number of the company law systems to be considered in the harmonisation process expanded. The European company law harmonisation already started to reveal its limits in 1972 when the proposal for the fifth company law directive on coordination of Member States’ legislation on the structure of public limited companies and the powers and obligations of their organs\(^\text{177}\) was submitted. The fifth company law directive was to deal with the important topics of company structure and


\(^{173}\) Eighth Council Directive 84/253/EEC of 10 April 1984 based on Article 54 (3) (g) of the Treaty on the approval of persons responsible for carrying out the statutory audits of accounting documents [1984] OJ L 126/20; see, in particular, Art. 51 of the Fourth Directive requires companies to have their annual accounts audited by one or more persons authorized by national law to audit accounts.

\(^{174}\) Dorresteijn, Kuiper and Morse, supra note 136, p. 48


employee participation in corporate decision-making, which has been the subject of much controversy.\textsuperscript{178} The failure of adopting the fifth company law directive is because of the detailed approach in its regulation.\textsuperscript{179} For similar reasons, the ninth company law directive on groups\textsuperscript{180} was abandoned.\textsuperscript{181} Several former adopted company law directives presuppose the existence of groups by regulating specific areas relevant to groups of companies such as the capital maintenance provisions of the second directive, the provisions of the third directive regulating mergers between parents and subsidiaries and the seventh directive on consolidated accounts. The absence of any general EU legislation on groups of companies was often mentioned as one of the major lacunae in the European company law harmonisation.\textsuperscript{182} The ninth company law directive was a lengthy preliminary draft for the coordination of creation of national laws governing affiliated enterprises, especially groups of companies. It was first drafted in 1974 and 1975, and subsequently revised in 1977, 1980 and 1984.\textsuperscript{183} However, facing the limits and the failure of the detailed approach, as in the ninth directive’s final abandonment, the European company law harmonisation process started to focus on more immediate projects based on the idea of a minimum harmonisation.\textsuperscript{184} Therefore, where harmonisation is deemed to be necessary, the proposed measures should be focused on

\textsuperscript{178} Van den Bergh, \textit{supra} note 146, p. 457; Roth, \textit{supra} note 70, pp. 199-200
\textsuperscript{180} Preliminary Draft of a Directive based on Article 54 (3) (g) of the Treaty on Harmonisation of Groups of Companies, Doc XI/328/74 (Part I) and Doc XV/593/75 (Part II).
\textsuperscript{181} Mock, \textit{supra} note 179; during the late 1970’s and beginning of 1980’s, the EU Commission elaborated a proposal for the ninth company law directive on groups of companies, largely inspired by the German \textit{Konzernrecht} model; see Report of the Reflection Group on the Future of EU Company Law, Brussels, 5 April 2011, p. 59; available at: <http://ec.europa.eu/internal_market/company/docs/modern/reflectiongroup_report_en.pdf>
\textsuperscript{182} Edwards, EC Company Law, \textit{supra} note 78, p. 390
\textsuperscript{183} The final revision in 1984 was Proposal for a Ninth Directive based on Article 54 (3) (g) of the Treaty on links between undertakings and in particular on groups of companies, Doc III/1639/84-E; the text of the revisions are not made public; Edwards, EC Company Law, \textit{supra} note 78, p. 391
\textsuperscript{184} Mock, \textit{supra} note 179; during the late 1970’s and beginning of 1980’s, the EU Commission elaborated a proposal for the ninth company law directive on groups of companies, largely inspired by the German \textit{Konzernrecht} model; see Report of the Reflection Group on the Future of EU Company Law, \textit{supra} note 181, p. 59
the particular problems in question. It can be understood along the same line that the High Level Group of Company Law Experts decided against the introduction of a comprehensive law on groups of companies, recommending instead that the EU should consider provisions within the existing range of corporate law to address particular problems. Although, after the recommendation, there were no subsequent measures in dealing with groups of companies, it is noteworthy that the European Private Company (EPC) relates to the issue of groups of companies since it was in part designed to make the management of EU cross-border groups easier. At any rate, the EU company law harmonisation process came to a turning point after 1984, and the eleventh company law directive on disclosure by branches and the twelfth company law directive on single-member private limited companies were passed in 1989 as a result.

It was noted that disparities between disclosure requirements could comprise obstacles to cross-border corporate activities. Therefore, the first, fourth, seventh and eighth company law directives impose a series of disclosure requirements on companies. The eleventh company law directive on disclosure by branches further seeks to subject branches to certain of the disclosure requirements. The twelfth company law directive was adopted to create a legal instrument allowing the limitation of liability of the individual entrepreneur throughout the Union. This directive is an example of the pragmatic approach where the EU lays down common principles and minimum

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185 Report of the Reflection Group on the Future of EU Company Law, supra note 181, p. 8
187 Proposal for a Council Regulation on the Statute for a European private company, COM 2008 (0396) final, Brussels, 25.6.2008 (the original EPC Proposal); see the development of the EPC Proposal in Section 5.3.4 (3) European Private Company or Societas Privata Europaea.
191 Edwards, EC Company Law, supra note 78, p. 212
192 Ibid., p. 219
requirements which Member States would be required to implement through more
detailed rules according to their national practices. Therefore, the directive provides that
the companies concerned must be recognised as soon as they are formed, with the
Member States being left free to decide on their own arrangements.

Another example of this pragmatic approach can be found in the area of
takeover bids. In 1989, the Commission submitted the first proposal for a thirteenth
company law directive concerning takeover and other general bids,\textsuperscript{193} which was to
provide a European wide take-over regime introducing transparent rules that would
apply to cross-border takeover bids.\textsuperscript{194} However, meeting with strong oppositions of
many Member States to the proposal, the Commission reconsidered its approach and
produced a compromise text of a new proposal in October 2002 after 12 years of
negotiation. Directive 2004/25 on Takeover bids\textsuperscript{195} was modified into a regime
allowing Member States to adopt protectionist opt outs and target companies to invoke
reciprocity against bidders, which could be a setback for the internal market.\textsuperscript{196}

The 1972 proposal for the fifth Directive and the 1985 proposal for the tenth
Directive on cross-border mergers of public limited companies\textsuperscript{197} would have
harmonised national legislation on cross-border mergers between limited companies.
Employee participation was a key issue in the negotiations of those directives, given the
widely diverging systems in force in the Member States. Finally, the tenth company law
directive 2005/56 on cross-border mergers of limited liability companies (Cross-border
Merger Directive)\textsuperscript{198} was adopted dealing with the question of a loss or a reduction of

\textsuperscript{193} Proposal for a Thirteenth Council Directive on Company Law, concerning takeover and other general
\textsuperscript{194} See Press Release IP/01/943, Brussels, 4th July 2001; available at:
\textsuperscript{196} Arnell \textit{et al}, supra note 154, pp. 883 and 886
\textsuperscript{197} Proposal for a Tenth Council Directive based on Article 54 (3) (g) of the Treaty concerning cross-
border mergers of public limited companies COM (84) 727 final, 8 January 1085 [1985] OJ C23/11..
\textsuperscript{198} Directive 2005/56/EC of the European Parliament and of the Council of 26 October 2005 on cross-
employee participation implied by cross-border mergers. It was agreed that employee participation schemes should apply to cross-border mergers where at least one of the merging companies is operating under an employee participation system. Employee participation in the newly created company will be subject to negotiations based on the model of the European Company Statute. The Cross-border Merger Directive aims to facilitate cross-border mergers between limited liability companies in the EU. Despite the third company law directive on mergers of public companies, it remained uncertain to what extent companies from different Member States could engage in mergers. Therefore, the Cross-border Merger Directive complements the third company law directive and includes all limited liability companies, not only public limited companies. It also provided the necessary legal environment for the decision only a few months later by the Court of Justice in SEVIC, which held that national companies had a right directly under the Treaty’s provisions on the freedom of establishment to engage in mergers with companies of other Member States on the same basis as mergers with companies in their own jurisdictions. One must pay attention to the fact that the Cross-border Merger Directive was designed to reduce the cost of such operations, to guarantee their legal certainty and to offer this option particularly to SMEs who cannot take advantage of the provisions of the European Company Statute concerning formation of a European Company (Societas Europea (SE)). The Cross-border Merger Directive has settled to what extent a Member State has to accept the participation of its national companies in cross-border mergers whereby they are dissolved while the continuing company is subject to the laws of another Member State.

However, this raises another issue, under the circumstances that the fourteenth company law directive on cross-border transfer of the registered office of limited liability companies has not been adopted, that it would be possible to effectuate the transfer of the registered office by means of a merger of the existing company with a subsidiary set up in the Member State to which it wants to move its office.

In *Daily Mail*, the Court of Justice has held that, not all the problems related to the manner of transferring the seat of a company incorporated under national law from one Member State to another have been resolved by the rules concerning the right of establishment and such problems must therefore be dealt with by future legislation or conventions. The planned fourteenth company law directive on the cross-border transfer of the registered office of limited companies tackles the issue at hand directly by allowing an existing business organisation to travel from one jurisdiction to another without having to be wound-up in the home Member State. Allowing a company to transfer its registered office to another Member State and to change its legal personality may enable it to increase its productivity and exercise its freedom of establishment. If adopted, possibly in conjunction with the Cross-border Merger Directive, this will open up the possibilities for international restructuring of European businesses. However, the highly diverse laws of the Member States on the matter, in line with the conflict of law problem on what constitute the necessary links between a company and its home state, prohibit a company from a transfer of its registered office and, in most cases, render it impossible in practice unless the company is wound up. Article 49 TFEU

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204 Proposal for a Fourteenth Company Law Directive on the transfer of the registered office of a company from one member state to another with a change of applicable law, 20 April 1997, doc. XV D2/6002/97, en-Rev 2, *supra* note 81
cannot be seen as providing a right for a company as defined by Article 54 TFEU to move its registered office from the national legal system of its home State to that of another Member State, that is, to change its nationality and submit itself to the legal regime of a new home State. This reading of the Treaty’s provisions on establishment was recently made clear by the Court of Justice in Cartesio. Consequently, national companies once formed according to the laws of a Member State cannot reorganise under the laws of another Member State. The prospect of this directive is dire although the harmonisation by the proposal of the fourteenth company law directive on the cross-border transfer of the registered office of limited companies is only required to the extent necessary to introduce a right to transfer the registered office without interfering with the national company law regime of either Member State beyond that, leaving the national conflict of law rules untouched.

(3) Conclusion on European Company law harmonisation

The EU harmonisation in the area of company law, on the one hand, was in line with the aim of the creation of a unified market as set out in Article 3 of the Treaty of Rome. Thus, the objectives pursued through the EU company law harmonisation are the mobility of firms in order to allow them to benefit from the advantages of a unified market, the equality of the conditions of competition between firms established in different Member States, the promotion of commercial links between Member States, the stimulation of cooperation between firms across frontiers and the facilitation of cross-border mergers and acquisitions. On the other hand, the backdrop of the harmonisation programme was to prevent the emergence of a European Delaware

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208 Case C-210/06, Cartesio Oktató és Szolgáltató Bt [2008] ECR 5483, para. 110
209 Directorate General Internal Market and Services has stopped work in this area; at: <http://ec.europa.eu/internal_market/company/seat-transfer/index_en.htm#ia>
210 Commission of the European Communities, Communication from the Commission to the Council: Making the Most of the Internal Market: Strategic Programme, supra note 142, p. 33
Syndrome where the differences in national company laws would encourage the
establishment of new companies in the Member State with the laxest laws. It is
suggested that the potential threat posed by the Delaware Syndrome is not as great as
many Europeans have come to fear because intervention and regulation both at national
level and the EU level are very widespread and thus, tend to offset the effects of a
purely market driven economy. The EU company law directives produced by the
harmonisation programme have reflected European values.

The EU tools of harmonisation and approximation by EU legislation as
interpreted by the Court of Justice and applied by national courts are significant in terms
of conflict of law problems. The EU tools may determine whether or not the law on a
particular issue has become the same in all Member States and thus, eliminate a conflict
of law problem. However, despite the voluminous work done through the EU
company law directives, it is difficult to say to which extent measures of company law
harmonisation might promote freedom of establishment and contribute to the
achievement of the internal market. Different company laws in Member States may
represent an area in which insufficient progress had been made at the EU level. The
possibility to engage in activities in a Member State other than that of the registered
office and the introduction of effective cross-border cooperation seem to be key
developments of the harmonisation programme. The objectives of these key
developments lie in improving the efficiency and competitive position of European
companies by providing them with the possibility of transferring their registered office
more easily and choosing a legal environment that best suits their business needs, while,
at the same time, guaranteeing the effective protection of the interests of the main

211 Edwards, EC Company Law, supra note 78, p. 3; John Armour (2005) ‘Who Should Make Corporate
at: <http://ssrn.com/abstract=860444>, p.10; see also Drury, ‘The ‘Delaware Syndrome’: European Fears
and Reactions’, supra note 148, pp. 730 and 733
212 Drury, ‘The ‘Delaware Syndrome’: European Fears and Reactions’, supra note 148, pp. 730 and 733
213 Ibid., p. 723
214 Dine, supra note 61, p. 70
215 Arnull et al, supra note 154, pp. 871-872
stakeholders in respect of the transfer. Since the adoption of the fourteenth company law directive on the cross-border transfer of the registered office of limited companies is unlikely to become a reality, the role of the Cross-border Merger Directive becomes even more important. In spite of the intention of the Cross-border Merger Directive on the facilitation of its use by SMEs for cross-border merger instead of a SE, SMEs may not make much use of the Directive due to its complexity of the rules. In addition, they often cannot afford to expend considerable resources and costs in order to transfer of their real seat by engaging a cross-border merger. Over all, it is difficult to establish that the net effect of harmonisation will be or has been increased cross-border activity or less costly cross-frontier activity.

Harmonisation through the medium of model laws could bring considerable delays in taking any action and there may well be significant disparities in the extent to which particular features of the relevant model are adopted in particular states. The harmonisation of company law has encountered difficulties that certain legal concepts may be familiar in one Member State, but unfamiliar and hard to understand in another, that the Member States have different policy positions in protecting legal interests, particularly on employee participation and minimum capital requirements. In addition, the uncertainties of the questions, such as what constitutes a common market in the Article 3 of the Treaty of Rome as a whole, where the economic policies of the Member States that must be approximated under the Treaty begin and end, and how far approximation must go, extend to the concrete level of company and capital market law.

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220 Arnulf et al., supra note 154, p. 871
222 Ibid., p. 39
harmonisation, although legal harmonisation in these areas would promote the transnationality of companies and offer national shareholders and creditors equal protection, which would ultimately benefit the common market.\textsuperscript{223}

Even if legal harmonisation will make a clear contribution to the European integration and promotion of cross-border mobility of European businesses, the legal harmonisation is too slow to make a contribution to enhancing corporate cross-border mobility. It is therefore difficult to testify to the practical effectiveness of such measures in this regard. The difficulty and slowness of legal harmonisation has been historically proved as in the EU company law harmonisation. Even when there were only six EU Member States, any attempt to move these States toward harmonisation in the central area of their legal systems would have had very little prospect of success.\textsuperscript{224}

Bearing in mind the limits of harmonisation drawn from the experience of EU company law harmonisation in tackling the barriers for cross-border business activities in the EU, I will now pay special attention to the judicial initiatives which have furthered the evolution of the single market. The judicial doctrines endorsed by the Court of Justice have not only facilitated the completion of the internal market but also promoted freedom of establishment for companies within the EU.

5.3.3 Promotion of Freedom of Establishment for Companies

(1) Free Movement of the Self-Employed

As part of the creation of the internal market, the EU provisions on establishment and on services enable business persons to establish themselves and to conduct business in another Member State of the EU on the conditions laid down by the law of the State of

\textsuperscript{223} Buxbaum and Hopt, supra note 27, p. 200
\textsuperscript{224} Ibid., p. 193
establishment for its own nationals. This may be by way of a principal place of business involving displacement of an undertaking’s entire activity from a State to another or the setting-up and administration of an undertaking in one State by nationals of another. The free movement of the self-employed can be granted under the EU law either in the form of a right of establishment (Article 49-55 TFEU (ex Article 43-48 and 294 EC)) or a right to provide services (Article 56-62 TFEU (ex Article 49 -55 EC)). Within the definition of establishment and services, the common key requirement will be some form of performance of economic activity for remuneration. In Gebhard, the Court of Justice suggested that the situation of an EU national who moves to another Member State in order to pursue an economic activity is governed by either the chapter of the Treaty on the free movement of workers, or the chapter on the right of establishment or the chapter on services, these being mutually exclusive.225 The mutual exclusiveness between establishment and the provision of services emerges clearly from the residual character of provisions of services based on the wording of the first paragraph of Article 57 TFEU (ex Article 50 EC) which specifies that the provisions relating to services apply only if those relating to the right of establishment do not apply. It was also confirmed that the concept of ‘establishment’ within the meaning of the Treaty is a very broad one, allowing an EU national to participate, on a stable and continuous basis, in the economic life of a Member State other than his State of origin and to profit therefrom, so contributing to economic and social interpenetration within the EU in the sphere of activities as self-employed persons.226 In order to invoke the provision of services under the Treaty, it is a precondition that a national must have a place of establishment in one Member State, and pursues his/her activity on the temporary basis in another State where the service is provided.227 The Advocate General in Gebhard

226 Ibid., para.25
227 The pursuit of economic activities carried out on a permanent basis, without a foreseeable limit to its duration, in a host State, would amount to establishment rather than to the provision of services, as was
indicated that the temporary nature of the activities in question has to be assessed in the
light, not only of the duration of the provision of the service, but also of its ‘regularity,
periodicity or continuity’. That is to say, what matters is not the mere existence of an
office in a Member State, but rather the temporary or permanent nature of the economic
activities carried on there. Two major criteria by which the provision of services can
be distinguished from establishment were discerned from scrutinising the Court’s case-
law and the EU legislation: (i) a temporal criterion: provision of services is temporary in
nature as compared with the on-going nature of establishment; (ii) a geographical
criterion: an economic operator established in a Member State is chiefly directed
towards the market in that State, whereas an economic operator who is a provider of
services carries out his activity in the host State only on a secondary or ancillary
basis. It cannot be denied that the provision of services does not necessarily preclude
the presence of permanent infrastructure in the Member State of the recipient of the
service, but each host State will impose specific requirements of the auditor as regards
the existence of infrastructure and actual presence in its territory which ought to be
compatible with the Treaty. Interestingly, the Services Directive 2006/123, whose
aim is to open up the market in services, define services in accordance with the GATS
definition; services means any self-employed economic activity, normally provided
for remuneration, as referred to in Article 50 of the Treaty (now Article 57 TFEU). However, Article 3 (3) of the Services Directive states that Member States shall apply

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229  Craig and de Búrca, supra note 4, p. 800
230  Opinion of Legar A.G. in case C-55/94, Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratore
di Milano [1995] ECR I-4165, para.31
231  Ibid., para. 50
in the internal market[2006] OJ L 376/36
233  Catherine Barnard (2008) ‘Unravelling the Services Directive’ 45 Common Market Law Review, 323, pp. 331-332; see for the GATS definition of services and the four mode of services supply in Section 4.2.2
234  Art. 4 (1) of the Services Directive
the provisions of the Services Directive in compliance with the rules of the Treaty on the right of establishment and the free movement of services. Article 4 (5) of the Services Directive also provides the definition of ‘establishment’ as the ‘actual pursuit of an economic activity, as referred to in Article 43 of the Treaty (now Article 49 TFEU).’

Article 49 TFEU (ex Article 43 EC), which was given direct effect by the Reyners case, provides for the abolition of barriers to the freedom of nationals of one Member State to establish themselves in another and thus, requires Member States to abolish restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State. This includes the right to set up agencies, branches or subsidiaries. Freedom of establishment is further defined as including the right to set up and manage undertakings. Article 49 TFEU is framed in terms of nationals and thus, excludes non-European persons. It is left to Article 54 TFEU to set out the legal persons that benefit from the rights of establishment. Therefore, in considering the concept of freedom of establishment for companies, Article 49 TFEU must be read in conjunction with Article 54 TFEU, which, in addition to defining ‘companies or firms’, provides that companies or firms, formed in accordance with the law of a Member State and having their registered office, central administration, or principle place of business within the EU, are to be treated in the same way as natural persons who are nationals of a Member State. However, the assimilation of companies to natural persons in the context of freedom of establishment has its limits. Due to the artificial nature of the corporate entity as a creation of national law, it is difficult to apply company principles to individuals who generally have an unequivocal

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235 Case 2/74, Jean Reyners v Belgian State [1974] ECR 631; Article 56 TFEU was conferred direct effect by Case
nationality, physically move across borders, and who are unlikely to be met by a refusal to recognise their lawful existence.237

Article 54 TFEU is important not only because it introduces the rule of equal treatment with natural persons, but also because it deals with all companies in the EU, irrespective of whether they have their registered office, their central administration, or their principle place of business within the EU.238 The language of this Article suggests that these three requirements, being on an equal footing, are alternative rather than cumulative.239 This triple formulation in fact is to cover the traditional and longstanding controversy between the two competing theories to determine the law of the Member State governing a company; namely the real seat theory, and the place of incorporation theory.240 Therefore, as for the freedom of establishment for companies under the Treaty, it consists of two elements: one is that Member States must recognise the existence of a foreign company if it is formed in accordance with the laws of one Member State; and the other is that the companies should fulfil one of three criteria set out above as a connecting factor with the legal system of a State.241 In clarifying the types of companies and firms in question, Article 54 TFEU excludes non-profit making undertakings. This definition becomes problematic, for example, when the undertakings operating in the health, pensions and insurance sectors which often take the form of cooperatives or mutualised companies, like to operate on a cross-border basis by relying on the Treaty. This is a rather grey area, however, and actual commercial activity shades gradually into those activities.242
In respect of companies, the Treaty provisions contemplate two forms of establishment: primary establishment and secondary establishment.\textsuperscript{243} The right of primary establishment is guaranteed by the first sentence of Article 49 TFEU. With regard to the secondary establishments, the Court of Justice defined the subsidiary, agency or any other establishment as operational centres with the power, authority and means to conduct business with third parties, who, assuming the link of these establishments with the parent company and not being able to enter into negotiations or contracts with the foreign company itself, prefer to deal with its extension, namely with its agency, branch, office or subsidiary.\textsuperscript{244} In the Insurance Services case, an enterprise is said to fall within the concept of establishment even if its presence is not in the form of a branch or agency but consists merely of an office managed by the enterprise’s own staff or by a person who is independent but is authorised to act on a permanent basis for the enterprise.\textsuperscript{245} In contrast to the primary establishment, the Court of Justice appears to express to defend the company’s right to establish to pursue their activities in another Member State through secondary establishment.\textsuperscript{246} Within the situation where foreign and domestic companies coexist in the same market of a country, one is unable to determine whether the establishment is a principal office, a branch or some other intermediate form or even whether a company is domestic or foreign.\textsuperscript{247}

Although Article 54 TFEU says that both legal and natural persons shall be treated in the same way, the freedom of establishment of companies could not be fully achieved by the application of the relevant EU Treaty provisions due to the great differences of the Member States’ laws with regard to company law matters. This is because companies only exist by virtue of the varying national legislation. Despite the

\textsuperscript{243} Art. 49 and 54 TFEU
\textsuperscript{245} Case 205/84, Commission v. Germany [1986] ECR 3755, para.21
\textsuperscript{247} Wymeersch, ‘Is a Directive on Corporate Mobility Needed?’, supra note 149, pp. 167-168
increasing tendency for the cross-frontier movement of companies in the light of the single internal market idea in the EU, these companies operating across borders experience considerable differences in treatment between company law regimes of the EU Member States. In this respect, different national legislation for companies in each Member State and the difficulty in harmonising the national legislation are great barriers to the freedom of establishment for companies. With regard to dealing with company law, the EU law approaches the position of companies in terms of freedom of establishment in a cross-border context rather than prescribing some general provisions for the EU to harmonise legislation in general. As a result of the case-law of the Court of Justice through a line of cases on company law relevant to the freedom of establishment for companies, considerable cross-border mobility is now available for companies despite continuing differences among the national company law regimes of the Member States within the EU.

(2) Development of Case-Law in the Court of Justice

The relevant Treaty provisions directly affect company law matters, while the EU has enacted secondary legislation directed to national legislators. However, company law in Europe is essentially the national law of the Member States, and the involvement of the EU in this area is rather limited. It is accepted that the definition of Article 54 TFEU (ex. Article 48 EC) is not without its limitations, in particular, the legal nature of companies and firms being defined by reference to national law, is such that Member States remain in a position to impose fiscal and other requirements on the transfer of the company from one Member State to another without these necessarily constituting a

248 Rammeloo, supra note 59, pp. 249-230
250 Ibid., pp. 160-161
breach of the rights of establishment.\textsuperscript{251}

Through a series of cases, the Court of Justice has tested the relationship of national company law rules with the principle of freedom of establishment within the EU Treaty and broadened the possible use of the freedom of establishment by companies incorporated in a Member State. Those decisions refer only to the interpretation of rules of European Law, not of national law, but confront the latter with the superior legal order.\textsuperscript{252} Accordingly, the Court of Justice is binding on the national jurisdiction at least in the case at hand so the national judge has to make a final ruling on the basis of the decision of the Court of Justice.\textsuperscript{253}

The first case directly concerning the Treaty provisions on the freedom of establishment of companies was \textit{Commission v. France}.\textsuperscript{254} It dealt with French tax provisions that denied tax credits in respect of dividends on shares in French companies held by branches or agencies of companies, whose registered office was in another Member State.\textsuperscript{255} The tax credit (\textit{avoir fiscal}) sought to avoid double taxation as income in the hands of the recipients of the dividends since dividends are paid out of profits which have already been subject to corporate tax.\textsuperscript{256} The Commission brought Article 258 TFEU proceedings against France, arguing that French legislation which restricted shareholders’ tax credits in respect of dividends received from French companies to persons having their habitual residence or seat in France, infringed Article 49 TFEU, in that the credit was not available to French branches or agencies of insurance companies whose registered office was in other Member States on the same

\textsuperscript{251} Case 81/87, \textit{The Queen v. HM Treasury and Commissioners of Inland Revenue ex p. Daily Mail and General Trust plc.} [1988] ECR 5487, para. 19
\textsuperscript{252} See the pivotal role of the preliminary ruling procedure under Art. 267 TFEU (ex Art. 234 EC) in EU legal integration in Section 2.3.2 Enforcement Mechanism
\textsuperscript{253} Wymeersch, ‘Modern Company Law-Making. About Techniques of Regulating Companies in the European Union’, \textit{supra} note 238, pp. 163-164
\textsuperscript{254} Case 270/83, \textit{Commission v. France} [1986] ECR 273; Edwards, EC Company Law, \textit{supra} note 78, p. 344
\textsuperscript{256} \textit{Ibid.}, para.3; Edwards, EC Company Law, \textit{supra} note 78, p. 344
terms as applied to French companies. As a defendant, the French government put forward several arguments. Firstly, it was argued that the difference in treatment was objectively justified because it was based upon the international tax law distinction between residents and non-residents. Further, it was indicated that branches and agencies of companies whose registered office was abroad enjoyed various advantages over French companies which balanced out any disadvantages in regard to shareholders’ tax credits, and that also, those disadvantages were insignificant and might be easily avoided by setting up a subsidiary in France. Although the possibility was left open that a distinction based on the location of a company’s seat or the place of residence of a natural person might under certain conditions be justified in an area such as tax law, the Court of Justice ruled this out and stated that the French tax law did not distinguish between companies having their registered office in France and branches and agencies situated in France of companies whose registered office was abroad for the purpose of determining the income liable to corporation tax. It was also pointed out that Article 49 TFEU leaves the beneficiaries of the right of establishment at liberty to choose the appropriate legal form in which to pursue their activities in another Member State and such freedom of choice between branches and subsidiaries cannot be limited by discriminatory provisions. In its second line of argument, the French government sought to justify the difference in treatment by reference to the absence of harmonisation of national tax law systems, double taxation agreements concluded between the Member States and the necessity of preventing tax evasion. The Court of Justice rejected the argument, holding that none of those grounds permitted any

257 Case 270/83, Commission v. France [1986] ECR 273, paras. 4 and 7; Edwards, EC Company Law, supra note 78, p. 344
261 Ibid., para.23
derogation from the principle of freedom of establishment under Article 49 TFEU.\textsuperscript{262} At any rate, the finding that the location of the registered office determines the nationality of a company in this case,\textsuperscript{263} paved the way for the full endorsement of the doctrine of incorporation in the next case.\textsuperscript{264}

In Segers, a Dutch national, Mr. Segers, who used to carry a business as a sole trader in the Netherlands, incorporated his business by registering as a private limited company under English company law rather than using the Dutch equivalent.\textsuperscript{265} This was because setting up a private limited company according to English company law normally entails less requirements and accompanying delays than the Dutch private limited company (Besloten Vennootschap, or B.V.) and also, the English legal form of a limited company is better known internationally than a Dutch ‘B.V.’.\textsuperscript{266} Mr. Segers became sole director, and he and his wife, the sole shareholders of the company. While having a registered office in London, the business continued to operate wholly through a subsidiary of the said company in the Netherlands, comprising the entire activity of the company, and thus, was subject to the Netherlands social security legislation.\textsuperscript{267} Mr. Segers subsequently sought for sickness insurance benefits from the relevant Dutch authorities, particularly, the banking, insurance, wholesale trade and professions’ association (Bedrijfsvereniging voor Bank-en Verzekeringswezen, Groothandel en Vrije Beroepen) which was the authority in charge of the due operation of the mandatory employees’ social security system. His argument was based on the then Dutch case-law on the notion of an employee, which was extended to a managing director who held

\begin{itemize}
  \item \textsuperscript{262} Ibid., paras. 24-26
  \item \textsuperscript{263} Ibid., para. 18
  \item \textsuperscript{265} Case 79/85, Segers v. Bedrijfsvereniging voor Bank-en Verzekeringswezen, Groothandel en Vrije Beroepen [1986] ECR 2375, para. 3
  \item \textsuperscript{266} Cath, supra note 60, pp. 456-457
  \item \textsuperscript{267} Case 79/85, Segers v. Bedrijfsvereniging voor Bank-en Verzekeringswezen, Groothandel en Vrije Beroepen [1986] ECR 2375, para. 3
\end{itemize}
fifty per cent or more of his company’s shares.\textsuperscript{268} However, the application for the cover was refused on the ground that the relevant Dutch case-law only applied only to directors of companies incorporated and with a registered office in the Netherlands.\textsuperscript{269} The Court of Justice held that the competent Dutch association could not validly refuse to grant social security benefits to the director of a company that, having been incorporated in the United Kingdom, had its activity exclusively deployed in the Netherlands, on the mere basis that the company had its registered office in the United Kingdom.\textsuperscript{270} Applying a different treatment depending on whether the company’s seat was established in another Member State was considered contrary to Article 54 TFEU.\textsuperscript{271} It is noteworthy that the Court of Justice under this decision already expressed a reservation towards cases tainted with fraud and the need to combat possible abuse, or the possibility where the ‘general good’ exception, i.e. public policy grounds or an overriding requirement of public interest, might have been validly invoked.\textsuperscript{272}

In \textit{Daily Mail}, the Court of Justice had to decide, in the light of the Treaty provisions on freedom of establishment, to what extent a British company could be refused the transfer of its central management and control to another State.\textsuperscript{273} The applicant, Daily Mail and General Trust plc, incorporated under the English company law and having its registered office in the United Kingdom, contemplated a full-fledged transfer of central management and control to the Netherlands, without losing legal personality or ceasing to be a company incorporated in the United Kingdom, in order to

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\item\textsuperscript{268} \textit{Ibid.}, para. 5; the relevant Dutch case-law was later repealed; Cath, \textit{supra} note 60, p.457
\item\textsuperscript{269} Case 79/85, \textit{Segers v. Bedrijfsvereniging voor Bank-en Verzekeringswezen, Groothandel en Vrije Beroepen} [1986] ECR 2375, para.5
\item\textsuperscript{270} \textit{Ibid.}, para. 19
\item\textsuperscript{271} \textit{Ibid.}, para. 14; the text of the judgement in English was wrongly translated as ‘registered office’; Edwards, EC Company Law, \textit{supra} note 78, p.350
\item\textsuperscript{273} Wymeersch, ‘Modern Company Law-Making, About Techniques of Regulating Companies in the European Union’, \textit{supra} note 238, p. 164
\end{enumerate}
\end{footnotesize}
establish residence in the Netherlands. However, according to the relevant United Kingdom tax legislation, this was subject to the consent of HM Treasury, the United Kingdom tax authorities. It was clear that the principal reason for the proposed transfer of central management and control was tax-driven so that the applicant would avoid substantial capital gains liabilities under the United Kingdom tax law for the sale of a significant part of its non-permanent assets with a view to use the proceeds of that sale to buy its own shares. Therefore, the question arose whether Articles 49 and 54 TFEU preclude a Member State from prohibiting a corporate body with its central management and control in that Member State from transferring that central management and control to another Member State without prior consent or approval. The Court of Justice decided that, in the absence of the relevant harmonisation of company law, freedom of establishment enshrined in Articles 49 and 54 TFEU cannot be interpreted as conferring on companies incorporated under the law of a Member State a right to transfer their central management and control and their central administration to another Member State while retaining their status as companies incorporated under the legislation of the first Member State, i.e. it regarded primary establishment as yet unaffected by the general freedom. In many ways, this decision has high importance and has received considerable criticism afterwards. The reasoning was too elaborate, particularly in dealing with the conflict of laws theories that it did not actually involve the transfer of the seat or the legal status of a company but merely the tax position of a company. The acknowledgment of the Court of Justice towards the need of harmonisation of the rules in this area held in this judgment triggered the

275 Ibid., paras. 4-5
276 Ibid., para. 7
277 Ibid., paras.9-11
278 Ibid., paras.24-25.
Commission’s draft Proposal for a fourteenth company law directive on the transfer of the registered office.\textsuperscript{280}

The general question underlying \textit{Daily Mail}, i.e. to what extent a company can rely on the Treaty provisions on freedom of establishment to set up various forms of establishment more than one Member State, given the continued absence of EU harmonisation, was revisited just over ten years later in \textit{Centros}.\textsuperscript{281} The \textit{Centros} case concerned a refusal by Danish authorities to register a branch of a company formed in the United Kingdom, in which it had its registered office but conducted no business.\textsuperscript{282} Whereas in \textit{Daily Mail} the restriction was imposed by the State in which the company had its primary establishment, in \textit{Centros}, the restriction came from the State, Denmark, where the company sought to conduct business through a secondary establishment.\textsuperscript{283} It was in fact seeking to move a primary establishment by launching all activities in Denmark, thereby circumventing Danish Rules, those on minimum capital requirement.\textsuperscript{284} In addition to qualifying this situation under the scope of freedom of establishment of the Treaty,\textsuperscript{285} the Court of Justice analysed on what grounds the Danish registrar could have refused: fraud and circumvention, or the ‘general good’ exception were identified as the grounds on which national legislation could validly have imposed additional requirements.\textsuperscript{286} In the end, the Court of Justice found that the refusal of Danish authorities amounted to a restriction of freedom of establishment that could not be justified because this measure did not fulfil any of the imperative

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\begin{enumerate}
\item Case 81/87, \textit{The Queen v. HM Treasury and Commissioners of Inland Revenue ex p. Daily Mail and General Trust plc.} [1988] ECR 5487, paras.20-21; Proposal for a Fourteenth Company Law Directive on the transfer of the registered office of a company from one member state to another with a change of applicable law, \textit{supra} note 81.
\item Craig and de Búrca, \textit{supra} note 4, p. 807
\item Case C-212/97, \textit{Centros Ltd v. Erhvers-og Selskabsstyrelsen} [1999] ECR I-1459, paras.2-3
\item Craig and de Búrca, \textit{supra} note 4, pp. 807-808
\item Case C-212/97, \textit{Centros Ltd v. Erhvers-og Selskabsstyrelsen} [1999] ECR I-1459, para. 7
\item Ibid., para.17; to the effect, see also Case 79/85, \textit{Segers v. Bedrijfsvereniging voor Bank-en Verzekeringenwezen, Groothandel en Vrije Beroepen} [1986] ECR 2375, para.16
\end{enumerate}
\end{footnotesize}
requirements in the general interest such as the aims of protecting public and private creditors and preventing fraud. This decision suggests how the abuse of rights doctrine is to be applied to the right of establishment of companies as well as the meaning in this context of the expressions ‘improper circumvention of national legislation’ or ‘improperly or fraudulently taking advantage of provisions of Community law. What makes this judgment even more meaningful is not just the fact that the Court of Justice did not hesitate to clarify the freedom of secondary establishment but also the question whether this judgment could be interpreted as an extension of such freedom to primary establishment. Although the scope and implications of this decision were very controversial, a lot of comments had followed on whether this judgment had overruled the Daily Mail case and suggested that the real seat theory cannot be maintained as a consequence of the EU law. Some even described the Centros case as reflecting a judicial willingness to break down the remaining constraints to the free movement of companies in the EU and as opening the door to competition among national rules as an alternative approach to ensure the completion of the internal market. The following rulings of Überseering and Inspire Art confirmed and extended the Centros approach.

In Überseering, the question was raised whether Articles 49 and 54 TFEU are to be interpreted as meaning that the freedom of establishment of companies precludes the legal capacity and capacity to be a party to legal proceedings, i.e. locus standi, of a company validly incorporated under the law of one Member State from being determined according to the law of another State to which the company has moved its

291 Craig and de Búrca, supra note 4, p.810
actual centre of administration. Überseering, a company incorporated and having its registered office in the Netherlands, sued a German contractor for its defective building works before German courts. However, the German courts refused Überseering access to court on the basis that German law would not recognise the legal capacity of the company incorporated in the Netherlands because they found that the company had transferred its centre of administration to Germany once its entire share capital had been bought by German shareholders. The Court of Justice held that German law (following the real seat theory as the relevant connecting factor for recognition of a company, which left no alternative for recognition but reincorporation in Germany) was contrary to the Treaty as it would have resulted in the negation of the existence of a company which had been validly formed in another Member State. It ruled that the Treaty provisions on freedom of establishment were applicable in this case following the opinion of the Advocate General that Article 293 EC, which gave Member States the opportunity to enter into negotiations with a view to facilitating the resolution of problems arising from the discrepancies between the various laws relating to the mutual recognition of companies and the retention of legal personality in the event of the transfer of their seat from one country to another, did not constitute reserve legislative competence in this area to the Member States because this intergovernmental activity was only called for ‘so far as is necessary’. That is to say, the exercise of the freedom of establishment could not depend on the adoption of such conventions under Article 293 EC. In this regard, of particular interest was the interpretation of the decision in the Daily Mail case, which was enlisted to support the argument that the issue of

292 Case C-208/00, Überseering BV v Nordic Construction Company Baumanagement GmbH (NCC) [2002] ECR I-9919, para. 21
293 Ibid., para. 6-8
294 Ibid., para.9
295 Ibid., paras. 78-82
298 Case 81/87, The Queen v. HM Treasury and Commissioners of Inland Revenue ex p. Daily Mail and
secondary establishment where a company relocates its seat was to be addressed by national legislation or convention. The Court of Justice ruled that it was impossible to assimilate the situation of this case to that of Daily Mail because Überseering had never given any indications of transferring its seat to Germany, and also, highlighted that the Daily Mail case dealt with a ‘moving out’ situation whereas this case concerns a ‘moving in’ situation, i.e. the relation between the company and the host State. The Court of Justice in this ruling further distinguished the ruling in Centros from that in Daily Mail on the basis that Daily Mail was never concerned with the rules of the Member State in which the company was incorporated. By contrast, Centros and Überseering both concerned the recognition by one Member State of a company which was validly incorporated in another Member State, dealing with the problem of whether the measures of Member States affecting the cross-border movement of companies (the entry of a pseudo-foreign company and the transfer of seat) can come within the scope of EU law in general. It is noteworthy that the restrictive attitude of the Court of Justice in Überseering could hardly be interpreted such that the Daily Mail judgment has been overruled by this decision. The ruling of Überseering establishes that, despite the lack of harmonisation of the laws governing the connecting factor of incorporation, a Member State cannot deny the recognition of the legal personality of a company which moved in after its legitimate incorporation in another Member State. Although the German rule in question was found to be disproportionate which could not

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301 Ibid., paras. 70-73; Eva Micheler (2003) ‘Current Developments: Private international Law, Recognition of Companies Incorporated in Other EU Member States’ 52 International and Comparative Law Review, 521, p. 524

302 Ibid., paras.62-70; see also Opinion of Mr Advocate General Alber in Case C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd. [2003] ECR I-10155, paras. 105-106; Micheler, supra note 301, p. 524

303 Roth, supra note 70, p. 190

304 Craig and de Bûra, supra note 4, p.810
be justified, the Court of Justice accepted the possibility of justifying the restrictions on freedom of establishment by overriding requirements relating to general interests, such as the enhancement of legal certainty, protection of creditors, minority shareholders and employees, and legitimate fiscal requirements.\footnote{Case C-208/00, Überseering BV v Nordic Construction Company Baumanagement GmbH(NCC) [2002] ECR I-9919, para. 92}

The \textit{Inspire Art} case\footnote{Case C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd. [2003] ECR I-10155, para. 39} has taken the subject one step further by raising the question of the extent to which a national legislator can impose additional requirements on companies that have been formed under the jurisdiction of another Member State where its registered office is located, but without developing any business activity there.\footnote{Wyneersch, ‘Modern Company Law-Making, About Techniques of Regulating Companies in the European Union’, \textit{supra} note 238, p. 165} The facts of \textit{Inspire Art} are similar to those of the \textit{Centros} case: the founders in this case were from the Netherlands. They formed a limited company under English law and filed in their home country for the registration of a branch, which in fact constituted the company’s principal place of business.\footnote{Daniel Zimmer (2004) ‘Case C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd., judgment of 30 September 2003, nyr’ \textit{Common Market Law Review}, 1127, p. 1130} However, from a legal perspective the new case is different from \textit{Centros}: the registration of a branch of a company that is in fact managed domestically is not flatly denied in the Netherlands as would have been the case in Denmark in \textit{Centros}.\footnote{\textit{Ibid.}} Dutch law, which adheres to the incorporation doctrine, did recognise the legal personality of foreign incorporated companies, but classified these companies trading exclusively or almost exclusively in the Netherlands as pseudo-foreign companies.\footnote{Micheler, \textit{supra} note 301, p. 525} According to the Dutch law, these pseudo-foreign companies must indicate this status on all communications with third parties and comply with the same minimum capital requirements, accounting and disclosure rules that apply to Dutch companies.\footnote{Case C-167/01, Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd. [2003] ECR I-10155, paras. 22-33} Following its previous reasoning on free movement...
of companies, the Court of Justice ruled that Articles 49 and 54 TFEU prevented national legislation from imposing certain conditions provided for in domestic law in respect of company formation relating to minimum capital and directors’ liability on the exercise of freedom of secondary establishment by companies formed in accordance with the law of another Member State. The Court also found that the fact that the company had been formed in the other State or carries on its activities exclusively or almost exclusively in the Member State of establishment, did not deprive it of the right of establishment guaranteed under the Treaty, save where the existence of an abuse was established on a case-by-case basis.\(^3\) Accordingly, the legality of national laws impeding the exercise of freedom of establishment must be tested by reference to the four conditions of the Gebhard test.\(^4\) Therefore, after the justifications put forward by the Netherlands government, namely, the aims of protecting creditors, combating improper recourse to freedom of establishment, and protecting both effective tax inspections and fairness in business dealings, being evaluated by reference to overriding reasons related to the public interest, the Court of Justice concluded the Dutch rules to be disproportionate and unnecessary.\(^5\) This judgment is significant because it was principally concerned with registration and procedural questions, which means confronting substantive company law issues.\(^6\) The decision would also seem to confirm that the eleventh company law directive\(^7\) is exhaustive so that Member States

\(^{312}\) *Ibid.*, para. 143

\(^{313}\) Case C-167/01, *Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd*. [2003] ECR I-10155, paras. 107 and 133, applying Case C-1992 *Dieter Kraus v Land Baden-Württemberg* [1993] ECR I-1663, para.32; Case C-55/94, *Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratore di Milano* [1995] ECR I-165, para.37; Case C-212/97, *Centros Ltd v. Erhvers-og Selskabssstyrelsen* [1999] ECR I-1459, para.34; in *Gebhard*, it was pointed out that to get the favour of justification, national measures liable to hinder or make less attractive the exercise of fundamental freedoms guaranteed by the Treaty must fulfil the four following conditions: they must be applied in a non-discriminatory manner; they must be justified by imperative requirements in the general interest; they must be suitable for securing the attainment of the objective which they pursue; and they must not go beyond what is necessary in order to attain it; Case C-55/94, *Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratore di Milano* [1995] ECR I-4165, para.37.


\(^{315}\) *Lowry, supra note 299*, p.342

\(^{316}\) The Eleventh Council Directive 89/666/EEC of 21 December 1989 concerning disclosure requirements in respect of branches opened in a Member State by certain types of company governed by
are not entitled to add further disclosure requirements.\textsuperscript{317} In the light of \textit{Überseering} and \textit{Inspire Art}, it was highlighted again that the forces ranged against the real seat theory seemed unassailable.\textsuperscript{318}

In \textit{SEVIC}, the question was raised of whether the question of the possibility of a cross-border merger was supported directly by rules under the Treaty provisions on freedom of establishment.\textsuperscript{319} \textit{SEVIC} systems AG, a German company, applied for registration in the German commercial register of the merger between itself and a company established in Luxembourg.\textsuperscript{320} However, this application was refused because German law on company transformation of 1994 (\textit{Umwandlungsgesetz}) provided only for internal mergers between companies established in Germany, not for cross-border mergers.\textsuperscript{321} The Court of Justice emphasised that cross-border operations, like other company transformation operations, responding to the needs for cooperation and consolidation between companies established in different Member States, constituted particular methods of exercise of the freedom of establishment, important for the proper functioning of the internal market, and thus, fall within those economic activities under Article 49 TFEU.\textsuperscript{322} Since, under national rules, recourse to such a means of company transformation was not possible where one of the companies was established in a Member State other than Germany, German law established a difference in treatment between companies according to the internal or cross-border nature of the merger, which was likely to deter the exercise of the freedom of establishment under the Treaty.\textsuperscript{323} The Court of Justice concluded the German rule at issue refusing generally the register of a cross-border merger constituted a restriction within the meaning of the law of another State [1989] OJ L 395/36.

\textsuperscript{317} Case C-167/01, \textit{Kamer van Koophandel en Fabrieken voor Amsterdam v. Inspire Art Ltd.} [2003] ECR I-10155, para. 66
\textsuperscript{318} \textit{Lowry, supra note 299, p. 334}
\textsuperscript{320} Case C-411/03, \textit{SEVIC Systems AG} [2005] ECR I-10805, para.2
\textsuperscript{321} \textit{Ibid.}, para.3
\textsuperscript{322} \textit{Ibid.}, para.19
\textsuperscript{323} \textit{Ibid.}, para.22
Articles 49 and 54 TFEU and went beyond what was necessary to protect public interests.\(^{324}\) The *SEVIC* case demonstrated that Member States must not limit the possibility of mergers to internal mergers in such a way as to generally prevent cross-border operations.\(^{325}\) However, what the case did not imply was an obligation of Member States to positively enact merger laws in order to make mergers possible in the first place.\(^{326}\) Because such obligation can only be based on EU legislation whose objective is to harmonise national merger laws, the *SEVIC* decision therefore did not obviate the necessity of the Cross-border Merger Directive.\(^{327}\) The Cross-border Merger Directive, which was adopted a few months after *SEVIC*, settles the problem to what extent a Member State has to accept the participation of its national companies in cross-border mergers whereby they are dissolved while the continuing company is subject to the laws of another Member State.\(^{328}\)

In *Cartesio*, the Court of Justice dealt with the controversial issues related to the cross-border transfer of the company’s seat.\(^{329}\) *Cartesio*, a Hungarian limited partnership\(^{330}\) wished to transfer its registered office to Italy without any intention to accordingly change, at the same time or as an immediate consequence thereof, its status to one of Italian partnership or company.\(^{331}\) Although Hungarian law followed the place of incorporation theory, the provisions of substantive company law still required that the seat of a company incorporated under Hungarian law must be located and registered in

\(^{324}\) Ibid., paras.23 and 24-30
\(^{326}\) Ibid.
\(^{329}\) Case C-210/06, *Cartesio Oktató és Szolgáltató Bt* [2008] ECR 5483, para. 40
\(^{330}\) *Cartesio* was a commercial partnership which had been subject to the registration requirement and had been treated essentially as a legal entity under Hungarian law. Consequently, it was a ‘company’ within the meaning of Article 54 TFEU; Andrzej W. Wiśniewski and Adam Opalski (2009) ‘Companies’ Freedom of Establishment after the ECJ *Cartesio* Judgment’ 10 European Business Organization Law Review, 595, p.598
\(^{331}\) Case C-210/06, *Cartesio Oktató és Szolgáltató Bt* [2008] ECR 5483, paras.11-20, 24 and 100
Hungary.\textsuperscript{332} Since Cartesio was interested in keeping its legal status in Hungary, it
applied for registration of the transfer of its seat to Italy and, in consequence, for
amendment of the entry regarding Cartesio's company seat in the commercial register.\textsuperscript{333}
However, that application was rejected on the ground that the Hungarian law in force
did not allow a company incorporated in Hungary to transfer its seat abroad while
continuing to be subject to Hungarian law as its personal law.\textsuperscript{334} Therefore, the main
question referred to the Court of Justice was whether Articles 49 and 54 TFEU are to be
interpreted as precluding legislation of a Member State under which a company
incorporated under the law of that State may not transfer its seat to another Member
State whilst retaining its status as a company governed by the law of the Member State
of incorporation.\textsuperscript{335} Based on the points that companies exist only by virtue of the
national legislation which determines its incorporation and functioning as creatures of
national law \textit{in Daily Mail}\textsuperscript{336} and that the rules relating to the transfer of the registered
office of a company shall be determined by the law of the Member State of
incorporation in \textit{Überseering},\textsuperscript{337} the Court of Justice concluded that, in the absence of a
uniform EU law, national law decides whether a national company can rely on the
freedom of establishment under the Treaty.\textsuperscript{338} As EU law currently stands, freedom of
establishment does not preclude a Member State from preventing a company
incorporated under its national law from transferring its seat to another Member State
whilst retaining its status as a company governed by the law of the Member State of
incorporation.\textsuperscript{339} This ruling of the Court of Justice, however, was completely against
the opinion of the Advocate General in this case who conversely suggested that Articles

\begin{footnotes}
\footnote{\textit{Ibid.}, paras 3-20 and 101; Wiśniewski and Opalski, \textit{supra} note 330, p.599}
\footnote{Case C-210/06, \textit{Cartesio Oktató és Szolgáltató Bt} [2008] ECR 5483, para.23}
\footnote{\textit{Ibid.}, para. 24}
\footnote{\textit{Ibid.}, para.99}
\footnote{\textit{Ibid.}, para. 104; see Case 81/87, \textit{The Queen v. HM Treasury and Commissioners of Inland Revenue ex p. Daily Mail and General Trust plc.} [1988] ECR 5487, para. 19}
\footnote{\textit{Ibid.}, para. 107; see Case C-208/00, \textit{Überseering BV v Nordic Construction Company Baumanagement GmbH(NCC)} [2002] ECR I-9919}
\footnote{\textit{Ibid.}, para. 124.}
\end{footnotes}
49 and 54 TFEU precluded national rules which made it impossible for a company constituted under national law to transfer its operational headquarters to another Member State.\textsuperscript{340} Cartesio’s confirmation of the Daily Mail ruling of the reliance upon national laws to clarify the status of a company as an EU entity was unexpected after the series of rulings from Centros to Inspire Art.\textsuperscript{341} Interestingly, as a consequence of Cartesio, the restrictions on the seat transfer for Hungarian incorporated companies have been later removed.\textsuperscript{342} Notably, Germany which used to represent the States following the real seat theory also introduced recently a similar reform through adoption of legislation modernising the law concerning the GmbH and combating its abuse.\textsuperscript{343} This was the result of the ongoing debate in Germany about the competitiveness of German private company law. In the aftermath of the landmark decisions of the Court of Justice in Centros, Überseering and Inspire Art, entrepreneurs have increasingly opted for foreign company types, particularly the English private limited company instead of the GmbH.\textsuperscript{344}

There have been many cases before the Court of Justice which involve restrictions relating to national tax law. Although direct taxation remains outside the competence of the EU, the Court of Justice has consistently reaffirmed that national tax measures must respect the fundamental freedoms under the Treaty\textsuperscript{345} and such measures infringing on the Treaty freedom shall be invalid unless they can be justified

\textsuperscript{340} Opinion of Mr Advocate General Poiares Maduro of Case C-210/06, Cartesio Oktató és Szolgáltató Bt [2008] ECR 5483, para.35
\textsuperscript{341} Wiśniewski and Opalski, supra note 330, pp.605-607
\textsuperscript{342} The amended relevant legislation was with effect of 1 September 2007 even before Cartesio was delivered; Veronika Koram and Peter Metzinger (2009) ‘Freedom of Establishment for Companies: the European Court of Justice confirms and refines its Daily Mail Decision in the Cartesio Case C-210/06’, 6 (1) European Company and Financial Law Review,125, p.158
\textsuperscript{343} Ibid., p.159; the relevant German legislation is Gesetz zur Modernisierung des GmbH-Rechts und zur Bekämpfung von Missbräuchen (MoMiG), drafted in May 2006 and came into force on 1 November 2008.
\textsuperscript{344} Jessica Schmidt, ‘Germany Company Law Reform: Makeover for the GmbH, a new “mini-GmbH” and some important news for the AG’, supra note 68, p. 306
on the basis of the public interest.\textsuperscript{346}

Indeed, the first case directly concerning the freedom of establishment of companies, \textit{Commission v. France}, was on the preferential treatment by national tax law of companies established in a State over those with only a branch or agency in the State but having their registered office in another Member State.\textsuperscript{347} The Court of Justice in this case endorsed three propositions of considerable importance as regards the relationship between the right of establishment and the application of national tax legislation.\textsuperscript{348} The first proposition is that, as regards the exercise of the right of establishment by companies, it is the location of their registered office, or central administration, or principal place of business, i.e. the seat of the company, that serve as the connecting factor with the legal system of a particular State, like the nationality of natural persons.\textsuperscript{349} Accordingly, treating a company differently solely by reason of the fact that the connecting factor is situated in another Member State would deprive the right of establishment of all meaning.\textsuperscript{350} Therefore, freedom of establishment under the Treaty aims to guarantee the benefit of national treatment in the host Member State by prohibiting any discrimination based on the place in which companies have their

\textsuperscript{346} Frank Barry and Rosemary Healy-Rae (2010) ‘FDI Implications of Recent European Court of Justice Decisions on Corporation Tax Matters’ 11 \textit{European Business Organization Law Review}, 125, p.128; the case-law of the Court of Justice in corporate tax matters has concentrated more on the freedom of establishment under Articles 49 and 54 TFEU than on the free movement of capital under Articles 63 and 65 TFEU. The Court of Justice tends to look at the case under the freedom of establishment first, and if it finds a breach of that freedom, it does not continue on to examine the case under the free movement of capital; see, \textit{ibid.}, p.131


\textsuperscript{348} Arnulf \textit{et al.}, \textit{supra} note 154, pp.888-889


The second proposition is that nevertheless the distinction based on the location of the registered office of a company or the place of residence of a natural person may, under certain conditions, be justified in an area such as tax law. Neither the lack of harmonisation of the tax laws of the different Member States nor the risk of tax avoidance by companies could justify the restriction in Commission v. France. The third proposition is that where national tax rules treat two forms of establishment in the same way for the purposes of taxing their profits, that amounts to an admission that there is no objective difference between their positions as regards the detailed rules and conditions relating to that taxation which could justify different treatment.

The Court of Justice drew an analogy between the location of the registered office of a company and the place of residence of a natural person in Commission v. France. The criteria serving as a connecting factor of a company with a legal system of a Member State which were mentioned above relating to the first proposition, are also used as criteria used to determine the residence of a company. The application to individuals and companies of the residence or seat criteria is such a commonplace of national tax regimes, that it seems almost intrinsically to raise a question as to its compatibility with freedom of establishment or other fundamental freedoms under the Treaty. Therefore, it is worth noting that there are some cases in which the Court of Justice accepted the second proposition derived from Commission v. France. The Futura Participations SA case dealt with the compatibility of Luxembourg legislation on corporate losses with the freedom of establishment. Futura Participations SA was

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351 Case C-524/04, Test Claimants in the Thin Cap Group Litigation v Commissioners of Inland Revenue [2007] ECR I-2107, para.37
353 In Commission v. France, the two forms of establishment are companies with a registered office in France on the one hand, and branches in France of companies with a registered office in another Member State on the other.
355 Ibid., para.18
356 Arnull et al., supra note 154, pp.889-890
a French company with its seat in Paris, and Singer was the Luxembourg branch of the company. The relevant Luxembourg law allowed non-resident taxpayers to deduct, from the total of their net income, previous losses carried forward from previous years ‘provided that they are economically related to income received locally and that accounts are kept within the country’. Based on the fact that Singer did not fulfil the two conditions laid down under the relevant Luxembourg legislation, the Luxembourg tax authorities refused to allow a set-off, and thus, Futura Participations SA and Singer appealed to the Conseil d'État, seeking variation or annulment of that decision, claiming that the refusal to take account of the losses in question impaired the freedom of establishment under the Treaty. The Court of Justice concluded that the first condition of the Luxembourg law requiring the existence of an economic link was not contrary to the Treaty. The Luxembourg law providing that, on the one hand, all of their income was taxable as regards resident taxpayers, irrespective of where it was earned, on the other hand, only profits and losses arising from their Luxembourg activities are taken into account in calculating the tax payable by them in that State for non-resident taxpayers, was in conformity with the fiscal principle of territoriality. However, with regard to the second condition of the accounting requirement, it stated that the imposition of such a condition, in principle, would be prohibited by Article 49 TFEU. It could have been permissible if it was justified by a pressing reason of public interest, namely in this case, the effectiveness of fiscal supervision, and also passed the proportionality test. However, the accounting requirement was found to be excessively restrictive even in the absence of harmonised rules in this area.
In recent years, there has been a significant amount of important litigation to clarify the scope and applicability of Article 49 TFEU to a range of corporate taxation laws directed at cross-border situations, governing matters such as tax credits, deductibility of losses (group tax relief) or taxation of dividends, as applied to companies which are established in more than one Member State. Among the litigation, Marks & Spencer received lots of attention. Marks & Spencer plc, the claimant of the procedure, was a British resident company and subject to the United Kingdom corporation tax on its world-wide income. In 2001, Marks & Spencer plc decided to divest itself of its Continental European activity and as a consequence, sold its French subsidiary and ceased trading in the subsidiaries in Belgium and Germany because they only generated losses in the relevant fiscal years (1998-2001). The British parent company claimed ‘group tax relief’ from the United Kingdom tax authorities for losses for these four tax years incurred by its Belgian, German and French subsidiaries i.e. to offset (domestic) profits and (foreign) losses from various companies within the group. However, the claims for relief were rejected on the ground that group relief could only be granted for losses recorded in the United Kingdom because the foreign subsidiaries were neither based in the United Kingdom nor trading in the United Kingdom through a branch or agency, as was legally required. Following the refusal of its claim, Marks & Spencer plc brought legal proceedings in the High Court of England and Wales, which asked the Court of Justice and Y v. Riksskatteverket [2002] ECR I-10829; Case C-334/02, Commission v. France [2004] ECR I-2229
Craig and de Búrca, supra note 4, p. 812
Case C-446/03, Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes) [2005] ECR I-10837
Ibid., paras. 18-21
Ibid., para. 22; all foreign subsidiary companies just mentioned limited their business activity to their State of residence. The accumulated continental-European losses amounted to approximately GBP 100 million, from which Marks & Spencer requested a tax refund of approximately GBP 30 million; Axel Cordewener and Ingmar Dörr (2006) ‘Case C-446/03, Marks & Spencer plc v. David Halsey (HM Inspector of Taxes), Judgment of the Court of Justice (Grand Chamber) of 13 December 2005, nyr.’ 43 Common Market Law Review, 855, p. 857
For the relevant United Kingdom tax law regarding group tax relief, see Case C-446/03, Marks & Spencer plc v David Halsey (Her Majesty's Inspector of Taxes) [2005] ECR I-10837, paras.12-17
251
whether the United Kingdom rules were compatible with the Treaty provisions on freedom of establishment. The essential question was whether there existed comparability for group relief purposes between a United Kingdom parent company with a United Kingdom resident subsidiary on the one hand, and a United Kingdom parent with a foreign non-resident subsidiary on the other, and whether the refusal to take foreign subsidiary losses into account can be justified. The Court of Justice firstly recognised the different tax treatment of losses incurred by a resident as compared to a non-resident subsidiary constituted a restriction on freedom of establishment within the meaning of Articles 49 and 54 TFEU. It then reiterated previous cases that such a restriction is permissible only where it meet two conditions: first, it must pursue a legitimate objective compatible with the Treaty and be justified by overriding reasons in the public interest; if this is the case, it must also be apt to ensure the attainment of the objective in question and not go beyond what is necessary to obtain that objective. The Court of Justice accepted, on the one hand, that, by taxing British companies on their worldwide profits and non-resident companies solely on the profits derived from their activities in the United Kingdom, the United Kingdom was acting in line with the principle of territoriality. On the other hand, however, the sole fact that profits of the non-resident subsidiaries of a British parent company are not taxable in the United Kingdom did not in itself justify restricting group relief to losses incurred by resident companies. Further, the Court of Justice explored the three justifications submitted by the British Government and other Member States, which, taken altogether, the restrictive United Kingdom provisions were indeed found to pursue

369 Cordewener and Dörr, supra note 367, p. 858  
370 Ibid., p.869; Case C-446/03, Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes) [2005] ECR I-10837, paras.27-34  
372 Case C-446/03, Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes) [2005] ECR I-10837, para. 39; Case C-250/95, Futura Participations and Singer [1997] ECR I-2471, para. 22  
373 Case C-446/03, Marks & Spencer plc v. David Halsey (Her Majesty's Inspector of Taxes) [2005] ECR I-10837, paras.36-40
legitimate objectives in the public interests that were compatible with the Treaty.\textsuperscript{374} Those three justifications were: (i) the need to protect a balanced allocation of the power to impose taxes between the Member States\textsuperscript{375}; (ii) the risk that losses might be taken into account twice\textsuperscript{376}; and (iii) the risk of tax avoidance.\textsuperscript{377} However, in the last step, the specific measure taken by the United Kingdom did not pass the proportionality test. It was suggested that access of foreign subsidiaries to the UK relief system could either be made conditional upon ‘the foreign subsidiary’s having taken full advantage of the possibilities available in its Member State of residence’ as regards equalisation of losses, or upon ‘the subsequent profits of the non-resident subsidiary being incorporated in the taxable profits of the company which benefited from group relief up to an amount equal to the losses previously set off’.\textsuperscript{378}

The Court of Justice has also dealt with the issues of technical company national legislation other than national tax laws. Notably, the Court of Justice addressed failure to disclose accounting documents concerning implementation of the relevant company law directives. In Daihatsu, the issue was Germany’s insufficient enforcement system to implement the obligation to disclose annual accounts.\textsuperscript{379} Daihatsu Deutschland GmbH, the German subsidiary of the Japanese carmaker had failed to disclose its accounts. The association of German car dealers trading in that brand was not able to induce the company, on which the members of the association were obviously strongly dependent, to disclose its financial statements to them and thus, applied to the court for an order requiring the company to publish its annual accounts and to pay a fine in the form of a periodic penalty payment.\textsuperscript{380} However, that

\begin{itemize}
\item \textsuperscript{374} Ibid., para.51
\item \textsuperscript{375} Ibid., para. 45
\item \textsuperscript{376} Ibid., paras.47-48
\item \textsuperscript{377} Ibid., paras.49-50
\item \textsuperscript{378} Ibid., paras.53-54
\item \textsuperscript{379} Case C-97/96, Verband deutscher Daihatsu-Händler eV v. Daihatsu Deutschland GmbH [1997] ECR I-6843; see also Case 191/95, Commission v Germany [1998] ECR I-5449 relating to the implementation of the first and the fourth company law directives; Teichmann, ‘European Company Law – Common Principles or Competition between Legislators?’, supra note 67, p.153
\item \textsuperscript{380} Case C-97/96, Verband deutscher Daihatsu-Händler eV v. Daihatsu Deutschland GmbH [1997] ECR
\end{itemize}
application was dismissed by the courts on the ground that the relevant provisions of the German Commercial Code, pursuant to which proceedings for the imposition of a fine in the form of a periodic penalty payment could be brought only by a member or creditor of the company, the general works council or the company's works council, which did not include the association of German car dealers. On the question whether Germany had correctly transposed Article 6 of the first company law directive, the Court of Justice drew attention to the wording of Article 50 (2) (g) TFEU, which referred to the need to protect the interests of ‘others’, without distinguishing or excluding any categories falling within the ambit of that term, and consequently, the term ‘others’ under the Article, could not be limited merely to creditors of the company as was generally recognised in then German academic legal writing. The objective of abolishing restrictions on freedom of establishment could not be circumscribed by the provisions of Article 50 (2) TFEU which merely set out a non-exhaustive list of measures to be taken in order to attain that objective. The Court of Justice also pointed to the language in the preamble and provisions of the first company law directive and concluded that ‘disclosure of annual accounts is primarily designed to provide information for third parties who do not know or cannot obtain sufficient knowledge of the company’s accounting and financial situation,’ enabling all interested parties to inform themselves on these matters. Thus, Member States may not restrict the imposition of such penalties to cases involving a request by parties such as creditors or members of the company concerned, as Germany had done in its previous legislation on penalties for failure to disclose.

I-6843, para.2

Ibid., paras.3-4

Article 50 (2) (g) TFEU states that the coordination of national systems of company law is designed to safeguard the interests of members and ‘others’.


Ibid., para.21

Ibid., paras. 22-23

The difficulties in arriving at a satisfactory analysis of the cases of the Court of Justice lie in the problem created by the Treaty provisions’ attempt to extrapolate to companies principles which apply comfortably to national persons and to dovetail two mutually exclusive theories of corporate nationality. 387 Still, the Court of Justice has often functioned as a catalyst in the European integration process, particularly considering that, in the Centros ruling, mutual recognition was introduced in relation to company law and the rights of cross-border activity in the EU were reinforced. 388 Through the case-law of the Court of Justice, the possible use of the freedom of establishment by companies incorporated in a Member State has been broadened, particularly in facilitating cross-border corporate mobility. 389 The approach of the Court of Justice implicitly recognises that the reality that the EU company law harmonisation programme is putting in place certain core standards across the jurisdictional divides within the EU. 390 It is essential to draw attention to the implications on the stance of the Court of Justice upon the need for a balance between the notion that the overriding objective of modern company law should be directed towards facilitating enterprise and the need to protect corporate constituencies against abuses of liability. 391

5.3.4 Introduction of Supranational Business Vehicles

(1) European Company or Societas Europea

Newly formed companies may incorporate in a Member State which they think has the

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388 Birkmose, supra note 154, p. 1093
390 Lowry, supra note 299, p. 342
391 Ibid., p.334
most advantageous corporate regime, but existing companies did not have such option. In addition, companies operating at EU level are obliged to maintain unnecessary and costly divisions in their structures and organisations to meet the requirements of national company laws. There was no single, universally recognised corporate vehicle which could operate in all the Member States under one legal regime, thus complementing the scale of these EU wide enterprises. To meet these challenges, new corporate forms that are the creatures of EU law were developed. Although they are inspired by national company law regimes and will operate within the jurisdictions of the 27 Member States, they form a distinct 28th company law regime on a supranational basis.\footnote{Report of the Reflection Group on the Future of EU Company Law, supra note 181, p. 29; we do not deal with the European Cooperative Society (SCE) (Council Regulation (EC) No1435/2003 of 22 July 2003 on the Statute for a European Cooperative Society (SCE) OJ L 207/1) in the thesis because cooperatives exist to serve the needs of their members who contribute to their capital, own and control them, rather than to provide a return on investment. Due to the specific principles upon which cooperatives are based, they are unsuitable for use by capital companies; European Commission, Commission Staff Working Document: Impact assessment on the Directive on the cross-border transfer of registered office, supra note 65, p. 12}

The first of these new legal forms to be developed was the European Company or \textit{Societas Europea} (SE). The European Company Statute (SE Regulation)\footnote{Council Regulation (EC) No 2157/2001 of 8 October 2001 on the Statute for a European Company (SE) [2004] OJ L 294/1} was adopted on 8 October 2001 based on Article 114 TFEU (ex Article 95 EC) which permits the adoption of measures for the approximation of provisions for the establishment and functioning of the internal market. The objectives of the SE Regulation, according to its recitals, \textit{inter alia}, were as follows:\footnote{Paragraphs 1, 2, 4, 6, 7, 14 and 21 of the recitals of the SE Regulation}

\begin{itemize}
\item To remove obstacles to the creation of groups of companies from different Member States;
\item To allow companies with a European dimension to combine, plan and carry out the reorganisation of their business on a Union scale and to transfer their registered
office to another Member State while ensuring adequate protection of the interests of minority shareholders and third parties;

- To ensure as far as possible that the economic unit and the legal unit of business in the EU coincide;
- To permit the creation and management of companies with a European dimension, free from the obstacles arising from the disparity and the limited territorial application of national company law;
- To allow companies with a European dimension to adapt their organisational structure, and to choose a suitable system of corporate governance ensuring efficient management, proper supervision and the maintaining of the rights of employees to involvement.

The first drafts of the SE Regulation were presented by the European Commission in 1970 and 1975, but the adoption of the SE Regulation took almost 30 years of negotiations in the Council. It was mainly because of the controversies on these two topics. The first topic was on codetermination. The 1970 proposal provided a dualistic system with a management body and a supervisory body. A third of the members of the supervisory body were to be elected by the employees.\(^\text{395}\) This encountered a lot of opposition, and so the 1975 proposal presented the so-called three bench model: a supervisory board consisting of one third of shareholders’ representatives, one third of employees’ representatives and one third of independent members.\(^\text{396}\) This too proved controversial and a common solution on these issues was only reached at the Nice summit in 2000. The SE Regulation is complemented by Council Directive 2001/86/EC on the involvement of employees in the SE.\(^\text{397}\) The

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\(^{395}\) Art. 137 of the 1970 draft of the Proposal of SE Regulation

\(^{396}\) Art. 74a of the 1975 draft of the Proposal of SE Regulation

deadline for adapting national legislation to the European legislation on the SE was set for 2004, but the transposition only happened in all Member States at the beginning of 2007. The second topic was disagreement about the roots of the company in European law. The proposals of 1970 and 1975 had tried to avoid any reference to national company law by combining two regulatory mechanisms. However, facing strong opposition, the 1975 proposal consisting of more than 300 articles was reduced to a mere 137 articles in the 1989 proposal and finally ended up with 70 articles in the text of 2001. The complete code of corporate law was cut into pieces and issues which could not be agreed upon were simply not regulated. Thus, in order to fill eventual gaps, matters not covered by the SE Regulation are governed by the law of the Member States on public limited liability companies.

The SE Regulation mainly deals with the formation of the SE, its organs and the transfer of seat. There are four ways of forming an SE: merger, formation of a holding company, formation of a joint subsidiary, or transformation of a public limited company previously formed under national law. Formation by merger is available only to public limited companies from different Member States. Formation of an SE holding company is available to public and private limited companies with their registered offices in different Member States or having subsidiaries or branches in Member States other than that of their registered office. Formation of a joint subsidiary is available under the same circumstances to any legal entities governed by

398 This was met only by 8 Member States in 2004.
401 Ibid.
402 Art. 2 of the SE Regulation; transformation of a public limited liability company into an SE is permitted if for at least two years it has had a subsidiary company governed by the law of another Member State; Art. 2 (4) of the SE Regulation
403 Art. 2 (1) of the SE Regulation
404 Art. 2 (2) (a) of the SE Regulation
405 Art. 2 (2) (b) of the SE Regulation; the subsidiaries or branches have to be in the Member States for at least for two years.
public or private law.\textsuperscript{406} It is noteworthy that both merger and transformation are only available to public limited liability companies, whereas the holding SE may be established by private limited liability companies. Only the formation by way of merger is regulated in detail under the SE Regulation and other methods of formation refer to national laws. Consequently, it is not easy to determine the applicable law although Article 9 of the SE Regulation provides the order of precedence of the laws applicable to the SE. Furthermore, the result of the many referrals to national law is that the formation of the SE is ultimately governed by various and often vastly differing national provisions depending on the home country of the participating undertakings and the registered office of the SE to be incorporated.\textsuperscript{407}

The SE must have a minimum capital of EUR 120,000.\textsuperscript{408} Where a Member State requires a larger capital for companies exercising certain types of activity, the same requirement will also apply to an SE with its registered office in that Member State.\textsuperscript{409} The national law of the SE’s registered office regulates e.g. the capital maintenance and alteration, shares and other securities.\textsuperscript{410} Despite the harmonisation of capital rules by the Second Directive,\textsuperscript{411} SEs registered in different Member States are therefore subject to very different capital regimes.

The SE Regulation provides as governing bodies the general meeting of shareholders and either a management board and a supervisory board (two-tier system) or an administrative board (one-tier system). It contains a number of rules applicable to both types of management structure; for example; a maximum term of office of six years, rules on eligibility for membership in any organ, a duty of confidentiality and

\textsuperscript{406} Art. 2 (3) of the SE Regulation
\textsuperscript{408} Art. 4 (2) of the SE Regulation
\textsuperscript{409} Art. 4 (3) of the SE Regulation
\textsuperscript{410} Art. 5 of the SE Regulation
rules on quorums and decision-taking in the respective organs.  

Under the two-tier system the SE is managed by a management board. The members of the management board have the power to represent the company in dealings with third parties and in legal proceedings. They are appointed and removed by the supervisory board. No person may be a member of both the management board and the supervisory board of the same company at the same time. However, the SE regulation provides explicit regulatory options for Member States. For example, Article 39(5) specifically empowers those Member States whose laws do not make provisions for a two-tier system to adopt the “appropriate measures” in relation to SEs. If a Member State’s Company Law already provides for a two-tier system, these rules will apply via Art. 9(1)(c)(ii). 

Under the one-tier system, the SE is managed by an administrative board. The members of the administrative board have the power to represent the company in dealings with third parties and in legal proceedings. Under the one-tier system, the administrative board may delegate the power of management to one or more of its members, but only if the national company law contains equivalent provisions and only under the same conditions.

The innovative feature of the SE lies in its possibility to transfer its seat to another Member State. For the purpose of a transfer of the registered office of an SE, its management or administrative organ shall draw up a transfer proposal and a transfer report and disclose the transfer proposal. The general meeting of the SE passes the transfer resolution with a qualified majority. The competent body in the state of the

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412 Arts 46 – 51 of the SE Regulation
413 Art. 39 (1) of the SE Regulation
414 Art. 39 (1) of the SE Regulation
415 Art. 39 (1) of the SE Regulation
417 Ibid.
418 Art. 43 (1) of the SE Regulation
419 Art. 8 of the SE Regulation
420 Art. 8 (2) (3) of the SE Regulation
421 Art. 8 (6) and 59 of the SE Regulation
former registered office of the SE, such as a court, a register, a notary public or an 
authority, issues a certificate about the compliance with all provisions of the transfer 
procedure.\footnote{Art. 8 (8) of the SE Regulation} Afterwards, the SE can be registered where the new registered office is 
located.\footnote{Art. 8 (9) of the SE Regulation} In the absence of a directive on the cross-border transfer of the registered 
office of a company, the SE remains the only company form that allows companies to 
transfer their registered office to any other Member State without liquidation.\footnote{Commission Report, The Application of Council Regulation 2157/2001 of 8 October 2011 on the 
Statute for a European Company (SE), supra note 399, p. 3} However, the requirement that the head office is moved together with the registered 
office reduces the advantage of providing the possibility to transfer the registered 
office.\footnote{Ibid., p. 7; Art. 7 of the SE Regulation; Art. 69 (a) of the SE Regulation} If, by way of the transfer of the registered office, the head office remains in 
the former location, the SE may face liquidation.\footnote{Art. 64 of the SE 
Regulation} In addition, the SE cannot be 
formed by a decision \textit{ab initio}, but requires the previous incorporation of companies 
with different home States that either merge into an SE or form the SE as a 
subsidiary.\footnote{Report of the Reflection Group on the Future of EU Company Law, supra note 181, p. 30} 

The idea of creating the SE, as a first pan-European company, realised the 
freedom of establishment envisaged for national companies by Article 220 of the 1957 
Treaty of Rome (Article 293 EC).\footnote{Ibid., p. 29} The SE has made it possible for companies with a 
European dimension to transfer the registered seat cross-border, to better reorganise and 
restructure and to choose between different board structures, while maintaining the 
rights of employees to involvement and protecting the interests of minority shareholders 
and third parties.\footnote{Commission Report, The application of Council Regulation 2157/2001 of 8 October 2011 on the 
Statute for a European Company (SE), supra note 399, p. 9} Other positive aspects of the SE are its European image in terms of 
penetrating other Member States’ markets and its supranational character in the process 

\footnote{\textsuperscript{422} Art. 8 (8) of the SE Regulation \textsuperscript{423} Art. 8 (9) of the SE Regulation \textsuperscript{424} Commission Report, The Application of Council Regulation 2157/2001 of 8 October 2011 on the 
Statute for a European Company (SE), supra note 399, p. 3 \textsuperscript{425} Ibid., p. 7; Art. 7 of the SE Regulation; Art. 69 (a) of the SE Regulation \textsuperscript{426} Art. 64 of the SE Regulation \textsuperscript{427} Report of the Reflection Group on the Future of EU Company Law, supra note 181, p. 30 \textsuperscript{428} Ibid., p. 29 \textsuperscript{429} Commission Report, The application of Council Regulation 2157/2001 of 8 October 2011 on the 
Statute for a European Company (SE), supra note 399, p. 9}
of conducting cross-border mergers or structural changes in a group.\textsuperscript{430}

Nevertheless, there are many peculiar aspects which prevent the SE to be a true European company form as a viable alternative to national companies. The set-up costs, time-consuming and complex procedures, and legal uncertainty of the SE formation process together with the lack of hindsight and practical experience of the advisors and competent public authorities are reported as the most important obstacles when establishing an SE.\textsuperscript{431} The minimum subscribed capital of the SE is EUR 120,000 which limits the number of companies which can benefit from the SE.\textsuperscript{432} Those are large companies which are already operating cross-border businesses in the EU.\textsuperscript{433} The rules on worker involvement is also mentioned as an obstacle which results in a complicated and long negotiation process, particularly in Member States where the national legislation does not provide for a system of employee participation. However, registration of an SE cannot be made before the completion of negotiations on employee involvement in particular for listed companies.\textsuperscript{434} The current formation conditions are considered burdensome, such as a heavy cross-border requirement, in particular the requirement for companies forming an SE to have had a subsidiary or a branch in another Member State for at least two years before the SE creation and limited methods of creation of an SE.\textsuperscript{435} Most of all, the high costs, complex procedures and legal

\textsuperscript{430} Ibid., pp.3 and 9; for example, when transforming national subsidiaries into branches of the parent company, it helps to avoid the feeling of a national ‘defeat’ of the management and staff in the absorbed company or previous subsidiaries.

\textsuperscript{431} Ibid. p. 4; the average set-up costs for the SEs interviewed in the external study were approximately EUR 784,000 (including the tax and legal advisory costs, translation costs and registration costs). The overall set-up costs range from approximately EUR 100,000 up to figures of between EUR 2 and 4 million.


\textsuperscript{433} See Buxbaum and Hopt, supra note 27, p. 202; it remains doubtful that transnational enterprises would change their own legal form or choose the form of the SE for new incorporations even for new incorporation of affiliates.


\textsuperscript{435} Art. 2 of the SE Regulation; Commission Report, The application of Council Regulation 2157/2001 of 8 October 2011 on the Statute for a European Company (SE), supra note 399, pp. 6-7
uncertainty of the SE formation actually stem from the lack of uniformity in the SE Regulation due to the many references to national law and discourage businesses from establishing an SE.\textsuperscript{436} Substantial references to national law in the SE Regulation provide many different variations depending on the national company law of the Member State where it was formed, which damages the SE as a pan-European company form.\textsuperscript{437}

\textbf{(2) European Economic Interest Grouping}

The European Commission developed the European Economic Interest Grouping (EEIG) which is a supranational form of business association that will facilitate cross-border cooperation between business entities operating within the EU. The Regulation on the EEIG (EEIG Regulation)\textsuperscript{438} was inspired by a French entity called the \textit{groupement d’intérêt économique}, which is regarded as an intermediate form between the \textit{société} (company or partnership) and the \textit{association} (club).\textsuperscript{439}

Whereas the SE Regulation is aimed at providing a form of business entity that will facilitate long term cooperation between companies in different Member States, the EEIG Regulation targets at producing a vehicle for cooperation with a contractual basis which will fulfil various functions for the members to facilitate the adaptation of their activities to the economic conditions of the EU.\textsuperscript{440} If the SE can be viewed as a supranational company, the EEIG could be looked upon as a kind of supranational

\begin{footnotesize}
\textsuperscript{436} Ibid., Commission Report, p. 6
\textsuperscript{437} Ibid., p. 9-10; Article 69 of the SE Regulation requires the European Commission to present a report on its application including proposals for amendments, where appropriate, five years after the entry into force. According to the 2010 Commission Report, the Commission is reflecting on potential amendments to the SE Regulation with a view to making proposals in 2012.
\textsuperscript{438} Council Regulation (EEC) 2137/85 of July 1985 on the European Economic Interest Grouping (EEIG), OJ L 199/1; Art.41 of the EEIG Regulation required that the member states took appropriate measures to enable the formation of an EEIG by 1 July 1989.
\textsuperscript{439} Andenas and Wooldridge, supra note 221, p. 377; the \textit{groupement d’intérêt économique} was introduced in 1967.
\textsuperscript{440} Preamble to the EEIG Regulation
\end{footnotesize}
partnership or joint venture. It is to offer a legal entity based on the EU law which allows entities from various Member States to develop cross-border activities through an external, independent and representative structure while retaining their economic and legal independence.

The purpose of this entity is strictly limited to facilitating or developing the economic activities of its members. An EEIG should not be created to make profit for itself. Indeed, its activities must not be more than ‘ancillary’ to the economic activities of its members. If it does make any profits, they will be apportioned among the members and taxed accordingly. Its activities must be related to the ‘economic activities’ of its members, but cannot replace them. An EEIG should not be created in order to be the parent company of several companies, but in order to allow different companies to work together. It is also neither to be used as a management or holding company for the members, nor as a conduit company for the members’ benefit. Further, as an EEIG cannot employ more than 500 persons, it is unlikely to be used for large scale manufacturing companies. This limit was introduced at the request of Germany in order to avoid the application of its rule on requiring employee representation in the supervisory board of certain corporate forms once they have more than 500 employees.

The EEIG is formed by the conclusion of a contract by the participating

442 Art. 3 (1) of the EEIG Regulation
443 Art. 21 (1) and 40 of the EEIG Regulation
444 Fifth recital in the preamble of the EEIG Regulation; Margaret Anderson (1990), European Economic Interest Groupings (London, Dublin, Edinburgh, Munich: Butterworths), p. 24
445 Peter T. Muchlinski, (2007) Multinational Enterprises & the Law (2nd) (Oxford: OUP), p. 74; Art. 3 (2) (a) (b) and (d) of the EEIG Regulation
446 Ibid.; Art. 3 (2) (c) of the EEIG Regulation
members. This formation contract of an EEIG must include its name, its official address and objects, the name, registration number and place of registration, if any, of each member of the EEIG and the duration of the EEIG, except where this is indefinite.\textsuperscript{448} Registration involves filing of information about the EEIG at the registry designated by each Member State, e.g. the contract, the managers and their powers.\textsuperscript{449} Registration in this manner confers full legal capacity on the EEIG throughout the EU.\textsuperscript{450} However, recognising the ‘legal personality’ of the EEIG depends on the choices of the Member States.\textsuperscript{451} This is because of the differences between legislation on the tax consequences linked to the granting of such personality.\textsuperscript{452} When an EEIG is formed or dissolved, a notice must be published in the Official Journal of the EU after it has been published in the official gazette of the Member State where the EEIG has its official address.\textsuperscript{453} Despite these compulsory provisions, the information on the EEIGs in the Official Journal of the EU is published often with a delay of several months. Thus, the exact estimate of the number of EEIGs is challenging. It is problematic that there is no EU-wide central register for EEIGs.\textsuperscript{454}

An EEIG must have at least two members from different Member States. The members can be companies, firms and other legal entities governed by public or private law which have been formed in accordance with the law of a Member State and have their registered office within the EU.\textsuperscript{455} Individuals carrying on an industrial, commercial, craft or agricultural activity or providing professional or other services can

\footnotesize{\textsuperscript{448} Art. 5 of the EEIG Regulation
\textsuperscript{449} Arts. 7 and 39 (1) of the EEIG Regulation
\textsuperscript{450} Art. 1 (2) and 6 of the EEIG Regulation
\textsuperscript{451} Art. 1 (3) of the EEIG Regulation
\textsuperscript{452} For instance, in Germany and Italy fiscal transparency, which is essential for an EEIG, is accepted only in the cases of bodies that do not have legal personality; European Commission (1999) EEIG: An Instrument for Transnational Cooperation: A Practical Handbook for Small and Medium-sized Enterprises (2nd) (Luxembourg: Office for Official Publications of the European Communities), p. 20
\textsuperscript{453} Arts. 11 and 39 (1) of the EEIG Regulation
\textsuperscript{454} Libertas-European Institute GmbH, European EEIG Information Centre, \textit{supra} note 447, p. 2
\textsuperscript{455} Art. 4 (1) (a) of the EEIG Regulation}
also be members.\footnote{Art. 4 (1) (b) of the EEIG Regulation} Each member of an EEIG has one vote, although the contract for its formation may give certain members more than one vote provided that no one member holds a majority of the votes.\footnote{Art. 17 (1) of the EEIG Regulation} The Regulation lists those decisions for which unanimity is required.\footnote{Art. 17 (2) of the EEIG Regulation} No EEIG may invite investment by the public.\footnote{Art. 23 of the EEIG Regulation} An EEIG does not necessarily have to be formed with capital. Members are free to use alternative means of financing.\footnote{Art. 17 (2) (e) of the EEIG Regulation} Forming an EEIG is flexible based on the contractual freedom and does not even require to provide a minimum amount of capital. As a counterweight, each member of the EEIG has unlimited joint and several liability for its debts, which national law shall determine the consequences of such liability. However, the persons who do not satisfy the condition to be a member of an EEIG may have ‘associate’ status, so-called associate members, through the formation contract.\footnote{European Commission, EEIG: An Instrument for Transnational Cooperation: A Practical Handbook for Small and Medium-sized Enterprises (2\textsuperscript{nd}), supra note 452, p. 43} An associate member is not entitled to vote when the members are acting collectively.\footnote{Ibid.} The EEIG must have at least two organs: the members acting collectively and the manager or managers.\footnote{Art. 16 (1) of the EEIG Regulation} The managers represent and bind the EEIG in its dealings with third parties even where their acts do not fall within the objects of the EEIG.\footnote{Art. 20 (1) and 6 of the EEIG Regulation}

The official address of the EEIG must be within the EU, either where it has its central administration or one of its members has its central administration, or in the case of a natural person, his principal activity, provided that the EEIG carries on an activity there.\footnote{Art. 12 of the EEIG Regulation} It can be transferred from one Member State to another within the EU subject to certain conditions laid down in the formation contract.\footnote{Art 13 of the EEIG Regulation} As an EEIG has either its central administration or its principal activities within the EU, there is no need for a
third member who is a natural person to comply with this requirement. Thus, even though the third parties’ principal activity is outside the EU, they may nevertheless become a member of an EEIG, if they carry on economic activity there.\footnote{Andenas and Wooldridge, \textit{supra} note 221, p. 378}

An EEIG is governed by a mixed legal regime consisting not only of supranational provisions of the EEIG Regulation, but also, in certain circumstances, of provisions of the contract of formation; as well as of the national or internal law of the Member State where the EEIG has its official address.\footnote{Ibid., p. 378}

The EEIG Regulation provides a framework for natural persons, companies and firms within the meaning of Article 54 TFEU and other entities governed by public or private law to enable them to cooperate effectively when carrying on business activities across national frontiers. The ancillary role of the EEIG’s activities to its members’ economic activities and the condition that an EEIG cannot make profits for itself limit its attractiveness as a cross-border cooperation vehicle.\footnote{Arnull \textit{et al.}, \textit{supra} note 154, p. 873} However, because of the flexibility in the formation and duration and in the arrangements governing its financing or operation, the EEIG is constantly being in use by economic operators in the EU, particularly by SMEs.\footnote{See the EEIG statistics from the European EEIG Information Centre at Libertas; stand/as to: 11.5.2011; available at:<http://www.libertas-institut.com/de/EWIV/statistik.pdf>}\footnote{European Commission, \textit{EEIG: An Instrument for Transnational Cooperation: A Practical Handbook for Small and Medium-sized Enterprises} (2\textsuperscript{nd}), \textit{supra} note 452, pp. 11-15} The EEIG is a uniform legal instrument at EU level in order to achieve the harmonious development of economic activity throughout the EU and the establishment of a common market offering conditions analogous to those of a national market and to alleviate the ‘legal, fiscal and psychological’ difficulties encountered for the cross-border business cooperation.\footnote{Preamble to the EEIG Regulation} The EEIG is a relatively inexpensive way of reaching other Member States, particularly useful for those who wish to extend their economic activities to other Member States but do not have enough
resources to set up an establishment.\textsuperscript{473} With a view to find cross-border business cooperation partners in order to organise an EEIG, SMEs can make use of the ‘Enterprise Europe Network’\textsuperscript{474} which has the ‘Business Cooperation Database’ consisting of a Europe-wide database of company profiles, all of whom are seeking cooperation or collaboration with foreign partners in their specific sectors.\textsuperscript{475}

(3) European Private Company or \textit{Societas Privata Europea}

SE is adapted only to large businesses and its structure and employee participation rules are too complex and unsuitable for smaller businesses.\textsuperscript{476} EEIG is designed to help transnational and inter-professional cooperation between SMEs but only provides a partial solution, particularly due to its ancillary nature. In 1995, CREDA, the research department of the Paris Chamber of Commerce and Industry, set up an international project to investigate the prospects for a European private company and developed a proposal.\textsuperscript{477} This company form would be complementary to the national forms of private companies in Member States and to the SE.\textsuperscript{478} In 2002, the European Economic and Social Committee adopted an opinion on a European Company Statute for SMEs stressing the necessity of this project for SMEs.\textsuperscript{479} Finally, in June 2008, the European

\begin{footnotesize}
\begin{enumerate}
\textsuperscript{473} Anderson, \textit{supra} note 444, p.8
\textsuperscript{474} The Enterprise Europe Network, launched in 2008, merges and builds on the European Commission’s two previous business support networks, namely the Euro Info Centre and Innovation Relay Centre networks. It unites over 500 organisations and 4,000 professionals across the EU and in certain neighbouring countries, by providing high-quality integrated business support services to SMEs; see ‘Business Cooperation in the European Union,’ Enterprise Europe Network London, London Chamber of Commerce and Industry, May 2010, p.5; available at: <http://www.londonchamber.co.uk/docimages/7300.pdf>
\textsuperscript{475} http://portal.enterprise-europe-network.ec.europa.eu/services-going-international
\textsuperscript{478} Susanne Braun (2004), ‘Essay-The European Private Company; A Supranational Form for Small and Medium-sized Enterprises?’ \textit{5} (11) \textit{German Law Journal}, 1393, p. 1399
\end{enumerate}
\end{footnotesize}
Commission developed a proposal for a supranational business vehicle across the EU, i.e. Proposal for a Regulation on a Statute for a European Private Company (EPC) or Societas Privata Europea (SPE).\textsuperscript{480} This proposal drafted by the Commission will be referred to as ‘original EPC Proposal,’ i.e. the Commission Draft.’ This proposal is part of the Commission initiative called the ‘Small Business Act (SBA),’ a Commission policy document designed to assist SMEs in Europe.\textsuperscript{481} The proposal of the Regulation was passed by the European Parliament with some amendments in March 2009 (the European Parliament Draft).\textsuperscript{482} Subsequently, the debate shifted to Council level and in December 2009, the Swedish Presidency of the Council submitted a compromise proposal. However, this proposal did not achieve the necessary unanimity for an agreement at the Council of Ministers. Following this failure, negotiations are currently stalled and already passed the original intended date for adoption on 1 July, 2010. In this thesis, the Presidency compromise proposal prepared in view of the meeting of the Council in December 2009 will be referred to as ‘EPC Proposal’.\textsuperscript{483}

The EPC can be formed \textit{ex nihilo} by one or several natural persons and/or legal entities. It may also be formed by transforming, merging or dividing existing companies.\textsuperscript{484} The original EPC proposal by the European Commission\textsuperscript{485} did not have any cross-border requirement, which meant that entrepreneurs could establish an EPC in the case of purely national economic activities as well. However, later, the European

\textsuperscript{480} Proposal for a Council Regulation on the Statute for a European private company, COM 2008 (0396) final, Brussels, 25.6.2008 (original EPC Proposal)
\textsuperscript{483} ‘A Revised Presidency compromise proposal for a Council Regulation on the Statute for a European private company’ (the EPC Proposal) is a Council document: 16115/09 DRS 71 SOC 711 ADD1, Brussels, 27, November, 2009 (Inter-institutional file 2008/0130 (CNS)) which can be found at: <http://www.europeanprivatecompany.eu/legal_texts/download/Council-November09-en.pdf>
\textsuperscript{484} Art. 5 of the EPC Proposal provides that an EPC may be formed:
(a) \textit{ex nihilo}, in accordance with this Regulation;
(b) by transformation in accordance with this Regulation;
\textsuperscript{485} Proposal for a Council Regulation on the Statute for a European private company, COM 2008 (0396) final, Brussels, 25.6.2008 (original EPC Proposal)
Parliament proposed to add cross-border conditions to the Proposal in order to facilitate SMEs to use the same company form as the EPC at EU level limit competition with national corporate forms.\textsuperscript{486} According to the proposed amendment to Article 3 of the EPC Proposal, an EPC shall have a cross-border element demonstrated by one of the following: a cross-border business intention or corporate objective; an intention to be significantly active in more than one Member State; establishments in different Member States, or a parent company registered in another Member State.\textsuperscript{487}

The European Commission, being aware of the European trend in abolition or reduction of the minimum capital, proposed that the minimum capital requirement is set at one Euro.\textsuperscript{488} Later, the European Parliament proposed to amend the European Commission’s Proposal that the minimum capital of the EPC shall be set at least one Euro, and provided that the articles of association require that the executive management body signs a solvency certificate in order to protect creditors from excessive distributions to members which could affect the ability of the EPC to pay its debts\textsuperscript{489} and also that, where the articles of association contain no provision to that effect, the capital should be at least EUR 8,000.\textsuperscript{490}

An EPC comes to existence as the result of a registration in the Member State in which the statutory registered office is located.\textsuperscript{491} Article 9 of the EPC Proposal provides rules on the formalities relating to registration.\textsuperscript{492} The registered office of the EPC may be transferred to another Member State, without having any consequences on the legal personality or on the rights and obligations created by contracts concluded.

\textsuperscript{487} Art. 3 (3) of the EPC Proposal
\textsuperscript{488} Art 19 (4) of Proposal for a Council Regulation on the Statute for a European private company, COM 2008 (0396) final, Brussels, 25.6.2008
\textsuperscript{489} Compare the wording between Art 21 (2) of the original EPC Proposal and Amendment 36 of Art. 21 (2) of from the European Parliament legislative resolution; see also, Art. 21 (4) of the current EPC Proposal.
\textsuperscript{490} Amendment 33 of Ar. 19 (4) from the European Parliament legislative resolution
\textsuperscript{491} Art. 10 (1) of the EPC Proposal
\textsuperscript{492} Art. 10 of Proposal for a Council Regulation on the Statute for a European private company, COM 2008 (0396) final, Brussels, 25.6.2008
previously despite the change of the applicable national law.\textsuperscript{493} Considering the conflict of laws issues regarding the recognition of foreign companies in the EU, the EPC Proposal incorporated a transitional provision. During the initial phase for two years, whilst experience is gained in the application of the EPC Project, the EPC should have its registered office and its central administration or its principal place of business in the same Member State, during which time that national law should apply.\textsuperscript{494} The transfer takes effect on the date of registration in the host State.\textsuperscript{495}

The EPC should be a transnational company form based on contractual freedom. Having maximum structural freedom for drafting companies’ constitutions is important for SMEs. Shareholders are responsible for the organisation of the EPC. They adopt resolutions that are binding upon shareholders, the management body and the supervisory body of the EPC and on third parties.\textsuperscript{496} The shareholders determine the Articles of Association of the EPC, including the matters listed in Annex I of the EPC Proposal.\textsuperscript{497} Matters not covered by the Articles of Association are subject to the national law of the Member State in which the EPC has its registered office. The EPC Proposal provides a hierarchy of rules applicable to the EPC. The primacy is given to the provisions of the EPC Regulation.\textsuperscript{498} The articles of association constitute the second level. The third level in the hierarchy of applicable rules is the national law related to private companies of the Member State where the EPC is registered.\textsuperscript{499} A major point of criticism of the SE Regulation was on the substantial reference to the national law of the Member States, by which the intended supranational and specifically European character was considerably diluted. Therefore, when drafting the EPC

\textsuperscript{493}Art. 36 (1) of the EPC Proposal
\textsuperscript{494}Art. 7 (1) of the EPC Proposal; (4) of the Preamble of the EPC Proposal
\textsuperscript{495}Art. 36 (3) of the EPC Proposal
\textsuperscript{496}Art. 14 of the EPC Proposal
\textsuperscript{497}Art. 8 of the EPC Proposal
\textsuperscript{498}Andenas and Wooldridge, supra note 221, p. 415
\textsuperscript{499}Art. 4 of the EPC Proposal; Sandra van den Braak (2010) ‘The European Private Company, its shareholders and its creditors’ 6 (1) Utrecht Law Review, p. 4
Proposal, efforts were made to avoid referring to the national law. Nevertheless, accounts management and the preparation, filing, auditing and publication of accounts shall be subject to national law.

Methods for employee participation are subject to the regulations of the Member State where the EPC has its registered office. The EPC should not be used to avoid pre-existing rights concerning employee participation being circumvented. However, the circumvention of employees’ rights can happen when the EPC is formed by the transformation of a national company under the national law already subject to the legal arrangements for employees’ participation.

It is expected that SMEs and individuals will benefit from this new simplified supranational vehicle once the EPC Proposal is adopted. The concept of this small uniform corporate form throughout the EU is also welcomed by groups of companies. However, the negotiation to adopt the EPC does not seem to be an easy journey. The EPC, an optional corporate form supplementing the existing forms, should be carefully vetted against existing national law so that on the one hand this new form is as flexible as national companies, and on the other hand the new form should not intrude on national arrangements.

5.3.5 Mutual Recognition of Foreign Companies in the EU

Although Article 54 TFEU grants the right of establishment both to legal persons and natural persons, the freedom of establishment of companies could not be fully achieved

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501 (6) to the Preamble of the EPC Proposal
502 (16) of the Preamble of the EPC Proposal
by the application of the relevant EU Treaty provisions due to the great differences between Member States’ laws with regard to company law matters. Companies only exist by virtue of the varying national legislation. This resulted in the recognition of the need for adoption of agreements for the mutual recognition and the retention of legal personality in the event of transfer of their seat from one country to another by Article 293 EC.

Article 293 EC provides for negotiations between the Member States to secure, *inter alia*, the mutual recognition of companies and firms, transfer or the seat of companies, and cross-border mergers. This opens the possibility of international treaties in this field. However, it requires the classic negotiation of a convention, with all the Member States signing and subsequently ratifying the instrument, which will take a long time. Meanwhile, it is difficult to secure the position of the Court of Justice in respect of interpretation and application of the convention as part of the EU law. One of the responses after the *Daily Mail* case was to see the judgment as a prompt to the Member States to enter into agreements under Article 293 EC on the mutual recognition of companies and firms and the retention of legal personality in the event of transferring their seat from one state to another.

There are many international treaties and conventions under which one state agrees to recognise companies legally formed upon the other state’s territory, either absolutely or upon certain conditions. The latest in this line is the draft Convention on the Mutual Recognition of Companies, produced on the basis of Article 220 of the

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507 See, for example, the proposals of the League of Nations in 1929, the draft Treaty of the Hague Conference on the Mutual Recognition of the Legal Personality of Companies which was signed by several of the participating states at the Hague Conference on Private International Law in 1956 (1956 draft Treaty of the Hague Conference on the Mutual Recognition of the Legal Personality of Companies), the Council of Europe Convention on the Establishment of Companies in 1966, the draft Convention on the Mutual Recognition of Companies and Bodies Corporate which was signed on 29 February 1968.
Treaty of Rome,\textsuperscript{508} and signed on 29 February 1968. However, the Netherlands had consistently refused to ratify it, inhibited perhaps by the provisions of its law of 25 July 1959 referred to earlier. The Convention tried to effect a classic compromise between the place of incorporation and the real seat theories. It provided that companies established in accordance with the law of a member state and which have their registered office within the EU, must be recognised as of right in the other member states. However, the next two articles seem to have a different approach. The first is the rule permitting member states not to apply the convention to companies which have their real seat outside the Community, and which do not have an effective link with the economy of a member state. The second, and more fundamental, derogation from the place of incorporation approach permitted member states, by a unilateral declaration, to apply their own mandatory legal provisions to companies incorporated in another member state, but having their real seat in the state of reception.\textsuperscript{509} The draft Convention on Mutual Recognition of Companies has never entered into force.

\textbf{5.4 Conclusion}

Since the inception of the EU in the 1957 Treaty of Rome, the EU has aimed at achieving a single market within which economic actors move freely. The progressive development of the European single market brought an increase in intra-EU trade and economic growth. The size of the single market and the potential growth has constituted an asset in terms of attracting international trade and investment to Europe.\textsuperscript{510} The completion of an open, liberalised and deregulated European single market, providing for the free movement of factors of production and the extension of competition would

\textsuperscript{508} Article 293 EC; it is now repealed under the Lisbon Treaty.
\textsuperscript{509} Drury, "The Regulation and Recognition of Foreign Corporations: Responses to the “Delaware Syndrome”", \textit{supra} note 61, pp. 181-182
\textsuperscript{510} Action Plan for the Single Market: Communication of the Commission to the European Council CSE(97)1 final, 4 June 1997, 11
stimulate European businesses.\footnote{Perry, supra note 6, p. 14} However, businesses operating across frontiers within the European internal market have experienced barriers. These are mainly NTBs such as red-tape relating to administrative formalities or originated from the diversity of company laws in Member States and conflict of laws problems. SMEs are often the prime victims of costs originating from those barriers. Therefore, several mechanisms were developed to tackle those problems in the EU. They not only enable companies to do business across frontiers in the internal market but also enable third parties to deal with them secure in the knowledge that they do so within a framework of common standards.\footnote{Richards, ‘What is EC Corporate Law?’, supra note 58, p. 1} These EU corporate mobility mechanisms dealt with under this chapter are: (i) removal of tariff and other barriers to trade; (ii) harmonisation of company laws through EU company law directives; (iii) promotion of freedom of establishment for companies; (iv) introduction of supranational business vehicles, such as SE, EEIG and EPC; and (v) adoption of an international agreement for mutual recognition of foreign companies in the EU.

The European single market is providing the conditions for improved European international competitiveness and its success serves as a model for other regions.\footnote{Action Plan for the Single Market: Communication of the Commission to the European Council CSE(97)1 final, 4 June 1997, 11} Despite the antagonism towards supranationalism, ASEAN has always showed interest in economic integration and its mechanisms under the EU, particularly in relation to building an AEC. In the following chapter, I evaluate the viability of the mechanisms drawn from the EU corporate mobility mechanisms in dealing with the major cross-border business barriers existing in the ASEAN Member Countries. As seen in Chapter 4, considering the fact that the ASEAN initiatives on economic cooperation, from PTA to AICO, are mostly focused on removing tariffs and relatively successful in that aspect, I will not deal with the area of removal of tariff in the next chapter. I intend to suggest
the most feasible, efficient and beneficial mechanisms for the ASEAN region among those developments in order to increase intra-ASEAN trade, promote the regional competence and reduce economic gaps among the ASEAN Member Countries at the realisation of the ASEAN single market.
Chapter 6 Implications from the European Experience for the Development of the ASEAN Economic Integration in Business Sector

6.1 Introduction: Suggested Mechanisms

Despite acknowledging that facilitating corporate collaboration among ASEAN-based businesses and enhancing private sector mobility within the ASEAN region would increase intra-ASEAN trade and be beneficial for the contribution of the AEC to the overall economic development of ASEAN, I have seen that the major instruments for the AEC or through the ASEAN industrial economic cooperation schemes have not been so successful in promoting intra-ASEAN trade in Chapter 4. Considering that ASEAN has seen the EU experience as a sort of role model in establishing the economic community in the region, I have selected four different areas drawn from the EU’s experience in enhancing cross-border corporate activities to develop the internal market in Chapter 5. In this chapter, the viability of the suggested mechanisms in those areas within ASEAN will be explored. Those selected four areas are:

1. Adopting an agreement or a convention on the mutual recognition of foreign companies under ASEAN;
2. Protecting rights of establishment through the ASEAN institutions;
3. Harmonisation of ASEAN company laws and business regulations;
4. Creating a supranational corporate entity: an ASEAN Business Cooperation Partnership (ABCP) similar to the European Economic Interest Grouping

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1. Seen Section 1.1 Background: General Considerations on ASEAN and Intra-ASEAN
2. See the major instruments for the AEC are AFTA, AFAS and AIA initiatives in Section 4.2 ASEAN Economic Community Instruments; ASEAN industrial economic cooperation schemes are from the AIP to AICO in Section 4.3 Industrial Economic Cooperation in ASEAN the thesis
3. It is to be highlighted that the interviewees agreed that ASEAN would benefit from the EU’s experience in the field of facilitating corporate collaboration and freedom of establishment; see the interview questions No. 12 for ASEAN experts in Appendix A; see also Michael G. Plummer (2006) ‘The ASEAN Economic community and the European Experience’, No.1 ADB Working Paper Series on Regional Economic Integration, p.1
The viability of the suggested mechanisms in those areas to enhance corporate mobility within ASEAN should be assessed on their ability to overcome the major barriers for foreign businesses existing in the ASEAN Member Countries which stand in the way of enabling cross-border business activities within ASEAN. Those barriers, which have been dealt with under Chapter 3, are the protectionist techniques adopted by the ASEAN Member Countries in order to preserve national interests and to protect indigenous industries from foreign competition by controlling foreign investments. They originate from different regulatory and corporate legal systems among the ASEAN Member Countries. I have categorised those barriers into four types: (i) excluding certain sectors from foreign investments or opening them only to a certain extent with foreign ownership limitations; (ii) regulating foreign equity joint ventures; (iii) restricting foreign shareholding in privatised companies or fostering domination of state-owned companies; and (iv) establishing various screening procedures or process-related restrictions. It is noteworthy that these barriers are perceived as non-tariff barriers (NTBs) by ASEAN which has experienced considerable difficulties in developing mechanisms to take care of them. Although there is strong national governments’ presence in policies of controlling foreign investment, ASEAN is overall an export-oriented market economy with strong interests in attracting foreign investments. In recent years, the ASEAN Member Countries tended to alleviate the restrictions on foreign investment towards a more enabling environment for foreigners to do business pursuing further liberalisation and opening up markets.\footnote{See, for example, the changes in lowering ownership requirements of the Malaysian Bumiputera participation or gradual opening of 100 per cent foreign ownership enterprises in Indonesia or Vietnam; see Section 3.3 Conclusion: An Analysis of Barriers} The barriers belonging to the categories of (i), (ii) and (iii), which are actually based on the frame of
protecting strategic sectors from foreign competition, would gradually lose ground as the national economies of the ASEAN Member Countries improve, particularly because most of those countries have made commitments as members of the WTO.\textsuperscript{5} In addition, the objective of the AIA, one of the ASEAN initiatives in achieving the AEC, is to liberalise all industries and sectors eventually, so as to grant national treatment and most-favoured-nation (MFN) treatment to ASEAN investors.\textsuperscript{6} Therefore, the mechanisms that work efficiently to reduce bureaucracy specifically imposed upon foreign investors in relation to the procedures of national screening or licencing under the category (iv) deserve particular attention.\textsuperscript{7}

In this chapter, firstly, I will evaluate each mechanism drawn from the four areas to see which of them are better in breaking down the major barriers for the cross-border business activities in ASEAN, and then, deal with the mechanism in depth that best satisfies the objective of overcoming the barriers so as to increase intra-ASEAN trade, which will eventually contribute to achieving the AEC.

**6.2 Evaluation of the Suggested Mechanisms**

**6.2.1 Mutual Recognition of Foreign Companies in ASEAN**

Corporations are creatures of national laws that exist by virtue of varying national legislations which determine their setting-up, validity, functioning and winding-up. When a corporation operates beyond the borders of the original jurisdiction of its incorporation (home state), it has to be decided which law regulates its affairs in the

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\textsuperscript{5} All ASEAN Member Countries except Lao PDR are the WTO members; see Section 3.2 Barriers Affecting All Foreign Investors in ASEAN: Protectionist Techniques in ASEAN Member Countries.

\textsuperscript{6} See Section 4.2.3 Framework of ASEAN Investment Area

\textsuperscript{7} Michael Ewing-Chow mentioned that the bureaucracy and corruption relating to the foreign investment, even with official approvals, constitute a major issue of doing business in some of the ASEAN Member Countries; interview on 8 April, 2009; see Section 3.2.4 Screening and Process-Related Restrictions
state of its operation (host state). This is related to the question of the recognition of a ‘foreign’ company by a ‘host’ jurisdiction where it has begun operations. With regard to the definition and recognition of ‘foreign’ companies and the rights conferred upon them, there are two conflicting theories in European laws, i.e. one links a company to its place of incorporation (the place of incorporation theory) and the other links the company to the location of its central administration or real seat (the real seat theory). Among the issues in relation to the meaning and the extent of the concept of recognition, it has been problematic in Europe, based on these conflicting theories, when the host state refuses to accept that the persons operating the business on its territory are in fact a company, on the ground that these persons have not complied with the domestic law which applies to companies with their central administration in the host state and treat them as an unincorporated association or just as a group of individuals. Another problem arises when the home state regards it as essential that the company maintains its central administration and control in the place of its incorporation and registration. Host states can be threatened by the challenge of pseudo-foreign corporations, that is, the corporation in question is not truly foreign, but is a manifestation of the will of persons who are linked firmly with one jurisdiction, but who seek to take advantage of what are perceived to be favourable factors of another jurisdiction by going through the process of incorporating their activities there in the form of a corporation, intent only on operating in their own home jurisdiction. There can be another concern, the Delaware Syndrome, that is, when the operation of companies incorporated in one state is facilitated in every other state in the region relying on the place of incorporation theory, it is possible for companies to cluster around the one state which they perceive to have

10 Ibid., p. 166; see cases of the Court of Justice in Section 5.3.3 (2) Development of Case-Law in the Court of Justice
the laxest or most favourable company laws, and then to operate from there in other states which have a more severe or onerous regime. There are many treaties and conventions under which one state agrees to recognise companies legally formed upon the other state’s territory, either absolutely or upon certain conditions. All of these, however, have failed to obtain recognition or ratification by all of the parties. The latest effort in Europe is the draft Convention on Mutual Recognition of Companies. This Convention tried to effect a compromise between the place of incorporation and the real seat theories, only to remain stillborn.

Yoong-Yoong-Lee, Jørgen Ørstrøm Møller, Hank Giokhay Lim, Denis Hew accepted the possibility of adopting an agreement or a convention on the mutual recognition of foreign companies in ASEAN when they were asked to choose one of the four mechanisms. However, according to Michael Ewing-Chow in his interview, what would actually matter is the meaning and the extent of the concept of recognition in the agreement or convention on the mutual recognition of foreign companies. Even if the contracting states adopted an agreement on the mutual recognition of foreign companies, they would still remain free to restrict the rights of foreign companies as

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11 This phenomenon, known as after the state most favoured in the US for the incorporation of companies, has aroused very vehement criticism in other, particularly European countries; Drury, ‘The Regulation and Recognition of Foreign Corporations: Responses to the “Delaware Syndrome”, supra note 9, pp. 166-167

12 See the examples of such treaties and conventions in supra note 1096.

13 The examples of the conditions are such as there being nothing in the company’s constitution or objects which is contrary to the other nation’s public policy; see also Art. 3 and 4 of the draft Convention on the Mutual Recognition of Companies and Bodies Corporate. Signed on 29 February 1968, Bulletin of the European Communities, Supplement 2/69, p. 7-16; Drury, ‘The Regulation and Recognition of Foreign Corporations: Responses to the “Delaware Syndrome”, supra note 9, p. 182


15 See for the background in Drury, ‘The Regulation and Recognition of Foreign Corporations: Responses to the “Delaware Syndrome”’, supra note 9, p. 182

16 Interview on 7 April, 2009

17 Interview on 3 April 2009

18 Interview on 3 April 2009

19 Interview on 13 April, 2009

20 Interview Question No. 9 for ASEAN Experts in Appendix A; some of the ASEAN experts seem to be familiar with the term of ‘mutual recognition’ due to the mutual recognition arrangements (MRAs) for professionals under AFAS.

21 Interview on 8 April, 2009; the same question is addressed in Drury, ‘The Regulation and Recognition of Foreign Corporations: Responses to the “Delaware Syndrome”’, supra note 9, p. 165
long as the condition that the *ius standi in iudicio* is not infringed.\(^{22}\) One of the business interviewees with long business experience in Singapore also indicated the possible continuing existence of many barriers for foreign businesses imposed by the ASEAN Member Countries, even after their adopting such an agreement.\(^{23}\) Therefore, adopting an agreement on mutual recognition of foreign companies in ASEAN could easily leave the barriers for foreign businesses based on the protectionist techniques in the ASEAN Member Countries untouched.

In addition, there seem to be no conflict of law issues in ASEAN regarding the recognition of foreign companies as in Europe. As Southeast Asian economies are overall open and eager to attract foreign investments for their economic developments, it is less likely that any legal system in ASEAN has strong adherence to the real seat theory. Michael Ewing-Chow mentioned an interesting point that the conflict of law problem, as in the EU, would only occur when there are conflicting legal regimes sophisticated enough to be concerned about conflict of laws. However, some of the ASEAN Member Countries, particularly the CLMV countries in the region, are still on their way to developing their legal systems focusing more on making their company laws and business regulations more efficient.\(^ {24}\) Furthermore, the ASEAN Member Countries do not need to worry about the future threats of pseudo-foreign corporations or of the Delaware Syndrome. This is because of the firm popularity of Singapore as a place of incorporation and registration for majority of the companies who are capable of performing cross-border business activities relating to intra-ASEAN investments.\(^ {25}\) This dominance of Singapore would not change for a long time because it has a sound and transparent corporate legal system coupled with the laxest corporate tax in the

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22 See, for example, Art. 5 of the 1956 Draft Treaty of the Hague Conference on the Mutual Recognition of the Legal Personality of Companies; Rammeloo, *supra* note 8, p. 25

23 Interview with a businessman on 4 May, 2009

24 Interview with Michael Ewing-Chow on 8 April, 2009

25 Singapore is also an entrepôt of foreign investments outside of ASEAN. It locates the regional headquarters of international MNCs. The majority of companies registered in Singapore are SMEs; interview with Denis Hew on 13 April, 2009; Yoong-Yoong Lee on 7 April, 2009; and Hank Giokhay Lim on interview on 3 April 2009
Among the ASEAN Member Countries who are active in intra-ASEAN investments, Malaysia and Singapore have inherited the British corporate law system which follows the place of incorporation theory.27

6.2.2 Protection of Rights of Establishment through the ASEAN Institutions

Cross-border mobility of ASEAN-based businesses or facilitation of business cooperation and collaboration may be achieved by protecting rights of establishment through the ASEAN institutions. In the EU, this has been done through protecting the free movement of self-employed persons under freedom of establishment or under freedom to provide services.28 In relation to the establishment of companies, there are two forms of establishment protected under the EU law: the right to set up and manage undertakings (primary establishment), and the right to set up agencies, branches or subsidiaries by nationals of any EU Member State established in the territory of any Member State (secondary establishment).29 An undertaking may fall within the concept of establishment even if it only has a mere office.30 The concept of establishment implies integration into the economy of the host state. In particular, freedom of establishment includes: (i) the right to leave the state of origin for the shift of her/his establishment to another state within the region; (ii) the right to have more than one place of business in the region; (iii) the right to carry on business under the conditions

26 Singapore was the top of the World Bank Ease of Doing Business ranking for several years to date. Other ASEAN Member Countries’ ranks have been improved over years but still fall short of Singapore’s standing; see at: <http://www.doingbusiness.org/rankings>

27 Singapore, Malaysia and Thailand are the active ASEAN Members of intra-ASEAN investments.

28 Arts. 49-55 TFEU (ex. Arts. 43-48 and 294 EC) for freedom of establishment; Arts. 56-62 TFEU (ex.Arts.49-55 EC) for freedom to provide services; sometimes, it is difficult to tell at what stage this temporary nature of residence under freedom to provide services turns into a permanent one under freedom of establishment particularly when a self-employed person provides regular services into or within a Member State; Paul Craig and Gráinne de Búrca (2008) EU Law: Text, Cases and Materials (4th) (Oxford: OUP), p. 766; see further in chapter 5 for the relationship and the distinction between freedom of establishment and freedom to provide services.

29 Arts. 49 and 54 TFEU

30 Case 205/84, Commission v. Germany [1986] ECR 3755
laid down for its own nationals by the law of the host state; and (iv) the right to resist the application of national measures which are liable to hinder or make less attractive the exercise of the right of establishment.\textsuperscript{31}

The Treaty articles in the EU provide legal bases for the protection of the rights of the free movement of the self-employed.\textsuperscript{32} Article 53 TFEU (ex. Article 47 EC) also specifically imposes duties on the European Parliament and the Council in relation to the issuance of directives for the mutual recognition of diplomas and for the coordination of national laws and regulations concerning the taking up and pursuit of activities as self-employed persons. However, due to the slow progress in the legislative procedures in those institutions, the Court of Justice endowed provisions under freedom of establishment and freedom to provide services with direct effect both vertically against the EU Member States and horizontally against certain private parties.\textsuperscript{33} The Court of Justice also developed the supremacy of the EU law over national laws,\textsuperscript{34} which implies a prohibition for the national authorities to adopt laws inconsistent with binding EU rules and a duty to modify the national laws inconsistent with EU law obligations. In addition, EU rules apply, setting any conflicting national norm aside, in a given case in the national courts of the EU Member States.

With a view to protect freedom of establishment and freedom to provide services, Article 49 and Article 59 TFEU require the removal of all discriminations or restrictions based on nationality within the EU. It is noteworthy the Court of Justice has developed a broad interpretation of those Articles, thereby expanding the scope of the


\textsuperscript{32} Art. 49-55 TFEU for freedom of establishment; Art. 56-62 TFEU for freedom to provide services; and Art. 18, 20 and 21 TFEU (ex. Art.12, 17 and 18 EC) for free movement and equal treatment of the EU citizens.

\textsuperscript{33} The direct effect of Art. 49 TFEU was given for the first time in Case 2/74, Jean Reyners v Belgian State [1974] ECR 631; and then, the direct effect of Art. 56 TFEU to the area of services was also introduced in Case 33/74, van Binsbergen v. bedrijfsvereniging metaalnijverheid [1974] ECR 1299.

\textsuperscript{34} There used to be no legal basis for the doctrine of supremacy of the EU law over the law of the Member States apart from the case-law of the Court of Justice. Now, there is a Declaration concerning supremacy appended to the Lisbon Treaty.
notion of restriction so that it covers national measures that directly or indirectly discriminate against the foreign EU nationals and also non-discriminatory hindrances to market access.\(^{35}\) If these measures cannot be justified by relying on public policy grounds or on an overriding requirement of public interest, they contravene the fundamental rights of the EU law and should be removed.\(^{36}\)

For the framework of the regional economic development of the AEC, i.e. AFTA, AFAS and AIA, ASEAN has mainly adopted the framework of the WTO by focusing on three core areas of goods, services and investments. The right of establishment, which entail any form of settlement by moving companies and firms or by setting up any form of affiliates, is included in Mode 3 namely, commercial presence, in AFAS.\(^{37}\) In addition, cross-border business activities within ASEAN can be protected as intra-ASEAN investment under the development of the AIA. Denis Hew also mentioned the development of the AIA is meant to be very comprehensive to include many aspects relating to the protection of rights of establishment.\(^{38}\)

However, the AEC initiatives would not work well enough to deal with those barriers relating to the cross-border businesses in ASEAN. The AFAS requires a massive amount of political negotiations as can be seen in the several rounds of previous negotiations with slow progress. The AFAS commitments also do not go substantially beyond those scheduled under the GATS. The completion of the services negotiations of the GATS under the Doha Development Agenda itself indeed is way behind schedule, which indicates that relying on the GATS-plus principle of the AFAS will make ASEAN incapable in dealing with the major barriers blocking freedom of

\(^{35}\) See for the development of the notion of restrictions under the Court of Justice in Section 2.2.1 Establishment of ASEAN Economic Community: Case C-55/94, Gebhard v Consiglio dell’Ordine degli Avvocati e Procuratore di Milano [1995] ECR I-4165, para. 37; Case C-76/90, Manfred Säger v Dennemeyer & Co. Ltd. [1991] ECR I-4221, para. 12.


\(^{37}\) Art. 1 of the GATS

\(^{38}\) Interview on 13 April, 2009
establishment and cross-border business activities in the ASEAN region. Added to this, the ASEAN Member Countries are in practice not fulfilling their commitments of the AEC initiatives including the AIA arrangements.\textsuperscript{39}

Michael Ewing-Chow and Jørgen Ørstrøm Møller, despite their beliefs in the protection of rights of establishment through legally binding arrangements being a good way in principle, rightly raised the problem that this option requires strong institutions which ASEAN lacks.\textsuperscript{40} ASEAN does not have any supranational institutions independent from the ASEAN Member Countries, particularly lacking an enforcement mechanism for the ASEAN Member Countries to keep their commitments and a working judicial institution. Considering the critical and constitutive role of the Court of Justice being in the centre of protecting rights of establishment, not only through the direct enforcement through the procedures of Article 258 to 267 TFEU but also through its monitoring and enforcing the EU Member States compliance with the EU, the fact that ASEAN currently does not have any working judicial institution in ASEAN is a huge problem. All in all, ASEAN does not have a working institutional infrastructure through which the protection of rights of establishment within ASEAN can be realised.

6.2.3 Harmonisation of ASEAN Company Laws and Business Regulations

Article 50 (2) (g) TFEU (ex. Article 44 (2) (g) EC) states that Council and the Commission shall carry out their duties by coordinating to the necessary extent the safeguards which are required by the Member States of companies and firms with a view to making such safeguards equivalent through the EU. Article 53 TFEU (ex. Article 47 EC) also specifically imposes duties on the European Parliament and the

\textsuperscript{39} See further for the development of the AFAS and the AIA arrangements in Section 4.2. ASEAN Economic Community (AEC) Instruments of Chapter 4.

\textsuperscript{40} Interview with Michael Ewing-Chow on 8 April, 2009; interview with Jørgen Ørstrøm Møller on 3 April 2009 in answering Question No. 9 for ASEAN experts in Appendix A
Council in relation to the issuance of directives for the coordination of national laws and regulations concerning the taking up and pursuit of activities as self-employed persons. Accordingly, a substantial achievement of harmonisation has been accomplished in European company law particularly by means of the directives in the EU. There may have been a number of reasons for linking freedom of establishment for companies and European harmonisation, such as an attempt to eliminate the risk of a European Delaware Syndrome, the intention that harmonisation would make it easier for companies to exercise freedom of establishment for companies, or the belief that having largely the same legal conditions across the EU under which companies operate would make it easier for companies to be established, but also make the company’s shareholders feel more secure about incorporation in another Member State. However, it has been very difficult to maintain the momentum of harmonisation in an economic integration in Europe. The harmonisation process is a highly political compromise and thus, tends to be slow and piecemeal. It is also not easy to draw a distinction between what it is essential to harmonise and what can be left to the individual Member State to regulate. It is challenging to encompass nations at significantly different stages of economic development and industrial differentiation, not to mention cultural and political diversity. This has posed significant additional challenges to the legal harmonisation efforts.

Even though the necessity of business law harmonisation has been raised by the ASEAN region-wide business survey, with the background of a lack of essential

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42 Ibid., p. 1091
43 This problem was also recognised under the Single European Act (Article 8c of the EEC Treaty as of 1987); Richard M. Buxbaum and Klaus J. Hopt (1988) Legal Harmonization and the Business Enterprise: Corporate and Capital Market Law Harmonization Policy in Europe and the U.S.A. (Berlin; New York: Walter de Gruyter), pp. 271-272
44 According to the ASEAN Region-wide Business Survey, respondents placed the highest importance on harmonisation of business laws, regulations and administrative procedures compared to other types of measures when asked directly to rate the importance of harmonisation across various types measures; Catherine Eddy, Rowena Owen and PT AC Nielsen Indonesia (2007), ‘An Investigation into the Measures Affecting the Integration of ASEAN’s Priority Sectors (Phase 2): Region-wide Business Survey’, REPSF
elements in the legal systems of some countries in Southeast Asia, it is almost impossible to expect harmonisation in company and business laws in ASEAN. All the ASEAN experts had the same view that harmonisation of company and business regulations has no chance of success or will not happen in ASEAN considering the big differences in economic and legal developments of its Member Countries and the heterogeneity of historical and legal backgrounds in each Member Country.45

In addition, for the same reason as in the mechanism of protecting rights of freedom of establishment, ASEAN lacks an institutional infrastructure in order to achieve harmonisation of corporate legal systems. The ASEAN institutions do not have any supranational nature in order to establish the basis of legislative harmonisation, particularly lacking in enforcement and monitoring mechanisms for ASEAN-wide obligations. Even the EU, which is well equipped with supranational institutions, makes extremely slow progress in the harmonisation of company laws by way of a series of directives.46 In addition, apart from the danger of harmonising only minimal standards without touching the major issues in the company law field, there is no guarantee that the harmonisation of company laws makes it easier for an enterprise to operate in another country. Harmonisation could even raise the standards by harmonising up to the level of the ‘best’ system. This would constitute a possible disincentive to a company wishing to operate under a laxer foreign regime.47 It is noteworthy that companies in Europe still have to find ways to operate across frontiers at the high cost of legal and consulting advice regardless of freedom of establishment for companies in the EU.

Project No. 06/001e, Final Report, pp. 1-2
45 See, in particular, interviews of Denis Hew on 13 April, 2009 and Hank Giokhay Lim on 28 April 2009; they mentioned the different legal backgrounds of the ASEAN Member Countries from their colonial experience.
46 See for the detail in Section 5.3.2 Harmonisation of Company Laws
47 Buxbaum and Hopt, supra note 43, pp. 271-272
6.2.4 Creation of Supranational Corporate Entities

The last mechanism I suggest to enhance cross-border corporate mobility and business cooperation is to create a common form of corporate entity; an ASEAN Business Cooperation Partnership Grouping (ABCP) similar to the European Economic Interest Grouping (EEIG)\(^48\) and/or an ASEAN Private Company (APC) similar to the European Private Company (EPC), i.e. *Societas Privata Europea* (SPE). The ABCP and APC can each be adopted under any form of an international agreement of all ASEAN Member Countries binding all of them upon the ratifications or acceptance by the signatories (the ABCP Agreement and the APC Agreement). The proposed ABCP and the APC Agreements respectively would set out in very clear terms the provisions of a law introducing the ABCP or the APC into a legal system and bind signatory states to enact it. Indicative wording might be:

‘All ASEAN Member Countries HEREBY AGREE to introduce into their legal systems, within two years from the date upon which this Agreement comes into force, legislation regarding the formation and organisation of an ASEAN Business Co-operation Partnership (ABCP) (or ASEAN Private Company (APC)) in the exact form in which it appears in this Agreement.’

It is important that all ASEAN Member Countries agree to introduce implementation legislation regarding the formation and organisation of an ABCP or an APC into their legal systems within a certain period. It is also suggested that the ABCP and the APC Agreements should bind the ASEAN Member Countries to file copies of the legislation introduced in accordance with its terms with the Secretary General of ASEAN ‘within 2 months of its enactment.’ The ABCP and the APC Agreements would enter into force

\(^{48}\) Unlike the EEIG, the ABCP does not have the ancillary nature and can make profits for itself and has the full and independent legal personality when it is registered; see Section 6.3.1(2) Differences from European Economic Interest Grouping and Section 6.3.2 (5) Legal personality and Taxation Status
upon the deposit of an instrument of ratification or acceptance by all signatory governments with the Secretary General of ASEAN who shall promptly inform each Member Country of such deposit.\textsuperscript{49}

The main barriers in the area of facilitation of cross-border business and corporate collaboration within the EU in developing its internal market are essentially NTBs, conflict of laws problem and company law differences.\textsuperscript{50} First of all, ASEAN does not have the same conflict of laws problem regarding the recognition of foreign companies as in Europe.\textsuperscript{51} Secondly, the main outstanding issues which are in the way of adopting the EPC\textsuperscript{52} are the different standpoints of the EU Member States in the areas of employee participation, minimum capital requirement and seat of an EPC originating from differences in their company laws. Some Member States who value their private company law mandatory rules in those areas fear that their businesses could escape from their national mandatory rules by opting for the EPC instead of their national corporate forms while still continuing their major economic activities in their territory.\textsuperscript{53} In ASEAN, it deserves particular attention that there is no trace of any national mandatory employee participation rule in company laws as in Europe. It might be perhaps because the industries in the region are mostly based on plentiful labour resources that workers have little rights or because ASEAN Member Countries, in developing their commercial laws, have been focusing more on attracting foreign investments rather than enhancing workers’ rights. Another possible explanation for this could be the US influence in the process of transplantation of Western commercial legal

\textsuperscript{49} Cf. Art. 13 of Basic Agreement on the ASEAN Industrial Cooperation Scheme (AICO Agreement); Art. VI Basic Agreement on ASEAN Industrial Joint Ventures (AIJV Agreement)
\textsuperscript{50} See Section 5.2 Barriers for Corporate Collaboration and Cross-Border Mobility within the EU
\textsuperscript{51} See Interview with Michael Ewing-Chow on 8 April, 2009 in Section 6.2.1 Mutual Recognition of Foreign Companies in ASEAN
\textsuperscript{52} The same issues mattered for the adoption of the EEIG and SE as well; see Section 5.2 Barriers for Corporate Collaboration and Cross-Border Mobility within the EU
\textsuperscript{53} See, for example, Germany’s protection of its codetermination and employee participation rules against the EU supranational vehicles in Section 5.2 Barriers for Corporate Collaboration and Cross-Border Mobility within the EU
laws as happened in other parts of East Asia and Latin America.\(^\text{54}\) Despite the difficulties in transferring commercial legal models across cultural, political and economic borders, there was a large US discourse on corporate governance laws internationally, which dismissed longstanding European corporate regimes that privilege worker and stakeholder representation on boards of directors.\(^\text{55}\) At any rate, the employee participation issue as in Europe, which is probably the most controversial area in the history of EU corporate mobility mechanism development, does not exist in ASEAN. As for the next issue, only Cambodia, Indonesia and the Philippines have minimum capital requirements for the establishment of a private limited company, and, among these, Cambodia and the Philippines require a relatively small amount.\(^\text{56}\) However, one can also note that the world trend for the removal or reduction of the minimum capital requirement is evident in ASEAN Member Countries.\(^\text{57}\) Thirdly, while recognising the minimum capital or employee participation rules would not be problematic in adopting the ABCP or the APC in ASEAN as in the EU, there is still the problem of differences in company laws and business regulations in ASEAN Member Countries. However, CLMV countries and Indonesia are in the process of changing and developing their major legal systems in order to meet economic demands, to attract foreign investments and to reduce the economic development gap with their neighbours.\(^\text{58}\)

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\(^{\text{55}}\) Gillespie, *ibid.*, pp. 5-6

\(^{\text{56}}\) Out of ten ASEAN Member Countries, only three countries have set a general minimum capital requirement for establishing a private limited company in their territory: Cambodia (KHR 4,000,000, roughly equivalent to USD 990); Indonesia (IDR 50,000,000, roughly equivalent to USD 5,600); Philippines (PHP 5,000, roughly equivalent to USD 115); see further suggestion on minimum capital requirement under the APC Agreement in Section 6.4.2 (5) Legal Capital


\(^{\text{58}}\) See, for example, the recent developments in Vietnam and Cambodia. Indonesia was also the most active reformer of business regulation in 2010 according the World Bank Doing Business Report. The
ABCP or an APC can be an indirect way to harmonisation or approximation of company laws in Southeast Asia to facilitate cross-frontier business activities in the region, particularly considering the low possibility of harmonisation of company and business laws through ASEAN.\(^5^9\) It will also happen by way of an agreement between the ASEAN Member Countries, not via supranational institutions which are currently lacking in ASEAN.\(^6^0\) Fourthly, among the issues that were raised relating to the adoption of the EPC, the seat of the EPC closely relates to the problem of applicable law and the concern of circumvention of the national mandatory rules of minimum capital or employee participation in the EU.\(^6^1\) Although there is no issue of those mandatory rules as in Europe, considering the big gap of legal development in ASEAN, it is still recommended to avoid referring to national laws as much as possible in the ABCP and APC Agreements for the consistent and uniform performance of the ABCP and APC across the ASEAN Member Countries.\(^6^2\)

Although these options are unfamiliar to ASEAN,\(^6^3\) the benefits which these supranational and transnational vehicles will bring are directed at tackling the NTBs, particularly the most serious and difficult barrier for foreign business activities in ASEAN according to the analysis of barriers in Chapter 3, i.e. screening and process-related restrictions for foreign investments in ASEAN Member Countries.\(^6^4\) Both the ABCP and the APC are additional optional corporate vehicles, registered and governed by the law of the country of their official address. They are to be treated and recognised

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59 See Section 6.2.3 Harmonisation of ASEAN Company Laws and Business Regulations
60 Indicating that ASEAN policy makers are almost allergic to supranationalism, Denis Hew started by opting out any mechanism which has bearing of supranational institutions in ASEAN in answering Question No. 9 of the Interview Questions for ASEAN Experts in Appendix A; interview on 13 April, 2009
61 See Section 5.2 Barriers for Corporate Collaboration and Cross-Border Mobility within the EU
62 See the criticism on SE in referencing to national company laws; section 5.3.4 (1) European Company or Societas Europea
63 Although business people’s responses were open to these options, they pointed out that the possibility of taking these options by businesses could be low if the benefits were not addressed well enough; interviews of businessmen on 30 April, 2009 and telephone interview on 5 May 2009 in answering Question No. 7 Interview Questions for businessmen in ASEAN in Appendix B Question No. 7
64 See Section 3.2.4 Screening and Process-Related Restrictions
as national entities in each ASEAN Member Country throughout ASEAN so as to overcome all protectionist policies which are barriers to cross-border business activities. More specifically, as they are always to be regarded as national corporate forms, they will not have to go through screening and process-related restrictions for foreign investments in each Member Country. In addition, the ABCP and APC are neutral forms across the region so they will be useful in facilitating joint ventures across ASEAN Member Countries. This is because it removes the need to choose the national form of one of the joint venture participants as an operating vehicle, thereby giving them a perceived advantage over the others. Furthermore, the ABCP and the APC will provide a uniform corporate form for ASEAN businesses which will increase their marketing potential. It will also increase trust in business forms which include participants from other ASEAN Member Countries and further contribute to building an AEC and an ASEAN identity in the region.65 The ABCP, due to its flexibility in formation and duration, can be a useful vehicle for first-time investors who are interested in starting cross-border businesses in the region. As in the case of the EEIGs, the ABCP can also be used to facilitate business activities across the ASEAN Member Countries encompassing both the public and private sectors.66 The APC, in the longer term, will be effective as a vehicle for cross-frontier collaboration to achieve a more viable commercial operation in overcoming the diversity of private company laws. Therefore, as uniform national entities throughout the ASEAN Member Countries, the ABCP and APC would be easily recognised forms overcoming the protectionist barriers for foreign businesses in all ASEAN Member Countries, which will promote intra-ASEAN trade.

Would ASEAN Member Countries possibly feel pressure from the competition

66 Yoong-Yoong Lee and Denis Hew have emphasised the importance of introducing greater private sector participation in the government-linked projects in public sector; interview with Denis Hew on 13 April, 2009; Yoong-Yoong Lee on 7 April, 2009; see further in Section 6.3.1 (1) Advantages of ASEAN Business Cooperation Partnership
introduced by the ABCP and the APC against their national corporate forms as the EU Member States did? The answer depends on in which area it would be most difficult to secure ASEAN Member Countries’ consent in relation to the uniform substantive rules introduced by the ABCP and the APC Agreements.\(^\text{67}\) As mentioned above, there are no mandatory rules such as minimum capital or employee participation in ASEAN. Although the strategic sectors and industries would gradually open under the framework of the WTO and the AIA initiatives, ASEAN Member Countries may feel uncomfortable in opening sectors which they have been securing to protect their national interests and local indigenous industries through sector specific laws and protectionist policies.\(^\text{68}\) However, the cross-border requirements of the ABCP and APC will prevent the immediate competition with national legal forms in those strategic sectors. After all, they are national corporate forms which would be complementary to the existing national forms in host Member Countries, for the purpose of facilitating cross-border businesses in ASEAN. In addition, Singapore, which works as an entrepôt of foreign investments, transferring them into other ASEAN Member Countries, may not have to be concerned so much about the competition between the national corporate form and the ABCP or the APC because it has already introduced one of the most relaxed corporate and tax rules in the world.\(^\text{69}\) The ABCP and APC, equipped with simple, uniform and transparent formation procedures across the region, will encourage entrepreneurs to perform cross-border business activities free from the differences in company laws and business regulations and from high establishment and transaction costs in all the ASEAN Member Countries. It is worth comparing the benefits and competitive potentials that they would bring into the ASEAN Member Countries and


\(^{68}\) See supra note 5 and 6; see for the barriers in Chapter 3 Major Barriers for Foreign Business Activities in ASEAN

\(^{69}\) Singapore has been the top of the World Bank Doing Business listing for several years to date; see supra note 26
the increase of intra-ASEAN trade to the potential loss caused by opening up strategic sectors of economic activity which are due to open anyway sometime in the future.

6.2.5 Results of Evaluation

When faced with the barriers for cross-border business activities, particularly due to different corporate forms in the Member Countries, the ASEAN Member Countries, which are interested in building a single market and a production base in the Southeast Asian region, can have three responses: firstly, they can ignore the differences but come to an agreement to recognise foreign companies; secondly, they can adjust the relevant laws through harmonisation; or thirdly, they can provide alternatives in addition to their national corporate forms that can be used for cross-border businesses. The first response relates to suggested mechanism (1), see Section 6.1 above, adopting an agreement or a convention on mutual recognition of foreign companies under ASEAN, which does not contribute to attacking the protectionist policies of the ASEAN Member Countries for foreign businesses, even after their adopting such an agreement. This also does not provide much of a benefit to ASEAN which does not have the conflict of law issue as in Europe and the perceived threat of the pseudo-foreign corporations. The second response relates to mechanism (3) harmonisation of ASEAN company laws and business regulations, which all the ASEAN experts regarded as a non-starter due to big differences in economic and legal developments of its Member Countries. The third response relates to mechanism (4) creating an ABCP or an APC as a common national corporate form across ASEAN, which, once adopted, would make the foreign investors overcome the protectionist barriers imposed by the ASEAN Member Countries by being registered and recognised as a national entity in each Member Country. Lastly, mechanism (2) the protection of rights of establishment relies on the institutional
development of ASEAN, which cannot be seriously considered as an option at this stage of ASEAN’s evolution.

Therefore, because I think the mechanism of creating supranational corporate entities treated as national entities would be most effective to overcome the barriers in order to increase intra-ASEAN trade, in the next section, I will look at the ABCP and the APC respectively in detail, their benefits and the issues to be dealt with relating to the contents of their agreements.

6.3 ASEAN Business Cooperation Partnership

6.3.1 Benefits and Features

Interviewees have stated that facilitating business cooperation and collaboration among ASEAN-based companies and enhancing private sector mobility within ASEAN will be beneficial to the overall economic development within the region. In the EU, the creation of a legal instrument for facilitating transnational cooperation between firms was an important element in the completion of the internal market. It will be explored if an ASEAN Business Cooperation Partnership (ABCP) similar to the European Economic Interest Grouping (EEIG) will benefit the ASEAN businesses to enhance cross-border cooperation and collaboration. Though to be adapted to the Southeast Asian business environment, an ABCP similar to the EEIG is expected to be very useful

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70 See supra note 11; further, in the interviews, all ASEAN experts believed that enabling cross-border corporate mobility within ASEAN would be beneficial to the Southeast Asian economies; see Question No. 6 in Appendix A.

71 Communication from the Commission: Participation of European Economic Interest Grouping (EEIGs) in public contracts and programmes financed by public funds [1997] COM (96) 329 final.

72 It does not matter much what it is called, e.g. ASEAN Business Cooperation Partnership, ASEAN Cooperation Partnership, ASEAN Economic Interest Grouping or ASEAN Economic Partnership. However, ASEAN Business Cooperation Partnership is chosen because partnerships are one of the common forms of commercial entities in Southeast Asian countries. The term, “business cooperation”, is particularly inserted considering the fact that “business cooperation contract (BCC)” is one of the common legal forms of investment permitted for foreigners in some ASEAN Member Countries, such as in Vietnam and Cambodia.
because it is an extremely flexible instrument that can adapt to different economic conditions of the ASEAN Member Countries, with guarantees of considerable freedom for its members in their internal organisation and in their contractual relations.

In the 1970s, the European Commission and the European Parliament realised the need of a specific legal instrument to help transnational and inter-professional cooperation between economic operators, particularly small and medium-sized enterprises (SMEs). Finally, in 1985, the Regulation on EEIGs was adopted. EEIGs offer the possibility of cross-border cooperation and collaboration within Europe, particularly to SMEs of every legal category and also to public sector entities. The European Commission has stated that some of the characteristics of the EEIG and the way in which it operates were designed to ensure that by using it, SMEs could combine to tender for public contracts and participate in programmes financed by public funds on an equal footing with other larger firms. Accordingly, an ABCP, similar to the EEIG, could confer benefits upon SMEs in Southeast Asia by means of giving access to public contracts or the government-linked projects financed by public funds. This would indeed be a means of speeding up completion of the single market and regional economic development. The limited availability and accessibility of financial sources to meet a variety of operational and investment needs within the SME sector is often mentioned to be one of the major barriers to the promotion of SMEs’ growth and competitiveness in Southeast Asia. Within the recognition that SMEs themselves are

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75 See Commission notice C(88) 2510 to the Member States on monitoring compliance with public procurement rules in the case of projects and programmes financed by the Structural Funds and financial instruments (OJ C 22, 28. 1. 1989, p. 3); see also the following Commission communications: Promoting SME participation in public procurement in the Community, COM (90) 166 of 7 May 1990; SME participation in public procurement in the Community, SEC (92) 722 final of 1 June 1992.

76 Thitapha Wattanapruttipaisan (2003), ‘Four Proposals for Improved Financing of SME Development
the engine of growth, the ASEAN governments have tried to act as a facilitator for the SME development. The formation of SME-based clusters, and inter-firm networks and linkages within ASEAN will create further business opportunities for SME entrepreneurs in the ASEAN region. There is a need to create and promote a conducive business environment for SME development where both government and the private sector assume synergistic and complementary roles. Collaborative SME development programmes within public-private partnership (PPP) framework will ensure the continued economic growth in the region. Considering the business environment with strong government presence and the domination of the state-owned companies in the economy of Southeast Asian countries, it is very important to engage public sector participation in business cooperation facilitation for economic development in the region. An ABCP, an ASEAN-wide legal instrument with considerable contractual freedom with legal capacity and reliability for the third parties, could pave the way for the facilitation of business cooperation between the private and public sectors as well as for general SME development in the ASEAN region. It is noteworthy that in Europe the public sector has participated in the EEIG. According to a statistics based on a sample of 198 EEIGs from the European Commission Survey in 1991 in the review of three years’ experience of the EEIG, for instance, almost seven per cent of the members of EEIGs were public or semi-public. Despite the clear dominance of the private sector over the public sector, it was interesting to note the diversity of public agents cooperating within EEIGs, e.g. public or semi-public enterprises, universities, regional or local authorities, credit institutions, research centres, chambers of commerce, etc.

77 See ASEAN Policy Blueprint for SME Development (APBSD), 2004-2014, p.2
78 Ibid.
79 Commission of the European Communities, (1993) EEIG: The Emergence of a New Form of European Cooperation: Review of three years’ experience (Luxembourg: Office for Official Publications of the European Communities), p. 29; see in Section 5.3.4 (2) European Economic Interest Grouping
80 Ibid., p.27
(1) Advantages of ASEAN Business Cooperation Partnership

The EEIG itself represents considerable progress for the European firms in that it enables them to organise their cooperation within a transnational structure that guarantees its members’ freedom to pursue their own activities. The ABCP can usefully work in the same way for the ASEAN firms, particularly for SMEs in the ASEAN region, so as to help them to be more competitive to face the global challenges. The ABCP, similar to the EEIG, has four main advantages:

(i) It will facilitate cross-border business collaboration through a neutral vehicle.

As the ABCP will be presented as an agreement under ASEAN, its formation and legal existence can therefore come about only on the terms, in the manner and with the effects laid down by the ABCP Agreement, arising from the uniform application of the agreement in all ASEAN Member Countries, even if this agreement refers back to national laws in certain respects. This legal neutrality of the ABCP places its members on an equal footing, which is very important for overcoming members’ fears that one of them may be more favourably positioned because it is operating in a more familiar legal environment.

(ii) The ABCP Agreement will require the ABCP to receive the same treatment as national business forms in all ASEAN Member Countries. This will help to overcome protectionist regimes and barriers set out in chapter 3.

The ABCP will be registered and governed by the law of the country in which it has its official address and thus, should be treated the same as national business forms in the country of its official address. The activities of the ABCP are subject to the ABCP Agreement so that, in the event of breach of the ABCP Agreement, the
individual governing law of the Member Country may impose appropriate sanctions.\textsuperscript{81} Also, the ABCP will be governed by the law of the Member Country of its official address, in so far as its day-to-day activities and relations with third parties in that country are concerned.\textsuperscript{82} Therefore, foreign investors who use the ABCP as their business form will be treated as part of a national entity of the ASEAN Member Country in which the official address of the ABCP is situated.\textsuperscript{83} This is an important feature of the ABCP because differentiations between domestic investors and foreign investors, in particular to protect special national economic interests, are still widely employed in Southeast Asia. The ASEAN Member Countries endow foreign investors with conditional rights based on their ‘foreign business’ legislation which allow Member Countries to impose point of entry and operating conditions on investments or to discriminate through various taxes, concessional or incentive systems as a means of directing or selecting investments deemed to be beneficial to the host country.\textsuperscript{84} The ABCP will enjoy full rights, not conditional, as a national business form of the host country, free from protectionist measures and screening procedures against foreign investors. Also, the ABCP will be immediately recognised as a business form in all other ASEAN Member Countries and be able to contract in all of them. The ABCP is a transnational business cooperation mechanism but has no supranational characteristics as its

\textsuperscript{81} The preamble to the EEIG Regulation; see also Art 2 of the EEIG Regulation.

\textsuperscript{82} However, the formation contract may specify a different legal system which is to be used in the event of a dispute between the parties which, for example, relates to the interpretation of the clauses in the formation contract; Margaret Anderson (1990), \textit{European Economic Interest Groupings} (London, Dublin, Edinburgh, Munich: Butterworths), p. 19

\textsuperscript{83} The official address of an ABCP may be transferred from one Member Country to another Member Country in compliance with ABCP Agreement; see Art 13 and 14 of the EEIG Regulation. The transfer of the official address of an ABCP means the change of registry and the change of jurisdiction. With regard to the transfer of official address, the Art 14 of the EEIG Regulation provides the possibility of the opposition from the former Member Country of registration on grounds of public interest and review by a judicial authority. In case of conflicts between ASEAN Member Countries in relation to this matter, establishment of an ASEAN-level of judicial institution who can be in charge of this matter ultimately is necessary.

\textsuperscript{84} See the various kind of protectionist techniques in the ASEAN Member Countries in Section 3.2 Barriers Affecting All Foreign Investors in ASEAN: Protectionist Techniques in ASEAN Member Countries.
running is controlled by the laws of the individual Member Country.

(iii) It will retain its autonomy.

The ABCP, like the EEIG, has full and independent legal capacity which differentiates it from purely contractual forms of cooperation, such as business cooperation contracts (BCC)\(^{85}\) or built-operate-transfer (BOT) contracts.\(^{86}\) The fact that it has its own organs gives it a much greater power to negotiate and represent its members than each of those members could exercise individually. Furthermore, regardless of the term ‘partnership’ that the ABCP uses and of its similarity to a partnership in that its members have unlimited joint and several liability for its debts, the ABCP has the capacity to act in its own name through managers who can be appointed independently of their status as members.\(^{87}\) This feature is important for the ABCP's participation in public contracts and programmes financed by public funds because it enables its members to present a united front when negotiating contracts and seeking loans or financial guarantees directly linked to public contracts.\(^{88}\) For example, an ABCP could be set up to tender for a public works contract by joining the forces of several contractors of complementary disciplines, to meet the conditions of the tender, which they might not have been able to fulfil individually, and it could also organise the distribution of tasks between its members and coordinate or monitor the performance of the contract if the contract

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85 A BCC is an agreement between one or more foreign investors and one or more local partners to cooperate in operating defined business activities. It does not mean the creating of a new legal entity. The parties involved are free to decide on the nature and limits of their cooperative agreement; Keith Trace (2008) ‘Vietnam: the Search for a Socialist Market Economy’ in Russell Smyth and Marika Vicziany (2008), *Business in Asia* (Clayton: Monash University Press), 109, p. 121
86 According to the Law on Foreign Investment in Vietnam, Build-Operate-Transfer (BOT) contracts have two forms: one is Build-Operate-Transfer forms and the other is Build-Transfer forms. The former is that the investor constructs a plant or facility and operates it for a specified period and then, the facility is transferred to the state without compensation. The latter is that the ownership of the facility is transferred to the state on completion of construction and the state compensates the investor, normally by granting the investor land-use rights or the right to construct or operate another facilities; Smyth and Vicziany, *supra* note 85, p. 121
87 See Art 19 of the EEIG Regulation
88 See Art 1 (2) of the EEIG Regulation; see also Communication from the Commission: Participation of European Economic Interest Grouping (EEIGs) in public contracts and programmes financed by public funds [1997] COM (96) 329 final
is awarded.\footnote{See for the case of EEIGs in Dirk van Gerven and Carel A.V. Aalders (1990) European Economic Interest Groupings: the EEC Regulation and its Application in the Member States of the European Community (Deventer: Kluwer Law and Taxation Publishers), pp. 10-11} It has been difficult for private sector firms to be involved in the big cross-border government-linked projects in ASEAN.\footnote{See the examples of government-linked projects, such as the Singapore-Kunming Rail Link (SKRL), ASEAN highway network, ASEAN Power Grid and the Trans-ASEAN Gas Pipeline Network, the Greater Mekong Sub-region (GMS) Economic Cooperation.} Yoong-Yoong Lee and Denis Hew have emphasised the importance of introducing greater private sector participation in those big projects in the public sector.\footnote{Interview with Denis Hew on 13 April, 2009; Yoong-Yoong Lee on 7 April, 2009} ASEAN is interested in establishing public-private partnerships (PPPs) along the line of development of the AEC with a view to promoting the infrastructure development in the region.\footnote{Interview with Yoong-Yoong Lee on 7 April, 2009} By joining together and setting up an ABCP, SMEs could have greater opportunities to step into works financed by public funds across ASEAN. The ABCP has flexibility both in its formation and its duration as it does not have to specify a fixed term for its existence while having the peculiarity of having a more structured form like a company. Therefore, an ABCP, as in the case of an EEIG, will be extremely useful at the early stage of forming a joint venture when neither of the negotiating parties for a joint venture is ready to make a commitment but are interested in mutual activities.\footnote{Robert Drury (2008), ‘The European Private Company’, 9 European Business Organization Law Review, 125, p. 129} Under the ABCP, each party still retains its autonomy while collaborating in certain fields with the other partner according to the formation contract. It is a transnational business collaboration mechanism but different from a cross-border merger of two companies. An ABCP not only provides more legal and stable relations to third parties than contractual forms of cooperation but also retains autonomy in terms of flexibility in its formation and duration and in the arrangements governing its financing or operation compared to mergers. Therefore, an ABCP will be a very useful vehicle for first-time investors in ASEAN as it has a fixed legal format, unlike a BCC, but it has flexibility vested with additional
protection for third parties. It requires no minimum capital and its finances are flexible.

On top of the flexibility in its formation and duration, the ABCP also has flexibility in the arrangements governing its financing or operation. The flexibility which EEIG's members enjoy regarding its financing has been very attractive to firms, which should be adopted by the ABCP as well. Therefore, capital is not required when it is formed. This flexibility is very important and distinguishes the formation of an ABCP from that of a company, where large sums of money may be tied up for a given period. By contrast, in the case of an ABCP, intermediate stages are possible which permit optimum use to be made of the funds which will subsequently be released. All types of contribution are possible, for example, contributions in cash, in kind or even in industrial property (technological knowledge, patents, commercial or trade relationships, etc.). As in the case of the EEIG, the ABCP may even function in some cases through the payment of regular contributions or through funds being made available on current account. Sums can be paid by members in arrears at defined intervals to meet current expenditure. Furthermore, although the EEIG Regulation prohibits an EEIG from inviting investment by the public, it is permitted to borrow from a bank. The same should apply to the ABCP.

(2) Differences from European Economic Interest Grouping

The ABCP shares the beneficial features of a transnational business cooperation vehicle with the EEIG. However, in order to facilitate the use of the ABCP, some characteristics of the EEIG cannot be taken from the EEIG.

94 Interview with Businessman on 5 May 2009, supra note 48.
95 Art 23 of the EEIG Regulation; Communication from the Commission: Participation of European Economic Interest Grouping (EEIGs) in public contracts and programmes financed by public funds [1997] COM (96) 329 final.
(i) The ancillary nature of an EEIG activity

In contrast to a company, which generally aims to make profits for itself, an EEIG differs principally in its aim, which is to facilitate or develop the economic activities of its members in order to enable them to increase their own profits, not to make profits for the EEIG itself.\textsuperscript{96} More clearly, Article 3 of the EEIG Regulation states that the EEIG’s activity must not be more than ancillary to the economic activities of its members. Owing to its ancillary nature, the EEIG’s activity must be connected with its members’ economic activities and not replace them.\textsuperscript{97} However, the formation of an EEIG is to establish a legal framework which facilitates the adaptation of its members’ activities to the economic conditions of the market.\textsuperscript{98} The ‘ancillary role’ of the EEIG’s activity must not be interpreted too narrowly and also the concept of ‘economic activities’ that members of an EEIG and the EEIG itself must exercise under Article 3 (1) of the EEIG Regulation must be interpreted in the widest sense.\textsuperscript{99} In practice, the ancillary nature of the EEIG’s activity was not regarded as an operational limitation which confines the EEIG to a subsidiary or minor role.\textsuperscript{100} It was also questioned how far the concept of an ‘ancillary’ activity could be stretched.\textsuperscript{101} At any rate, it was indicated that the condition that an EEIG cannot make profits for itself significantly reduces its attractiveness as a vehicle for cross-border cooperation.\textsuperscript{102} In this thesis, the ABCP is expected to function as a business form which can make profits for itself and for its members, particularly for the use of first-time investors who are not ready to establish a company in the

\textsuperscript{96} Art 3 (1) of the EEIG Regulation

\textsuperscript{97} Fifth recital in the preamble of the EEIG Regulation; Anderson, \textit{supra} note 82, p. 24

\textsuperscript{98} First recital of the EEIG Regulation; Communication from the Commission: Participation of European Economic Interest Grouping (EEIGs) in public contracts and programmes financed by public funds [1997] COM (96) 329 final.

\textsuperscript{99} Fifth recital of the EEIG Regulation; Commission of the European Communities, \textit{EEIG: The Emergence of a New Form of European Cooperation: Review of three years’ experience}, \textit{supra} note 79, p. 48

\textsuperscript{100} Communication from the Commission: Participation of European Economic Interest Grouping (EEIGs) in public contracts and programmes financed by public funds [1997] COM (96) 329 final.

\textsuperscript{101} Anderson, \textit{supra} note 82, p. 25

\textsuperscript{102} Arnall et al, \textit{supra} note 31, p. 873; see also in Section 5.3.4 (2) European Economic Interest Grouping
ASEAN region. Therefore, the ancillary nature of the EEIG will not be adopted in the ABCP Regulation and the purpose of the ABCP can be to make profits for itself. Accordingly, the would-be members of the ABCP, in the formation contract of the ABCP as in a partnership agreement, should specify, in writing, how profits are to be divided between the members among other things. It should also reflect each member’s contribution to the ABCP, the value of that contribution, and the resulting ownership interest. If the members are not to have equal management duties and decision-making authority, the formation contract should indicate the duties and authority granted to each member. The flexibility of the EEIG in the arrangements governing its internal management, division of powers, levels of decision-making, and financing was an advantage but a watchword due to its indefinite variety with the constituting documents.\textsuperscript{103} Making the ABCP a profit-making body unlike the EEIG requires even more care in preparing the formation contract than in the EEIG. It is recommended that the members of the ABCP should objectively revisit the judicial status of the corporate entity as an ABCP with a view to moving to a more conventional and appropriate company structure with limited liability, such as an APC, before the project involved with the ABCP moves to the next phase.\textsuperscript{104}

(ii) The necessity to articulate provisions on associate members

Despite the condition of attachment to a EU or EEA Member State to be a member of an EEIG, it is possible, in the formation contract, for the EEIG to forge cooperation links with persons who do not satisfy this condition, in which case, these persons will not be considered as members but may have ‘associate’ status (associate members). It was accepted by the European Commission that there was nothing to stop a foreign investor from becoming an associate member of an EEIG,

\textsuperscript{103} Colin Bailey (1996) ‘European Economic Interest Groups-A Bridge Too Far?’ 2(1) The Corporate Governance Quarterly, 19, p. 20
\textsuperscript{104} Ibid., p. 23
paying a certain proportion of the EEIG’s expenses and receiving a certain proportion of its revenue and taking on some of the EEIG’s financial obligation without changing the EEIG’s external liability for its obligations.\textsuperscript{105} Although the ABCP, acting as a legal instrument which enables natural persons, companies, firms, other entities or organisations within ASEAN to cooperate effectively across frontiers, is expected to contribute to increasing intra-ASEAN trade, one should bear in mind that the economic growth in Southeast Asia heavily depends upon foreign investors outside of ASEAN. Intra-ASEAN trade, in many cases, consists of foreign investments from outside ASEAN coming through Singapore or other ASEAN Member Countries which then flow to the rest of the ASEAN region. The distinctiveness of ASEAN’s open and export-originated economy, adds even more to the importance of ‘associate members’ in the enactment of the ABCP Agreement. Therefore, if associate membership is permitted by the formation contract, each associate member of the ABCP shall be filed at the registry with the details of full members and other documents for registration.\textsuperscript{106} In addition, regarding the position of associate members in the formation of founding contract of an ABCP, the following provision can be included:

Article 30 A\textsuperscript{107}

1. The contract for the formation of a ABCP may make provision for participation in the activities of the cooperation partnership by companies, firms, entities and organisations, or natural persons who carry on any industrial, commercial, craft or agricultural activity or who provide professional or other services, even though they have not been formed in accordance with the law of a Member


\textsuperscript{106} Art. 7 (A) of the EEIG Regulation can be amended and use for the ABCP Agreement in order to accommodate associate members of the ABCP.

\textsuperscript{107} It is provisionally entitled as Article 30A considering it can be included next to Art 30 of the EEIG Regulation on the premise that the ABCP Agreement is structured similarly to the EEIG Regulation.
Country and have their registered or statutory office and central administration outside ASEAN or carry on their activity or provide services outside ASEAN.

2. The organisations or persons described in the preceding paragraph shall not be full members of the ABCP, but shall have associate status which shall not entitle them to have any voting rights in the decisions taken by the members of the cooperation partnership, but shall give them such other rights, duties and responsibilities as the formation contract provides.

As was the case in the EEIG, having associate members will not change the ABCP’s external liability for its obligations. Thus, if a request for payment against the ABCP itself was not satisfied within a ‘certain period’, the creditors of the ABCP may demand payment of the ABCP’s debts solely from the ABCP’s full members, although the latter can proceed against the other members and, if the contract so provides, against associate members, to enforce their share of liability as specified in the contract or in a separate agreement.

6.3.2 Contents of the ABCP Agreement

(1) Regulatory Format

An ABCP can be adopted under any form of an agreement, e.g. a convention or a treaty.

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108 Art. 24 (2) of the EEIG Regulation states that the payment has to be made within 'appropriate period'. However, it is recommend to fix certain period, e.g. twenty one days, for creditor protection.

Art. 24 of the EEIG Regulation
1. The members of a grouping shall have unlimited joint and several liability for its debts and other liabilities of whatever nature. National law shall determine the consequences of such liability.
2. Creditors may not proceed against a member for payment in respect of debts and other liabilities, in accordance with the conditions laid down in paragraph 1, before the liquidation of a grouping is concluded, unless they have first requested the grouping to pay and payment has not been made within an 'appropriate period'.

which is binding all ASEAN Member Countries. Indicative wording might be: ‘All ASEAN Member Countries agree to introduce legislation regarding the formation and organisation of an ABCP into their legal systems, within giving effect to the provisions of this Agreement.’ In order to prevent endless delay over the binding effect of the Agreement, it would be better to make this binding immediately after the last Member Country has ratified or accepted it. A provision needs to be inserted requiring all implementation legislation to be acted within, e.g. two years, from the effective date of the Agreement. The binding provisions will concern the aspects of internal operation and the protection of third parties and the members of the ABCP. It is suggested that the ABCP and the APC Agreements should bind the ASEAN Member Countries to file copies of the legislation introduced in accordance with its terms with the Secretary General of ASEAN ‘within 2 months of its enactment.’ The intention of filing the implementation legislation required by the ABCP Agreement is not to allow any reservation with respect to any of the provisions of this agreement but to provide a comprehensive and binding documentation base. One of the major barriers for foreign business activities in ASEAN relates to screening and process-related restrictions of the Member Countries. For example, the main bottleneck in the AICO application procedures lies in obtaining approvals from each of the participating ASEAN Member Countries. Consequently, the Agreement will bind the ASEAN Member Countries upon the ratifications or acceptance by the signatories. No extra or supplementary provisions other than these annexed to the Agreement are necessary to implement obligations under the Agreement.

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110 This was mentioned in Section 6.2.4 Creation of a Supranational Corporate Entity.
111 Ibid.
112 See Art. 13 of the AICO Agreement and Art VI of the AIJV Agreement states that no reservation shall be made with respect to any of the provisions of this agreement.
(2) Contents

All ASEAN Member Countries agree to enact an internal law introducing the ABCP unaltered into their legal systems, and to treat any such entity validly created in another ASEAN Member Country as if it were created in their own Member Country for all purposes. The internal law of the Country in which the ABCP has its official address is applicable to the contract for the formation of an ABCP and to its internal organisation. Particularly in the areas of the status and capacity of natural and legal persons, the consequences of the unlimited joint and several liability of members of a grouping, liquidation of an ABCP, insolvency and cessation of payments, and the tax law applicable to members, the national law of the Member Country where the ABCP has its official address is applicable given that the principle of fiscal transparency is respected. ASEAN Member Countries may provide facilities for the transformation of certain forms of association or companies into the ABCP, and vice versa.

(3) Formation

Similar to the formation of an EEIG, the formalities involved in the formation of an ABCP shall be very simple, being limited to the conclusion of a written contract drawn up according to the governing law of a Member Country (the notarial procedure is not

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113 See Art 2(1) of the EEIG Regulation which states that subject to the provisions of this Regulation, the law applicable, on the one hand, to the contract for the formation of an EEIG, except as regards matters relating to the status or capacity of natural persons and to the capacity of legal persons and, on the other hand, to the internal organisation of a grouping shall be the internal law of the State in which the official address is situated, as laid down in the contract for the formation of the grouping.

114 See Art. 2 (1) of the EEIG Regulation

115 See Art.24 (1) of the EEIG Regulation

116 See Art. 35 (2) of the EEIG Regulation

117 See Art. 36 of the EEIG Regulation

118 See Art. 40 of the EEIG Regulation

119 France, the Netherlands and Portugal have done this for the EEIG; Commission of the European Communities, EEIG: The Emergence of a New Form of European Cooperation: Review of three years’ experience, supra note 79, p. 18
required) and the filing of the contract at a registry designated by the Member Country in which the official address is situated. The agreement on an ABCP may limit the compulsory contents to the strict minimum so that the internal law of a Member Country in which the ABCP has its official address may not impose supplementary requirements.\textsuperscript{120} It should be remembered that the success of the EEIG is attributed to the considerable freedom of its members in the foundation contract to determine the details of their relationships, which respects the autonomy of the will of the participants.\textsuperscript{121} The EEIG Regulation guaranteed the EEIG’s ability to adapt to economic conditions through its members’ freedom in their contractual relations and the internal organisation of the EEIG. This flexibility of the EEIG shall be reflected in the formation and duration of an ABCP. Thus, an ABCP can be formed for an indefinite or a limited period. However, because the ABCP is a profit-making body, unlike the EEIG, the flexibility of the ABCP in the arrangements governing its financing or operation would be more restricted than that of the EEIG. Despite the caution of more detailed incorporation in financing or operation in the formation contract, the ABCP still retains some flexibility of formation, which will make the ABCP a particularly suitable instrument for projects with a limited life, such as feasibility studies or the carrying out of short-term projects. It is the wide access to the EEIG form that enables it to respond effectively, where necessary, to any change in the conditions of cooperation. Therefore, this openness shall be guaranteed for the ABCP so that access to the ABCP form must be made as widely available as possible to natural persons, companies, firms and other

\textsuperscript{120} Ibid., p. 17; Art 5 of the EEIG Regulation laid down the minimum content of the formation contract of an EEIG as follows: (a) the name of the grouping preceded or followed either by the words 'European Economic Interest Grouping' or by the initials 'EEIG', unless those words or initials already form part of the name; (b) the official address of the grouping; (c) the objects for which the grouping is formed; (d) the name, business name, legal form, permanent address or registered office, and the number and place of registration, if any, of each member of the grouping; (e) the duration of the grouping, except where this is indefinite.

\textsuperscript{121} The preamble to the EEIG Regulation states that a grouping’s ability to adapt to economic conditions must be guaranteed by the considerable freedom for its members in their contractual relations and the internal organization of the grouping; Robert Drury and Andrew Hicks (1999), ‘The Proposal for a European Private company’, Journal of Business Law, 429, p.444
entities or organisations, either from private sector or public sector.\textsuperscript{122} This openness will bring about the accomplishment of the objective conceived in this instrument, which is to promote transnational cooperation between business entities at ASEAN level.

\textbf{(4) Registration}

An ABCP shall be registered in the national registry of the Member Country at a competent registry designated by the Member Country in which the ABCP has its official address. When the EEIG was introduced, it was not possible to make provision for standard formalities at a single registry to be set up in the EU, and thus, as a pragmatic approach, the use of existing national registries for companies was adopted.\textsuperscript{123} In ASEAN, under the current SME development, simplification, streamlining and rationalisation of the procedures for SME registration is emphasised. One of the processes for SME support services in ASEAN is the establishment of a one-stop SME office in the respective countries in seven functional areas: facilitation, monitoring and evaluation, outreach, advocacy, research, information systems, and liaisons.\textsuperscript{124}

\textbf{(5) Legal personality and Taxation Status}

Under the ABCP Agreement, the full and independent legal personality of an ABCP is to be accorded on completion of registration formalities as set out in the internal law of

\begin{footnotesize}
\textsuperscript{122} See the sixth recital of the EEIG Regulation; Art. 4 of the EEIG Regulation.
\textsuperscript{123} Commission of the European Communities, \textit{EEIG: The Emergence of a New Form of European Cooperation: Review of three years’ experience}, supra note 79, p. 18
\textsuperscript{124} ASEAN Policy Blueprint for SME Development (APBSD), 2004-2014, pp. 5-6; see Art. 39 of the EEIG Regulation
\end{footnotesize}
a Member Country where the ABCP has its official address.\textsuperscript{125} An ABCP is similar to a commercial partnership in that its members have unlimited joint and several liability for its debts, and its taxation status is the same as a commercial partnership.\textsuperscript{126} However, like the EEIG, the ABCP has features which are peculiar to more structured forms of companies. For example, from the date of its registration, an ABCP has the capacity to act in its own name through managers who can be appointed independently of their status as members on the basis of a rule which applies generally to limited companies.\textsuperscript{127}

(6) Membership

The membership of an ABCP shall be open to all legal and natural persons who carry on activities that can be considered to be of an economic nature, even if minimal or indirect.\textsuperscript{128} In ASEAN, there is no provision regarding the meaning of ‘legal persons’ or ‘companies or firms’ as in the EU. Legal persons who can be a member of an ABCP are companies or firms which have been formed in accordance with the law of a Member Country and which have their registered or statutory office and central administration in ASEAN.\textsuperscript{129} Natural persons, who carry on any industrial, commercial, craft or agricultural activity or who provide professional or other services in ASEAN, can be members of an ABCP.\textsuperscript{130} Any ASEAN Member Country may, on grounds of that State’s public interest only, prohibit or restrict participation in ABCPs by certain classes

\textsuperscript{125} In the case of the EEIG, the EEIG Regulation does not endow the EEIG with legal personality. Recognising the legal personality of the EEIG is left to the choices of the Member States according to Art.1 (3) of the EEIG Regulation.


\textsuperscript{127} Art. 1 (2) of the EEIG Regulation.

\textsuperscript{128} Art. 3 (1) of the EEIG Regulation defines the aim of the EEIG is to facilitate or develop the economic activities of its members.

\textsuperscript{129} According to Art. 54 TFEU (ex Art. 48 EC), ‘Companies or firms’ means companies or firms constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, save for those which are non-profit-making.

\textsuperscript{130} Art. 4 (1) of the EEIG Regulation
of natural persons, companies, firms, or other legal bodies. A precondition to establish an EEIG is however that at least two of the enterprises of other bodies of the grouping are located in at least two different EU Member States.  

An ABCP must comprise at least two members as such. As for the cross-border requirement, for active use of the ABCP as a business entity within ASEAN, it is recommendable not to impose a cross-border requirement. Nevertheless, if protecting strategic sectors from foreign competition is still prevalent across ASEAN or sectoral exclusions are not removed due to non-accomplishment of the AEC initiatives or to different levels of commitments made under the WTO, the ASEAN Member Countries may like to have a comforting requirement to protect strategic sectors for their indigenous industries from foreign competition coming through the ABCP. Therefore, the cross-border requirement similar to the EEIG may be kept in the ABCP Agreement. However, for the ABCP, limiting the maximum numbers as in the EEIG may not be necessary. It is further suggested to add provisions for ‘associate members’ of the ABCP under the ABCP Agreement.

(7) Publicity

Registration involves filing documents of information about the ABCP at the registry designated by each Member State. Following the registration of the ABCP, mandatory publication of documents and particulars should be provided for, in an official gazette or equivalent of the Member Country in which the official address is situated. This is important because the publication means that such documents and particulars can be relied upon by the ABCP against third parties. In particular, we

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131 Art. 4 (2) of the EEIG Regulation
132 See supra note 68 in Section 6.2.4 Creation of Supranational Corporate Entities
133 An EEIG cannot have more than twenty members; Art 4 (3) of the EEIG Regulation.
134 This was mentioned in Section 6.3.1 (2) Differences from European Economic Interest Grouping.
135 See Art. 7 and 39 (1) of the EEIG Regulation
suggest including an article for the information of associate members to be filed at the designated registry as follows:

Article 7 (a)

(i) any amendment to the contract for the formation of a cooperation partnership, including any change in the composition of a grouping;

(ii) the name, business name, legal form, permanent address or registered office, and the number and place of registration, if any, of each associate member of the cooperation partnership, if associate membership is permitted by the formation contract in accordance with Article 30 A136

When an EEIG is formed or dissolved, a notice must be published in the Official Journal of the EU after it has been published in the official gazette of the Member State where the EEIG has its official address, which further enhances publicity and transparency.137 Despite this publicity requirement, it is still difficult to estimate the number of EEIGs. There was thus a call for an EU-wide central register for EEIGs.138 It is important to establish an ASEAN Register and an ASEAN Gazette for public access to the necessary information of ABCPs.

6.3.3 Prospects and Challenges in Implementation

EEIG was created for natural persons, companies, firms and other legal bodies to enable effective cooperation across frontiers and to facilitate the adaptation of their activities to the economic conditions within the EU.139 It is a legal entity for cross-border cooperation with a contractual basis which will fulfil various functions for members.

136 See supra note 107
137 Arts. 11 and 39 (1) of the EEIG Regulation
138 Libertas-European Institute GmbH, European EEIG Information Centre, supra note 73, p.2.
139 Preamble to the EEIG Regulation
Similarly, the ABCP, a structural form with a legal entity equipped with flexibility in formation, financing and operation, is useful at the early stage of forming a joint venture across ASEAN. Further, in Southeast Asian economy where governments play a big role in initiating investment projects, SMEs could get easier access to public contracts or the government-linked projects financed by public funds by means of an ABCP, similar to the EEIG. This legally neutral vehicle business which receives the same treatment as national business forms will help overcoming legal, fiscal or psychological difficulties that can be encountered cross-frontier cooperation.

Furthermore, the ABCP does not have ancillary nature unlike the EEIG and is able to make its own profits. I expect the ABCP to bring effective business cooperation to ASEAN which would speed up completion of the single market and regional economic development.

ASEAN Member Countries are closely integrated with global markets and most of their important economic partners are outside of the region. As their economies are dependent on foreign investments from outside of the region, any mechanism suggested for business cooperation in the region should include the facilitation of trade and investments coming from outside of ASEAN. Accordingly, I recommend to articulate provisions for associate members of the ABCP.

There was a delay between the passing of the EEIG Regulation and the implementation by the Member States since they first had to put in place their own national measures dealing particularly with the registration, filing, and publicity requirements of the EEIG. ASEAN Member Countries agree to introduce implementation legislation for the ABCP within a certain period provided by the ABCP.

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140 See the examples of government-linked projects, such as the Singapore-Kunming Rail Link (SKRL), ASEAN highway network, ASEAN Power Grid and the Trans-ASEAN Gas Pipeline Network, the Greater Mekong Sub-region (GMS) Economic Cooperation.
141 Preamble to the EEIG Regulation
142 See the provisional Arts. 30A and 7A of the ABCP Agreement, supra note 107
143 See Art. 41 (1) of the EEIG Regulation.
Since the implementation commitment has to come with the ABCP Agreement, both the ASEAN Secretariat and each ASEAN Member Country make their best endeavours to communicate actively in establishing the national facilities for the registration, filing, and publicity requirements. They also have to develop the sanctions for non-compliance of the Agreement.

### 6.4 ASEAN Private Company

#### 6.4.1 Benefits and Features

Foreign investors, who are interested in establishing a business entity in a state but are wary of barriers for foreign business activities in the state, will normally choose a legal form as typical of the location as possible. However, this needs extensive information, requiring an investment of time and expertise which many businessmen do not have, and eventually may incur considerable amount of costs for legal advice to the foreign investors, which many SMEs normally cannot afford. They have either suffered from shouldering the increased cost or refrained entirely from establishing operations in other states, even in neighbouring countries. For this reason, there has been demand in the EU for the creation of a single supranational legal form for European SMEs to make cross-border activities easier and to improve their competitiveness. In response, the European Commission put forward a proposal in 2008 as part of a series of measures in the framework of the Small Business Act for Europe (SBA) providing for a Regulation for a Statute for a European Private Company (EPC) or Societas Privata Europea.

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144 See indicative wording of the ABCP Agreement suggests two years in Section 6.3.2 (2) Regulatory Format.

As in Europe, the ASEAN Member Countries have also increasingly realised the significance of developing SMEs, and put considerable efforts into developing them. Most domestic enterprises in Southeast Asia are predominantly SMEs and micro-enterprises. ASEAN governments have struggled to build SME-based clusters, and inter-firm networks and linkages within ASEAN. However, private company law is generally much more nationally distinctive in terms of its detail than public company law. There are various national forms of private companies.

Differences in company laws and business regulations among the ASEAN Member Countries are still very significant. Bearing in mind the low possibility of harmonisation of company and business laws through ASEAN, other alternatives have to be sought to overcome the disparities in company and business laws as they pose major obstacles for the performance of cross-frontier business activities. Introducing a common ASEAN transnational business entity, an ASEAN Private Company (APC) similar to the EPC, can be a useful alternative to the harmonisation or approximation of company laws in Southeast Asia. This can proceed by way of a convention, a treaty or an agreement between the ASEAN Member Countries. For marketing of products across borders, a company which has an ASEAN identity rather than a national identity should have distinctive psychological benefits, particularly for less developed countries,

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146 See in section chapter 5.3.4 (3) European Private Company or Societas Privata Europea; Proposal for a Council Regulation on the Statute for a European private company, COM 2008 (0396) final, Brussels, 25.6.2008 (original EPC Proposal); the latest version of the proposal, ‘Revised Presidency compromise proposal for a Council Regulation on the Statute for a European private company’ (EPC Proposal) is the Council document: 16115/09 DRS 71 SOC 711 ADD1, Brussels, 27, November, 2009 (Inter-institutional file 2008/0130 (CNS)).

147 For example, Malaysia and Singapore have planned corporate tax cuts for SMEs for years and countries such as Thailand have embarked on a range of schemes to help small businesses and widen its base of entrepreneurs; Denis Hew and Loi Wee Nee (2004), Entrepreneurship and SMEs in Southeast Asia (Singapore: ISEAS), p. xviii; see also under the ASEAN framework, ASEAN Policy Blueprint for SME Development (APBSD), 2004-2014.


150 Interview with Michael Ewing-Chow
e.g. CLMV (Cambodia, Lao PDR, Myanmar and Vietnam).\textsuperscript{151} The necessity for this aspect of an APC can be justified by the fact that there indeed was an official mention of a uniform label for ‘an ASEAN Product’\textsuperscript{152} for the regional development, which makes direct reference to a common form of corporate entity throughout ASEAN. Having a common ASEAN label of ‘ASEAN Product’ and ‘APC’ may be very useful for local industries, in particular local SMEs, on the commercial market and make ASEAN as a region a more competitive single market and production base.\textsuperscript{153} The possible APC would be beneficial to trade flows not only inside the ASEAN single market but also outside ASEAN. It may enhance the competitive position of ASEAN in the world market due to the marketing advantages for ASEAN exporters selling products throughout the world under a collective ASEAN masthead.\textsuperscript{154} While the ASEAN region is more known as an export-oriented production base for the global market, relying on its low cost of production, one should always keep in mind the possible large product and market demands in Southeast Asia. The APC will contribute in developing marketing potentials for businesses in ASEAN and thus, creating market opportunities will provide impetus for the growth of local enterprises.\textsuperscript{155} In addition, the APC can be a useful corporate form for groups of companies, including foreign MNCs, wishing to expand and operate across borders in ASEAN. These groups of companies often come

\textsuperscript{151} Mr Jørgen Ørstrøm Møller, during the interview, assured himself of the existence of non-legal psychological barriers to businesses in ASEAN; Drury (2001) ‘The European Private Company’, supra note 65, p. 55

\textsuperscript{152} The Concept of an ASEAN Product can be firstly retrieved from Art. 2 (4) of the AFTA CEPT Agreement, providing that an ASEAN product has to satisfy 40 per cent of the local content rule; at: <http://www.aseansec.org/12375.htm>; there are also ASEAN product directives in areas, such as cosmetics, electric and electrical products and pharmaceuticals. For example, the ASEAN product directive on cosmetics provides the ASEAN cosmetic product registration requirements and the process of mutual acceptance of each other’s product registration approvals; at: <http://www.aseansec.org/19014-1.pdf>


\textsuperscript{154} See for the possible advantages of the EPC; Drury and Hicks, ‘The Proposal for a European Private Company’, supra note 121, p. 433

\textsuperscript{155} Vijayakumari Kanapathy (2004) ‘Entrepreneurship in Malaysia’s electronics Industry: The Role of SMEs’ in Denis Hew and Loi Wee Nee (eds.) Entrepreneurship and SMEs in Southeast Asia (Singapore: ISEAS), 131, p. 147
into the region in the form of establishing local operations, usually via one or more subsidiaries.156 When they organise cross-border activities through subsidiaries, establishing a network of subsidiaries in different countries under the uniform set of APC rules would save considerable costs in cross-border group structures in contrast to using the national forms of the different Member Countries for each subsidiary.157 This will not only contribute to increasing FDIs into the region and enhancing intra-ASEAN trade but also to providing higher probability of promoting linkages between domestic enterprises and foreign groups of companies, thereby generating more technology transfer and employment to the local economy. It should be remembered that many domestic SMEs in ASEAN work as lower-tier suppliers or parts producers for foreign companies or large MNCs.158 Developing a sufficient level of linkage between foreign investors and local firms is crucial because some major industries in ASEAN are still heavily dependent on foreign technology as well as foreign capital. Upgrading technological capabilities of local SMEs in ASEAN is particularly valuable so as to find new markets.159 The chance for the joint venture and technology transfer could be improved if local SMEs, potential sub-suppliers for the foreign groups of companies, were also in the form of the APC that is familiar to the foreign companies, and ready for cross-border business activities. ASEAN, if only relying on its low production costs,

156 In Europe, cross-border activities are mostly organised through subsidiaries rather than branches, which have the benefit of limited tax exposure and which are more trusted by local creditors and customers; this observation was made by J. Simon (2006) ‘Presentations Held at the Public Hearing Before the Committee on Legal Affairs of the European Parliament in Brussels, 22 June 2006, on the European Private Company’, European Company Law, no. 6, p. 274; Sandra van den Braak (2010) ‘The European Private Company, its shareholders and its creditors’ 6 (1) Utrecht Law Review, p. 6

157 One of the interviewees, a businessman of a foreign SME in Singapore, mentioned that having a common business legal entity in ASEAN would be useful for first-time foreign investors interested in establishing multiple locations from the outset.

158 In major manufacturing sectors, such as automobile or electronics industries, local enterprises work as domestic suppliers for foreign MNCs who are foreign assemblers. For example, in automobile industry in Thailand, most indirect suppliers, providing raw materials, parts and equipment for vehicle assemblers and direct suppliers, are domestic SMEs, either wholly owned or controlled by Thai investors; Somkiat Tankitvanich (2004) ‘SME Development in Thailand’s Automotive Industry’ in Denis Hew and Loi Wee Nee (eds), Entrepreneurship and SMEs in Southeast Asia (Singapore: ISEAS), 206, p. 208

159 Henry Sandee and Jan ter Wengel (2004), ‘SMEs in Southeast Asia since the Asian Financial Crisis’ in Denis Hew and Loi Wee Nee (eds), Entrepreneurship and SMEs in Southeast Asia (Singapore: ISEAS), 24, p. 37
will lose its location advantage due to stiff competition with China and India. Intensifying the role of domestic SMEs is very important with a view to moving the transitional economies of Southeast Asia up to a higher level of economic development. Added to this, the APC, equipped with easy business start-up procedures and registration due to the transparent regulation and less bureaucracy involved and with sufficient flexibility in management, may bring many ASEAN local small businesses from the informal into the formal sector.\textsuperscript{160} Thirdly, there are indirect benefits that may be attained by having the APC throughout ASEAN. That is to say that the implementation of the APC project will bring some form of harmonisation of company and business laws because it will introduce a modern and up-to-date set of company law rules enabling some ASEAN Member Countries to improve their domestic provisions.\textsuperscript{161} Considering the different levels of legal developments among ASEAN Member Countries, the provisions of the APC could be very effective as a partial means of filling any legal vacuum, in particular for the centrally planned economies in ASEAN who are interested in adopting an infrastructure of capitalist business law.\textsuperscript{162} The APC could work as a model of corporate forms that all Member Countries would adopt, in which case, it would be beneficial to SMEs, particularly the ones who are interested in cross-border business activities. In the EU, in relation to the possible consequences of harmonising the company laws, it was mentioned that the EU Member States could face

\textsuperscript{160} Where business regulations are onerous, levels of informality are higher although the firms in the informal sector grow slower, have poorer access to credit and employ fewer workers. In the economies where the World Bank study Voices of the Poor asked questions to the people, up to 80 per cent of economic activity takes place in the informal sector. Firms may be prevented from entering the formal sector by excessive bureaucracy and regulation. Lower barriers to start-ups are associated with a smaller informal sector. The occurrence of the informality in businesses has been also detected in Indonesia in the sub-national report of Doing Business by the World Bank; see World Bank (2009) \textit{Doing Business in Indonesia 2010, Subnational Series} (Washington D.C.: World Bank Group), pp. 2-3


\textsuperscript{162} Many ASEAN Member Countries, in particular CLMV Members, are or used to be centrally-planned or communist economies; Drury highlighted this point for the recently joined EU Member States or are about to join the EU; Robert Drury (2010) ‘The European Private Company’ in J.A. McCahery, L. Timmerman and E.P.M. Vermeulen (eds.), \textit{Private Company Law Reform} (Hague: T-M-C Asser Press), 337, p. 338.
the challenges of amending their own company laws in order to put the EPC and national corporate forms on an equal footing with each other. However, many of the ASEAN Member Countries, particularly CLMV Members and Indonesia, are on their way of reforming their corporate legal system, eager to develop their business and company laws corresponding to the needs of market participants. As open export-oriented economies, they would be more interested in adopting up-to-date business rules in order to attract foreign investors and to proceed to the higher economic level rather than staying behind. In addition, Singapore, which works as an entrepôt of foreign investors into the region, may not have to be concerned so much for the competition between the national corporate form and the APC because it has already introduced one of the most relaxed corporate and tax rules in the world. Due to Singapore’s special position in the region and the fierce competition for attracting FDIs coming from outside ASEAN, there is little possibility of raising standards by way of jurisdictional competition among the ASEAN Member Countries. The APC will provide an alternative system, based upon modern rules, which will be available to all entrepreneurs in ASEAN.

The big economic development gap and the following disparities of business regulations or company laws among the ASEAN Member Countries constitute one of the major barriers for cross-border business collaboration in the region. For the same reason, on top of the current limitations of ASEAN’s performance in the area, harmonisation of relevant business or company laws through ASEAN would not happen in the near future. However, businesses, particularly SMEs, suffer from legal disparities the most, damaging their potential for performing cross-border activities.

163 See, for example, the recent developments in Vietnam and Cambodia. Indonesia was also the most active reformer of business regulation in 2010 according the World Bank Doing Business Report. The interviewee, a Singaporean solicitor in the banking sector also worked as a legal consultant for Cambodia.
164 See Singapore’s ranking of the World Bank Doing Business; supra note 26
165 See the discussion on the EPC in Uziahu-Santeros, supra note 161, p. 8
166 See Section 2.2.1 Establishment of ASEAN Economic Community
167 See the interview results in Section 6.2.3 Harmonisation of ASEAN Company Laws and Business Regulations
Despite the ASEAN Member Countries’ recognition of the importance of SME development, as the backbone of their economic developments,\textsuperscript{168} most of the SME policies of the ASEAN governments have not been very successful. An alternative of implementing the APC similar to the EPC, which would indirectly bring optimisation of company laws, can be a great answer for overcoming the legal disparities. The APC will be an extremely useful corporate form as a subsidiary in a group of companies or as a vehicle for a joint venture for cross-border business collaboration throughout Southeast Asia in order to increase intra-ASEAN trade. Given the benefits of the APC to the ASEAN region, the following section looks at the regulatory format on which the ASEAN Member Countries can provide an agreement as an avenue for cross-border businesses to use the APC and the contents of a possible APC referring to the framework of the EPC.\textsuperscript{169}

\textbf{6.4.2 Contents of the APC Agreement}

\textbf{(1) Regulatory Format}

As in the case of the ABCP, an APC can be adopted by way of a convention, a treaty or an agreement among the ASEAN Member Countries (hereinafter: APC Agreement). With a view to make businesses free from the severe protectionist measures in Member Countries, particularly from excessive bureaucracy or screening and process-related restrictions which inhibit intra-ASEAN trade, two points are crucial for the APC

\textsuperscript{168} Wattanapruttipaisan, ‘Four Proposals for Improved Financing of SME Development in ASEAN’, \textit{supra} note 76, p. 66

\textsuperscript{169} The EPC Proposal comprises ten chapters entitled successively General provisions (I), Formation (II), Shares (III), Capital (IV), Organisation of the EPC (V), Employee participation (VI), Transferring the registered office of the EPC (VII), Restructuring, dissolution and nullity (VIII), Additional and transitional provisions (IX), Final provisions (X). The Proposal also provides for two Annexes. Annex I relates to the articles of association of the EPC and Annex II to the registration of the transfer of the registered office of the EPC.
Agreement: One is that it should bind all the ASEAN Member Countries at the same time of its adoption. The other is that it should make sure for the APC to be immediately recognised and treated as a common national entity throughout all ASEAN Member Countries. An APC, similarly as in an EPC, is an additional optional corporate vehicle, registered and governed by the law of the country of its official address, complementary to the national legal forms in host Member Countries, for the purpose of facilitating cross-border businesses in ASEAN. The APC cannot fulfil its objective if it is not treated as a national corporate form in all ASEAN Member Countries at the same time. Therefore, for the effective performance and application of the APC in ASEAN, the APC Agreement, similar to the ABCP Agreement, binds all the ASEAN Member Countries upon the ratifications or acceptance by the signatories without extra or supplementary provisions other than those that are necessary to implement obligations under the agreement. The APC Agreement shall enter into force upon the deposit of instrument of ratification or acceptance by all signatory governments with the secretary general of ASEAN who promptly inform each Member Country of such deposit.

(2) Governing Law

In light of the view that only a consistent regulation for the EPC can facilitate cross-border activities, a comprehensive regulation, followed by the acceptance and the practical application of the EPC as a new organisation form in the EU, has been aimed at. Similarly, a wide range of statutory regulations for the APC shall be pursued in order to provide the legal certainty and the simplicity in the formation of the APC

171 Cf. Art. 13 of Basic Agreement on the ASEAN Industrial Cooperation Scheme (AICO Agreement); Art. VI Basic Agreement on ASEAN Industrial Joint Ventures (AIJV Agreement).
throughout ASEAN. Particularly, considering that the backtracking of the ASEAN Member Countries over their commitments has contributed to the inefficiency or the failure of most of the ASEAN economic cooperation initiatives, reference to the various national company laws in ASEAN as subsidiary laws has to be avoided as much as possible while drafting the APC Agreement. Therefore, similar to the EPC, the APC Agreement shall provide a hierarchy of rules applicable to the APC. The APC is first to be governed by the binding provisions of the APC Agreement. However, the APC is an ASEAN-wide legal form but with contractual flexibility, hence the articles of association constitute the second level. The third level in the hierarchy of applicable rules is the national law related to private companies of the Member Country where the APC is registered.

In order to ensure a high degree of contractual freedom of the EPC, Annex I to the EPC Proposal provides a list of matters in respect of which the shareholders of the EPC may lay down rules in their articles of association. Furthermore, the EPC Proposal explicitly mentions when members should also be able to adopt rules in the articles of association that are different from the substantive rules set in the Proposal. Therefore, the national laws of the Member Country only come into play where a matter is not covered by the articles of the EPC Proposal or by Annex I. All these features shall be brought into the APC Agreement as the rules on the law are applicable to the APC taking the similar structure of the hierarchy as in the EPC. Thus, the provisions of national company laws of the ASEAN Member Countries, as such, can only be applied where the APC Agreement expressly refers to them. According to the EPC Proposal,

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173 See further in Section 4.2 ASEAN Economic Community Instruments
174 See also in the case of the EPC; Drury (2001) ‘The European Private Company’, supra note 65, p. 62
175 Art. 4 of the EPC Proposal
176 See for the structure of source of law in Art. 4 of the EPC Proposal; van den Braak, supra note 156, p. 4
177 Where such matters listed in Annex I have not been included or have been only partly included in the articles of association of an EPC, such matters shall be governed by the applicable national law; Art. 4 (3) of the EPC Proposal.
178 See also in the case of the EPC; Drury (2001) ‘The European Private Company’, supra note 65, p. 62; Braun, supra note 153, p. 1401
matters related to accounting, insolvency, labour and tax laws shall be governed at the national level.\textsuperscript{179} It was also mentioned, due to the differences in the national regimes as regards financial assistance to third parties, that the expulsion and withdrawal of members and the general duties and liabilities of directors, these matters should be governed by national law.\textsuperscript{180} Added to this, the APC Agreement can articulate a provision similar to Article 4 (4) of the EPC Proposal stating that ‘Subject to the articles of association, if the nature of the business carried out by an APC is regulated by specific provisions of national law, those provisions shall apply to the APC,’ which will hopefully make the ASEAN Member Countries comfortable enough to adopt the APC Agreement.

Similar to the case of the EPC, the key to the success of the APC is that it should provide as complete and independent a system of company law as possible, free of reference to or dependence upon the individual domestic laws of the Member Countries.\textsuperscript{181} Referring core issues of the APC rules to national law is very risky not only due to the potential for the creation of ten different types of such a company, but also due to the difficulties that judges of national courts in the ASEAN Member Countries would face in their search for an appropriate solution to the relevant matters.\textsuperscript{182} The necessity to reduce the possibility of cross-references to national company law in the APC Agreement is crucial, particularly considering the different levels of legal developments among ASEAN Member Countries and the unlikelihood of harmonisation of relevant business or company laws through ASEAN in the near future. The problem that national judges may have an inconsistent interpretation on the APC rules causes all the more apprehension under the circumstances that there is no

\textsuperscript{179} (6) to the Preamble of the EPC Proposal.
\textsuperscript{180} (14a) of the Preamble to the EPC Proposal
\textsuperscript{182} This problem has been highlighted in developing the EPC law; Drury (2010) ‘The European Private Company’, supra note 162, p. 342; Drury (2008) ‘The European Private Company’, supra note 93, p. 131; Braun, supra note 153, p. 1398
overarching judicial institution under ASEAN. In the EU, to ensure uniform application by national courts in relation to the proposed EPC law, the system of appeals and references on preliminary rulings in the Court of Justice in the EU has been highlighted.\textsuperscript{183} It is extremely important to establish an ASEAN-level institution of judicial review to secure legal certainty and consistent interpretation of the APC rules. With a view for the APC to be recognised as a real ASEAN-wide national company, questions of interpretation have to be solved by the ASEAN-level judicial institution and not by national courts.\textsuperscript{184} The interpretation given by the ASEAN-level judicial institution would provide clear instructions for the national judges in seeking a solution in a particular way in the relevant APC cases to be decided before the national courts.

(3) **Formation and Cross-border Requirement**

An APC, similar to an EPC, does not come in place of other national legal forms, but rather as an additional optional corporate vehicle, whose purpose is to facilitate businesses, particularly SMEs, as a widely accessible, easy-to-set-up, and cheap-to-run form, uniform throughout the region.\textsuperscript{185} The APC may be formed either by individuals or companies. Legal personality is conferred upon it from the time of its registration.\textsuperscript{186}

With regard to formation, an EPC can be formed by the straight registration of a new company from scratch or by way of transformation of an existing national company into an EPC.\textsuperscript{187} Still, more circumspection is needed to adopt all the formation methods of the EPC to the APC. Initial creation of an APC, as a joint subsidiary or a holding

\textsuperscript{183} Drury and Hicks, ‘The Proposal for a European Private Company’, supra note 121, p. 450; Braun, supra note 153, p. 1398
\textsuperscript{184} Braun, supra note 153, p. 1398
\textsuperscript{185} Uziahu-Santcroos, supra note 161, p. 1
\textsuperscript{186} According to Art. 3 (1) of the EPC Proposal, an EPC shall comply with the following requirements. Firstly, its capital shall be divided into shares. Secondly, a shareholder shall not be liable for more than the amount he has subscribed or agreed to subscribe. Thirdly, an EPC shall have legal personality. Fourthly, its shares shall not be offered to the public and shall not be publicly traded.
\textsuperscript{187} Art. 5 of the EPC Proposal
company, would be very useful in achieving the purpose of the APC, particularly since
the access is not restricted to ASEAN nationals, thereby possibly working as a means of
attracting FDIs from outside ASEAN. On the other hand, adopting the transformation
methods to establish an APC deserves caution. It should be noted that, also in the EU,
although the access was prohibited to non-EU nationals, the question whether to
allow the transformation of existing European companies into EPCs was controversial.
The reason was that it opened the way for existing companies to evade unfavourable
provisions of their governing national laws by transforming to the EPC. In ASEAN,
the exclusion of the transformation method would be highly recommendable to avoid
unnecessary antagonism from the ASEAN Member Countries towards the APC and also,
to prevent them from introducing further entry barriers to deter frivolous use of the APC.
In addition, it is better for ASEAN to avoid the complications accompanied by adopting
transformation methods which entail more reference to individual national laws of the
Members Countries governing such restructurings of the transforming company.
Allowing initial creation only for the formation of the APC serves the best at the current
stage of the ASEAN economic integration with a view to increasing intra-ASEAN trade
through vigorous use of the APC. In this way, the APC can also contribute to attracting
foreign investments outside ASEAN who are interested in ASEAN-wide businesses,
which would result in increasing the influx of foreign capitals into the region.

As the objective of the APC project is to enable investors to use the same
company form across ASEAN as a subsidiary in a group of companies or as a vehicle
for a joint venture, the accessibility of the APC should depend on the presence of a
cross-border dimension of the business. Without a cross-border requirement, the APC
may enter into competition with national legal forms, which the ASEAN Member

188 Art. 5b of the EPC Proposal
190 D.F.M.M. Zaman and M.S Koppert-van Beeck (2009) ‘Formation’ in D.F.M.M. Zaman, C.A. Schwarz,
M.L. Lennarts, H.-J. de Kluiver and A.F.M. Dorresteijn (eds), The European Private Company (SPE): A
Critical Analysis of the EU Draft Statute (Antwerp: Intersentia), 45, p. 50; Art. 5b of the EPC Proposal
Countries would not approve of. In addition, for the same reason that the ABCP Agreement maintains the cross-border requirement, the cross-border requirement of the APC will provide some comforts to the ASEAN Member Countries who are not completely ready to open their strategic sectors to foreigners.\textsuperscript{191} They need considerable time to monitor the performance and benefits of the APC after its adoption and to ponder over adjusting their own private limited company forms to the APC model. Forcing this adjustment by adopting the APC without a cross-border element that leads to the immediate competition with national legal forms is not recommendable, considering that ASEAN has never experienced any form of transnational or supranational business legal instruments before.\textsuperscript{192} One should also keep in mind the antagonism towards supranationalism similar to the EU in ASEAN. In the case of the EPC, an EPC shall have a cross-border element demonstrated by one of the following: a cross-border business intention or corporate objective; an intention to be significantly active in more than one Member State; establishments in different Member States, or a parent company registered in another Member State.\textsuperscript{193} It has been observed that the cross-border requirements proposed by the European Parliament may be easy to circumvent.\textsuperscript{194} However, a requirement of undertaking economic activities in at least two Member States would be sufficient to justify a European legal form for SMEs instead of the requirement that companies from at least two Member States are to be involved in the incorporation of an EPC, which would not be suited for SMEs.\textsuperscript{195} In the process of incorporating the APC Agreement, the ASEAN Member Countries have to develop the best way to demonstrate the cross-border requirement of the APC. It is

\textsuperscript{191} See supra note 134; see also in Section 6.3.1 (2) Differences from European Economic Interest Grouping

\textsuperscript{192} It is different from the EU because the EU has run different transnational business legal entities such as European Economic Interest Grouping (EEIG), a European Company (SE) or a European Cooperative Society (SCE). AIJV or AICO cannot be counted as forms of regional legal transnational or supranational instruments. In addition, ASEAN never experienced any form of harmonisation of business and company laws as in the EU.

\textsuperscript{193} See in the case for the EPC; Art. 3(3) of the EPC Proposal

\textsuperscript{194} van den Braak, supra note 156, p. 4

\textsuperscript{195} Braun, supra note 153, p. 1397
recommendable that the cross-border requirement should not be stricter than that in the current EPC Proposal in order to allow a full development of this form of company within ASEAN. The less Member Countries involved in the process of the APC incorporation, the less bureaucracy and the less impediments for freedom of establishment in ASEAN.

(4) Registration and Transfer of the Registered Office

Similar to the EPC, an APC shall be registered in accordance with the provisions of the applicable national law of the Member Country in which it has its registered office and the new APC will acquire legal personality on the date on which it is entered into the register.\textsuperscript{196} Article 9 of the EPC Proposal\textsuperscript{197} provides rules on the formalities relating to registration which can be adopted for the registration of the APC.\textsuperscript{198} Special attention needs to be paid to the registration by electronic means which is set out to make the formation and registration of the EPC easier and cheaper. The EU first company law directive\textsuperscript{199} dealing primarily with the uniformity of minimum disclosure provisions for company information in the commercial register, was also amended to contain the rules to file company documents and particulars by paper or by electronic means, so as to enable interested parties to obtain a copy of such company documents and particulars by paper as well as by electronic means from the register.\textsuperscript{200} In the absence of any kind of harmonisation of publicity requirements applying to the companies within ASEAN,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{196} Art 9 of the earlier EPC Proposal ; Proposal for a Council Regulation on the Statute for a European private company, COM 2008 (0396) final, Brussels, 25.6.2008.
\item \textsuperscript{197} Art. 10 of the earlier EPC Proposal
\item \textsuperscript{198} Art. 9 (2) of the EPC Proposal provides the list of particulars and documents to be registered.
\item \textsuperscript{199} First Council Directive 68/151/EEC of 9 March, 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of protection of the interests of member states and others, are required by Member States of companies within the meaning of the second paragraph of Article 48 (now 58) of the Treaty, with a view to making such safeguards equivalent the Community [1968] OJ L 65/8.
\end{itemize}
\end{footnotesize}
such as the first company law directive in the EU, it is extremely important and challenging to ensure transparency and disclosure of accurate APCs’ information. Therefore, the recommendation of the European Parliament in the recital 8b of the EPC Proposal, shall be emphasised which proposes the European Commission should establish and coordinate a database for EPCs’, available on the internet for the purpose of disclosing, collecting and disseminating information and particulars concerning their registration, registered office, centre of activity, branches and any transfer of their registered office, etc. The European Parliament also recommended that a copy of each registration of an EPC and all amendments thereto should be sent by the respective national registers to a European Register especially created for this purpose. The ASEAN Policy Blueprint SME Development (APBSD) has suggested establishing by 2014 general or industry-specific registers of SME suppliers and buyers within Member Countries in the area of setting up regional and sub-regional networks of interlinked, online clearing points or trading houses for SME businesses. These were also to collect and disseminate best practices in simplification, streamlining and rationalisation of the procedure for SME registration and the process for SME support services through online information. According to the approach of the APBSD, it is noticeable that ASEAN has recognised the importance of building a network of information for SMEs, particularly via online networks. However, building a more organised and centralised database for the APC under the ASEAN Secretariat, as was recommended for the EPC by the European Parliament to the European Commission, will be necessary for the APCs to work as transnational legal entities throughout ASEAN. Therefore, for the best and most consistent performance of the APC throughout ASEAN, I would like to

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203 ASEAN Policy Blueprint for SME Development (APBSD), 2004-2014, pp. 14 and 23
suggest not only making the registration of the APC by electronic means available in each commercial registrar of the ASEAN Member Countries, but also, centralising the management of the registration of the APC by establishing an ASEAN Register, similar to the European Register, under the ASEAN Secretariat.

In order to enable businesses to reap the full benefits of the internal market, the EPC Proposal enables the EPC to transfer its registered office from one Member State to another. Since the purpose of the APC is to facilitate cross-border business activities, the transfer of the registered office of an APC within ASEAN has to be allowed as well. The EPC Proposal articulates that during the initial phase for two years, whilst experience is gained in the application of the EPC Project, the EPC should have its registered office and its central administration or its principal place of business in the same Member State, during which time that national law should apply. For the APC, there may be no need for this transitional provision because, in ASEAN, there are no conflict of law problems regarding the recognition of foreign companies as in Europe. The procedure of transfer consists of the emigration of the APC from the home state and the immigration of the APC into the host state. The strength lies in the fact that the transfer of the registered office from one country to another would not result in the winding-up of the APC or the loss of the APC’s legal personality, despite the change of the applicable national law. During the process, it is important to keep the APC’s legal personality and to protect the interested parties, particularly creditors and shareholders. For the emigration of the APC, the home state shall designate a competent authority, e.g. commercial registrar or commercial court, to scrutinise the legality of the transfer by verifying the compliance procedure provided by the APC Agreement and

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204 See the provisions related to the transfer of the registered office in Chapter VII of the EPC Proposal.
205 Art. 7 (1) of the EPC Proposal; (4) of the Preamble of the EPC Proposal
206 Interview with Michael Ewing-Chow on 8 April, 2009; see the conflicts of law problem in Europe, i.e. incorporation theory vs. real seat theory, in Section 5.2 Barriers for Corporate Collaboration and Cross-Border Mobility within the EU
207 See Art. 36 (1) of the EPC Proposal
208 There may be cases when notaries as well as registries may be involved in founding a company.
to issue a certificate attesting to the completion of the acts and the formation to be accomplished before the transfer.\textsuperscript{209} The recent EPC Proposal has inserted a new provision for possible review by a judicial authority of the home state in case the competent authority of the home state opposes the transfer.\textsuperscript{210} The possibility for the home state to have the authority of issuing the certificate with right to opposition and its judicial review will make the ASEAN Member Countries more comfortable to adopt the APC Agreement. However, it is notable that such opposition may be based only on the grounds of public interest.\textsuperscript{211} Without this certificate, it will not be possible to register the APC in the host state. The simpler the issuing procedure of the certificate is, the more enhanced the cross-border business activities via the APC are in the region.

\textbf{(5) Legal Capital}

While in search for the best corporate form for private companies, one of the main questions that has arisen in the EU is whether legal capital is the right tool for creditor and shareholder protection. The European legal capital regime is generally not considered a competitive disadvantage for European companies, but it is no competitive advantage either.\textsuperscript{212} With regard to the responses to the consultation for the High Level Group of Company Law Experts, some noted that legal capital must not be abolished because it gives the best safeguards, but the majority stressed that legal capital is not in practice effective in attaining its objectives. It has also been argued that legal capital has

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{209} Art 38 (2) of the EPC Proposal
  \item \textsuperscript{210} Art. 38 (2a) of the EPC Proposal
  \item \textsuperscript{211} Art. 38 (2a) of the EPC Proposal
\end{itemize}
\end{footnotesize}
The core concept of legal capital is that restrictions are imposed on corporate activity by reference to the shareholders’ capital investment, as shown on the balance sheet. In Europe, many countries have either abolished or reduced the minimum capital requirement for the incorporation of their national corporate forms due to the regulatory competition. Contrary to this trend, the fact that the EPC requires minimum capital for its incorporation counteracts its motivation of making the SMEs’ cross-border activities easier and cheaper through the EPC. Therefore, by raising the incorporation cost, having minimum capital requirements may not only impede the EPC’s own formation but also the use of the EPC by SMEs. Moreover, finding a uniform minimum capital requirement for the EPC has been difficult owing not only to the different standards of living within the EU but also to the different needs of companies depending on their activities. Consequently, it was determined that the EPC should not be subject to a high mandatory capital requirement since this would be a barrier to the creation of EPCs. Later, the European Parliament proposed to amend the European Commission’s Proposal that the minimum capital of the EPC shall be set

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213 The majority (68 per cent) of the 65 respondents to the question does not think that legal capital effectively protects the interests of creditors and shareholders, and ensures capital adequacy. Only a minority (25 per cent) of the respondents firmly believes in the current system; Summary of Comments submitted to the High Level Group of Company Law Experts in Response to its Consultation Document, Erasmus University Rotterdam, October 2002 in the Annex 3 of the Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe, supra note 212, p.147.


215 See for the trend of abolition or reduction of minimum capital in Europe, for example in France and Germany; Section 5.3.2 (1) (1) Harmonisation Approach

216 The European Commission said the minimum capital requirement in the EU-15 (old member states) averages EUR 10,000 - 12,000, while the figure in the EU-12 (new member states) was merely EUR 4,000; European Commission, Commission staff working document accompanying the Proposal for a Council Regulation on the Statute for a European Private Company, p 6f; see also Barnerveld, supra note 214, p. 85; Deutsche Bank Research, ‘A European Private Company: Is Europe’s Single Legal Form for SMEs Close to Approval?’, 19 July, 2010, p. 5; available at: <http://www.dbresearch.de/PROD/DBR_INTERNET_EN-PROD/PROD00000000000260277/A+European+Private+Company%3A+Is+Europe%E2%80%99s+Single+legal+form+for+SMEs+close+to+approval%3F.PDF>

217 Art. 19 (3) of the EPC Proposal; Art. 19 (4) of the earlier EPC Proposal
at least one Euro, provided that the articles of association require that the executive management body signs a solvency certificate in order to protect creditors from excessive distributions to members which could affect the ability of the EPC to pay its debts and also that, where the articles of association contain no provision to that effect, the capital should be at least EUR 8,000. In addition, there is another restriction on distribution of dividends for the EPC, that is, to satisfy a balance-sheet test, namely the assets of the EPC must fully cover its liabilities after the distribution. The European Parliament seems to think that an EPC with a capital of at least EUR 8,000 can do without a solvency test because the balance-sheet test is sufficient to protect creditors. Despite the European Parliament’s opinion, the current EPC Proposal leaves Member States the possibility to decide whether to set a higher minimum capital for the EPC within the limit of EUR 8,000, or whether to require the management body of the EPC to sign a solvency certificate. At any rate, looking at the development and exchange of the EU institutions on legal capital of the EPC illustrates the difficulty in positioning the EPC in relation to the domestic companies. Nonetheless, what is clear in Europe is that, by allowing a very low minimum capital, the EPC Proposal appears to depart from the concept that the company’s capital is the right tool to protect its creditors, accepting that legal capital works as a poor indication of the company’s ability to pay its debts. The ongoing trend in Europe as a

218 Compare the wording between Art 21 (2) of the earlier EPC Proposal and Amendment 36 of Art. 21 (2) of from the European Parliament legislative resolution; see also, Art. 21 (4) of the EPC Proposal
219 Amendment 33 of Ar. 19 (4) from the European Parliament legislative resolution
220 Art. 21 and Art. 11 (2) (d) of the EPC Proposal
221 Barnerveld, supra note 214, p. 90
222 (11) the Preamble of the EPC Proposal; Art. 3 of the EPC Proposal states that Member States may set a higher minimum capital requirement for EPCs registered in their territory than the amount in the first subparagraph. However, it shall not exceed EUR 8,000; however, the Commission shall, two years after the date of application of the EPC Regulation, analyse the effect of permitting Member States to set differing minimum capital requirements; Art. 3a of the EPC Proposal.
223 Art. 21 (4) of the EPC Proposal;
224 van den Braak, supra note 156, p. 3
225 Barnerveld, supra note 214, p. 90
226 Moreover, annual accounts have become an inadequate yardstick for making decisions on distributions and for assessing the company’s ability to pay its debts; Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe, supra note 212, p.13.
whole to remove or reduce the minimum capital requirement also indicates that the EU Member States acknowledge that the legal capital regime is inflexible and costly, lacking the efficiency to protect creditors.

Given the backdrop of the current trend in Europe and development of legal capital in the EPC Proposal, it now needs to be considered whether to include a mandatory minimum capital requirement for the APC. Surprisingly, reflecting the characteristics of the ASEAN region, as a whole, keen on attracting FDIs and MNCs for its economic development, it was found that only a few Member Countries set general minimum capital requirements for establishing their national forms of private limited companies. It is clear that having a mandatory minimum requirement for the APC means reducing the flexibility of the APC despite the contractual freedom enshrined for an APC and limiting the prospects of the APC as a tool to enhance the cross-border business activities of local SMEs. However, before abandoning the mandatory minimum capital requirements for the APC, there are two important questions to consider. Firstly, if there is no minimum capital requirement for an APC, what would be a possible way to satisfy the ASEAN Member Countries who have the minimum requirement for establishment of a company? Instead of giving up the minimum capital requirement, there should be a pay-off for them by providing the tool of an APC. For example, Indonesia, which has the highest minimum capital requirement for establishing a private limited company in its territory in ASEAN, would fear that Indonesian enterprises might avoid paying up the minimum capital for the establishment of local Indonesian company by choosing an APC. In order to limit competition from the APC and make it less of a threat for Indonesia, a mandatory cross-border requirement for the APC may be useful. However, the question still remains if

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227 Out of ten ASEAN Member Countries, only three countries have set a general minimum capital requirement for establishing a private limited company in their territory: Cambodia (KHR 4,000,000.00, roughly equivalent to USD 990); Indonesia (IDR 50,000,000, roughly equivalent to USD 5,600); Philippines (PHP 5,000.00, roughly equivalent to USD 115).
facilitation of cross-border business activities through the APC may work as a satisfying pay-off for Indonesia, enough to give up any insistence on a minimum capital requirement.

Secondly, if there is no minimum capital requirement for an APC, what are the alternatives available in ASEAN to protect creditors of the APC? It may be possible to prepare to have a balance-sheet test and a solvency test on distributions in the ASEAN Member Countries. In order to adopt the solvency test for the APC, the Member Countries should have the possibility to require the management body of the APC to sign a solvency certificate. Those Member Countries should also lay down provisions on the liability of directors of the APC with respect to the statement. However, what would matter the most in performing the balance-sheet test and the solvency test is how much the ASEAN Member Countries are ready to perform the publication of accounts of the APC to show annual state of accounts to the public, which is a prerequisite to perform the balance-sheet test and the solvency test. Accordingly, the importance of establishing an ASEAN Register and an ASEAN Gazette available to the public to get access to the necessary information of the APC cannot be emphasised enough. ASEAN Member Countries need to arrive at an agreement to set standards for publicity and disclosure of company documents and for an accounting system common in ASEAN. It is also crucial that the APC Agreement must include the following article regarding accounts and statutory audit that is similar to Article 26 of the EPC Proposal:

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228 See in the case for the EPC; (11) the Preamble of the EPC Proposal.
229 See the same point emphasised for the ABCP in section 6.3.2 (7) Publicity.
1. An APC shall be subject to the requirements of the applicable national law as regards the preparation, filing, auditing and publication of accounts.

2. The management body shall keep the accounting records of the APC ‘subject to minimum obligation to publish the latest balance sheet.’²³¹

However, the inclusion of this Article would not work efficiently without some form of harmonisation. I could additionally impose an obligation on all APCs to make available to members of the public, on demand, copies of the latest balance sheet and, possibly, profit and loss accounts, drawn up and certified to international standard accounting practice by a qualified accountant.

One may still wonder if providing a balance-sheet test and a solvency certificate would be enough for the creditor protection of an APC. There is an argument in the EU that annual accounts may not be an adequate yardstick for making decisions on distributions and for assessing the company’s ability to pay its debts, particularly due to the fact that they can fall rapidly out of date.²³² With the aim of providing safeguards to creditors in the case of capital reduction, on top of the condition that the capital reduction has to be decided by a resolution of the general assembly just as in the cases of distributions and purchases of own shares,²³³ following the disclosure of the resolution to reduce capital, those creditors, whose claims antedate the disclosure of the resolution, shall have the right to request the EPC to provide them with adequate safeguards²³⁴ or to apply to the competent court for an order that the EPC provide the creditor with adequate safeguard.²³⁵ In this sense, it needs to be highlighted that the

²³¹ See the difference in text: Article 26 of the EPC Proposal
²³³ Art. 28 of the EPC Proposal
²³⁴ Art. 24 (2a) of the EPC Proposal
²³⁵ Art. 24 (3)and (3a) of the EPC Proposal are as following:
3. If the SPE does not provide adequate safeguards or the creditor considers the safeguard unsatisfactory, the creditor shall have the right to apply to the competent court for an order that the SPE provide the creditor with adequate safeguard. An application shall be made within 30 calendar days of the
EPC Proposal provides advanced machinery that should be adopted for the APC.

In conclusion, ASEAN may not be ready to do without a minimum capital for the APC at this stage, particularly, because it needs some time for the ASEAN Member Countries to establish common standards for publicity and disclosure of company documents and for accounting system in ASEAN. At any rate, having a minimum capital has been seen as providing some assurance to potential creditors, and having access to information on a company’s accounts can help a third party to evaluate the risks associated with extending credit to the company. The discussion on the legal capital for the EPC has inherited from the different corporate law protection system between the continental asset protection system with statutory minimum capital and the Anglo-Saxon liquidity protection system. 236 Considering the APC Project is inherently alien to ASEAN, having both mechanisms might help to engender confidence in the APC as a serious business form. 237 However, considering the big difference in amount between the minimum capital in Indonesia and those in other Member Countries with lesser requirements, it is not easy to decide a uniform minimum capital. 238 For example, I could propose a minimum equivalent to USD 1000-5500 in local currency, to operate for a period of up to 10 years, afterwards to be removed. 239 It is important that while deciding the suitable level of the minimum capital for the APC, the ASEAN Member Countries must weigh the doubtful efficacy of the minimum capital as a device for creditor protection against the benefits of the APC facilitating cross-border business response of the SPE to the request or in the absence of a response, within 60 calendar days of the submission of the request.

The court may order the SPE to provide safeguards if the creditor credibly demonstrates that due to the reduction in the capital the satisfaction of his claims is at stake, and that no adequate safeguards have been obtained from the SPE.

3a. Any further safeguards provided to the creditors under the applicable national law by confirming capital reduction through court order may also apply.

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236 Hommelhoff, supra note 172, p. 327
238 See supra note 56 and 227for ASEAN Member Countries’ minimum capital requirements
239 Considering the Indonesian minimum capital for its private limited company (IDR 50,000,000, roughly equivalent to USD 5,600), the minimum capital for the APC may not be higher than USD 5,600. For the provisional period, the shorter, the better.
activities in ASEAN and enhancing the local SMEs’ competitiveness.

(6) Articles of Association and Organisation

The APC, similar to the EPC, should be a transnational company form based on contractual freedom in order to facilitate a flexible up-to-date structure of a company. The maximum possible structural freedom for drafting companies’ statutes is all the more important for SMEs. They are usually characterised by the personality and individuality of their ownership, not only by the relationship of the owners between themselves and their specific business objectives but also by the markets in which they are active and their products and services. However, priority shall be given to contractual freedom for the establishment of the APC as long as the adequate protection of the shareholders and third parties is secured. Under this basic principle, the founders have freedom of choice when drafting the companies’ articles of association for setting up an APC.

In the EU, it was recognised that while acknowledging the importance of the contractual freedom in the statutes for the internal organisation in the EPC, the greater uniformity among the EPCs will enhance their transnationality with greater legal certainty and less advisory costs. Accordingly, firstly, the EPC Proposal provides a list of particulars that the articles of association need to cover at least which shall be included in the APC Agreement. Secondly, the articles of association Annex I to the earlier EPC Proposal by the European Commission provides 44 subjects to be regulated

240 Braun, supra note 153, p. 1397; Drury and Hicks, ‘The Proposal for a European Private Company’, supra note 121, p. 436
241 Hommelhoff, supra note 172, p. 327
243 See Statement of 31 October 2007 at the occasion of the EU Consultation Paper on the European Private Company
244 Art. 8 (1) of the EPC Proposal
by the articles of association\textsuperscript{245} which could also work as guidelines for the APC. Further, the current Proposal adds 23 additional points.\textsuperscript{246} Thirdly, the EPC Proposal recommends that the EU Member States may draw up model articles of association to be used by entrepreneurs as an example although the application of the model articles of association shall not be made mandatory.\textsuperscript{247} It will be useful, in practice, to draw up a form of model articles of association for the APC in order to facilitate the formation of an APC by SMEs.\textsuperscript{248} If a form of model articles was available that could easily be adapted by the entrepreneurs themselves or by their usual local legal advisors, this may reduce costs for the entrepreneurs, which eventually makes the APC a cheaper alternative for SMEs.\textsuperscript{249} In addition, although not binding unless the founders take an express decision to adopt them in whole or in part, the standard form of model articles of association itself may contribute to filling the company law development gap among the ASEAN Member Countries.\textsuperscript{250}

When allocating which matters are to be dealt with by shareholders and which by the management body in the articles of association of the APC, it is important to keep a balance between these conflicting forces.\textsuperscript{251} There are certain minimum rights to be reserved for shareholders, such as the approval of accounts, the allocation of annual

\textsuperscript{245} Art. 8 (1a) of the EPC Proposal
\textsuperscript{246} Annex I to the Annex of the EPC Proposal; Council document: 16115/09 DRS 71 SOC 711 ADD1, \textit{supra} note 1072.
\textsuperscript{247} (8a) of the Preamble of the EPC Proposal
\textsuperscript{248} For the EPC, CREDA/MDEF Drafting Group for the EPC Regulation has drafted a standard set of model articles for the EPC. They provide the following points to be covered by the model articles: i) the fiduciary duties of directors, in particular the obligation to avoid a conflict between their personal interest and their duty to the company; ii) a business judgment rule providing a defense against a negligence claim where the directors acted ‘honestly and reasonably having duly obtained sufficient information before making any relevant decision’; iii) pre-emption rights of shareholders on an increase in share capital; iv) the requirement of a three-quarters majority resolution to dissolve the company or to alter those terms of the articles which do not require unanimity for this purpose; v) the ability of shareholders, by a special majority resolution, to give the directors binding instructions on the exercise of their management powers; vi) relieving shareholders from the effects of any alteration in the articles requiring them to contribute further capital unless they have consented in writing; and the ability of the shareholders to ratify a breach of the no conflict rule, etc.; Drury (2010) ‘The European Private Company’, \textit{supra} note 162, pp. 343-344; further, in order to give practical substance for the EPC, the drafting group have developed two models, a micro-business model and a more capacious model, for the standard form articles of association; available in Annex to Drury (2010) ‘The European Private Company’, \textit{supra} note 162
\textsuperscript{249} \textit{Ibid.}, p. 337
\textsuperscript{250} \textit{Ibid.}, p. 338
\textsuperscript{251} Drury (2001), ‘The European Private Company’, \textit{supra} note 65, p. 59
profits to reserve or distribution, the appointment of auditors if necessary and the alteration of articles.\textsuperscript{252} Essentially because close companies or family companies are expected to use the form of the EPC, the EPC Proposal provides that the shareholders could restrict the free right of a member to transfer their shares by requiring the submission of a proposal for a resolution to the members of the management body or by requiring the approval of a general meeting.\textsuperscript{253} The rule of the EPC Proposal relating to the information rights for the members deserves special attention due to its high standard.\textsuperscript{254} It makes a good example of a progressive regulation on granting shareholders access to information, which is also extremely valuable for the protection of minority shareholders of the EPC.\textsuperscript{255} If the management body fails to provide answers to the questions put by the shareholders, shareholders are given the right to request a competent court or administrative authority to appoint an independent expert, in particular an independent auditor to report on certain acts of management.\textsuperscript{256} The provisions related to this matter may be included in the articles of association.\textsuperscript{257} It would have been better if the EPC Proposal provided a clear reference to the remedies available and further to the explicit jurisdiction rule.\textsuperscript{258} However, the shareholders and minority protection mechanism on information right contained in the current EPC Proposal will be very useful when adopted by the APC agreement.

In the articles of association of the EPC, the founders may set up any form of management structure that they feel comfortable with, either a single manager, a one-

\begin{footnotes}
\item[252] In the case of the EPC, Art. 28 of the EPC Proposal; \textit{ibid.}, p. 58
\item[253] The articles of association may include the procedure for proposing a resolution to be applied if the management body does not submit a proposal on a request; (22) of Annex I to the Annex to the EPC Proposal; Drury (2001) \textquote{The European Private Company}, supra note 65, p. 59; Art. 30 of the EPC Proposal provides shareholders' right to request a resolution or to convene a general meeting. It also states that the articles of association may provide for a threshold for minority shareholders. However, the current provision is poorly incorporated even compared to the competent original provision (Art. 29 of the earlier EPC Proposal )
\item[254] Art. 29 of the EPC Proposal
\item[255] Drury (2001) \textquote{The European Private Company}, supra note 65, p. 59
\item[256] Art. 29 (2) of the earlier EPC Proposal
\item[257] Annex I to the earlier EPC Proposal
\item[258] van den Braak, supra note 156, p. 8
\end{footnotes}
tier board (unitary board) with or without managing director, or a two-tier board (dual board), i.e. with a management board and a supervisory board. Similarly, the APC also has to offer entrepreneurs and shareholders optimal flexibility to internally organise themselves.\textsuperscript{259} ASEAN is probably not yet ready for single member private companies, and in any event, this is not suitable for the APC project in hand. Hence, I recommend a minimum of two shareholders. In addition, it may not be necessary to provide regulations on the two-tier board structure for an APC as in the EPC Proposal, particularly if the APC is more to be used for SMEs who are often a close company or a family company, which are prevalent in Southeast Asian countries. Those companies in lots of cases are not so big or sophisticated enough to have a two-tier board structure and also, often cannot afford to have a supervisory board which is responsible for the supervision of the management board. However, the provisions regarding the management structure of the APC must still be sufficiently flexible enough to accommodate either a one-tier board or a two-tier board.\textsuperscript{260} In addition, when endorsing the articles of association to set up an APC, the entrepreneurs may consider adopting joint representation, that is, two or more directors to act jointly against third parties and before the courts.\textsuperscript{261} Joint representation in the APC may facilitate joint ventures via the APC in the ASEAN region.

The conflict regarding the rules on codetermination and employees participation in the decision-making process in companies has placed one of the major barriers in the field of the EU company law harmonisation and of the introduction of the EU-wide legal entities.\textsuperscript{262} Basically, employees’ rights of participation in the EPC

\textsuperscript{259} Uziahu-Santcroos, supra note 161, p. 1
\textsuperscript{260} For example, the APC could accommodate Indonesian board structure with Sharia supervisory board with business in compliance with Islamic laws to operate if its registered office is in Indonesia; see, for the new provisions included in Indonesian Company Law No. 40 of 2007(16 August, 2007); Karen Mills and Karim Syah (2009) ‘Indonesia’ in Christian Campbell (ed.) \textit{Legal Aspects of Doing Business in Asia} (Salzburg, Austria: Yorkhill Law Publishing), pp. INO-10-11
\textsuperscript{261} See, for example, Model A, Article 9.3 in Annex to Drury (2010) ‘The European Private Company’, supra note 162
\textsuperscript{262} See Section 5.2 Barriers for Corporate Collaboration and Cross-Border Mobility within the EU
should be governed by the legislation of the Member State in which the EPC has its registered office. Nevertheless, it is not too difficult to establish an EPC without employees’ participation or by lowering the existing level of participation although the EPC Proposal mentioned that the EPC should not be used for the purpose of circumventing such rights. The circumvention of employees’ rights matters particularly when the EPC is formed by the transformation of a national company under the national law already subject to the legal arrangements for employees’ participation. However, as mentioned above, the transformation methods would not be adopted to the APC Agreement. In addition, the ASEAN Member Countries’ laws on the private limited companies do not seem to have employee participation rule in the management structure. Therefore, the provisions of the EPC Proposal relating to the employee participation would not be necessary for the APC Agreement. When drafting the APC Agreement, more weight should be put on facilitating the use of the APC by providing an easy set-up procedure, particularly in the way of adapting to the needs of SMEs for flexibility with less burden of establishment as much as possible rather than focusing on keeping the existing company laws of the ASEAN Member Countries. One should also bear in mind that the legal systems of some ASEAN Members are still on their way to developing modern systems and company laws.

6.4.3 Prospects and Implementation Challenges

I have discussed how the introduction of the APC, as a business entity in a form common to all of the Member Countries of ASEAN, would be beneficial in enhancing

263 (16) of the Preamble of the EPC Proposal.
265 See Section 6.2.4 Creation of Supranational Corporate Entities
266 For example, Art. 2 (f) and Chapter IV of the EPC Proposal
cross-border business activities in ASEAN and increasing intra-ASEAN trade, particularly by overcoming the legal barriers derived from difference in company and business law in the ASEAN Member Countries. The potential advantages can be summed up as follows:

(i) The simple, uniform and transparent formation procedure of the APC will work as an effective vehicle for cross-border collaboration to achieve a more viable commercial operation, particularly by reducing costs for cross-border activities;

(ii) Requiring the APC to be treated as a ‘national’ entity in all Member Countries will make participation by ‘foreign’ companies easier, thereby contributing to overcoming some of the protectionist policies in Member Countries which inhibit intra-ASEAN trade;

(iii) By providing a ‘neutral’ company form of the APC which removes the need to choose the national form of one of the joint venture participants, the creation of successful joint ventures in the region will be encouraged and facilitated;

(iv) Using the APC may increase trust in business forms from other Member Countries, which may contribute to building the AEC and the ASEAN identity;

(v) Providing a uniform ‘badge’ for ASEAN businesses via the APC will contribute to increasing their marketing potential, which may also enhance the competitive position of ASEAN in the world market;

(vi) The fact that the APC as an ASEAN-wide corporate form allows the transfer of its registered office within ASEAN would facilitate ASEAN businesses’ cross-frontier relocation if needed. This, in turn, would enhance corporate mobility in ASEAN and increase intra-ASEAN trade;
(vii) Introducing a modern and up-to-date set of company law rules through the APC, possibly by example of a model of corporate form, would enable some Member Countries to improve their domestic provisions.

With a view to benefiting from the introduction of the APC, the major premise is that the APC shall be recognised and treated as a ‘national’ corporate form in all ASEAN Member Countries, as an additional type of corporate entity at the time of the adoption of the APC Agreement in ASEAN. Although the APC shall be treated as a national form, the success of adopting the APC as an effective vehicle to cross-frontier collaboration across ASEAN relies on the extent of independence of the APC law in its core areas from the reference to the individual domestic laws of the Member Countries as in the case of the EPC.267 Therefore, in those core areas, the provisions of the APC Agreement must have the highest priority of the rules on the law applicable to the APC. Next come the articles of association to ensure a high degree of contractual freedom and flexibility of the APC. At the lowest level of the hierarchy of the applicable law is located the national private company law of the ASEAN Member Country where the APC is registered. The APC is expected to be used as a subsidiary or a vehicle for a joint venture in large groups of companies, but its main purpose lies in facilitating cross-border business activities for SMEs in Southeast Asia, thereby enhancing their competitiveness. In drafting the APC Agreement, it is not easy to keep the balance for an effective APC between a high degree of contractual freedom and a consistent performance as a single ASEAN-wide legal corporate entity. The rules in the EPC Proposal and the discussions involved in the process of its development put forward important issues and possible problems that may stand in the way of success of the APC project. The contents of the APC Agreement may mostly follow the framework of the EPC Proposal, with some alterations to it that will suit the ASEAN context. To sum up,

our suggestions on the contents of the APC Agreement are as follows:

(i) With regard to the formation of the APC, only an initial creation method shall be introduced. The transformation method of the EPC is excluded to prevent the use of the APC to evade the governing national laws by transforming the existing company to the APC;

(ii) The APC shall have a cross-border requirement to avoid immediate competition with national corporate forms. The APC Agreement has to develop its own way to demonstrate this requirement that suits ASEAN the best but should be no stricter than that in the current EPC Proposal;

(iii) Despite the ongoing trend in the EU of reducing the significance of the mandatory minimum capital in terms of creditor protection and the fact that only a few ASEAN Members have that requirement for their national private companies, I recommend incorporating into the APC Agreement a mandatory minimum capital as well as a balance-sheet test and a solvency test in case ASEAN is not ready to do without the minimum capital at this stage. For example, I could propose a minimum of USD 1000-5500, to operate for a period of 10 years, afterwards to be removed;

(iv) Considering that a ready-made structure with as little reference to national laws as possible would give a consistent and transparent performance to the APC, particularly as a cheaper alternative corporate form of establishment for SMEs, the APC Agreement may provide a list of particulars that articles of association need to cover, including at least those in the Annex to the EPC Proposal. Further, the ASEAN Member Countries may consider drawing up a standard form of model articles of association that could be easily adapted by the APC founders;

(v) The provisions of the APC Agreement regarding the management structure must be simple and sufficiently flexible, leaving the entrepreneurs to choose between a one-tier board and a two-tier one. However, it may be too sophisticated to provide regulations on a two-tier board structure in the APC Agreement as in the EPC
Proposal. Further, there is no need to introduce the provisions of the EPC Proposal regarding the employee participation in decision-making into the APC Agreement;

(vi) With regard to the transfer of the registered office of the APC within ASEAN, considering there are not the same conflict of law issues regarding the recognition of foreign companies as in Europe, there may be no need to adopt the transitional provision of the EPC that during the initial phase for two years, the EPC should have its registered office and its central administration or its principal place of business in the same Member State, during which time, national law should apply.\(^{268}\)

In the drafting of the contents of the APC Agreement, a question arises if there is a wish for a genuine ASEAN company in ASEAN, which is not subject to national laws, securing a unitary and ASEAN-wide character.\(^{269}\) What is clear at this stage of ASEAN is that it is impossible to overcome the legal barriers based on national distinctiveness of private company law by harmonisation of company laws or by resorting to the ASEAN institutions lacking enforcement mechanism of the ASEAN obligations. The impossibility is due to the economic and legal development gap and some ASEAN Countries are working on developing essential aspects of their legal system. However, due to this development gap, the APC can be welcomed as a model of a corporate form and an effective means of filling any legal vacuum and of building legal infrastructure. In addition, because there are fewer legal frameworks to harmonise in some relevant areas, there are fewer obstacles for adopting the APC into ASEAN than adopting the EPC to the EU. For example, there are no conflict of law issues regarding the recognition of foreign companies or regarding the management structure or employee participation as in Europe. Moreover, ASEAN is basically an open export-oriented

\(^{268}\) Art. 7 (1) of the EPC Proposal; (4) of the Preamble of the EPC Proposal

\(^{269}\) See for the EPC in Braun, supra note 153, p.1398
economy as a whole, which is evidenced by the fact that only a few Member Countries actually have statutory minimum capital requirements for their private companies. What indeed matters is that whether the ASEAN Member Countries have the strong political will towards increasing intra-ASEAN trade through the APC, an efficient transnational and supranational corporate entity. When the ASEAN governments decide to adopt an APC Agreement, it is crucial to ensure that the APC is treated as a national corporate form in all the ASEAN Member Countries with uniform application by national courts in relation to the APC rules. For this purpose, it is important to set up an ASEAN-level judicial institution providing a consistent interpretation of the questions related to the APC rules which would function similarly to the Court of Justice in the EU for the EPC rules. In conclusion, whether the APC project is feasible eventually depends on the confidence of the decision-makers in the ASEAN Member Countries in its viability.

6.5 Conclusion

Considering the limits of related ASEAN instruments in facilitating corporate collaboration and promoting intra-ASEAN trade and investments, four different areas of mechanisms are considered drawn from the EU’s experience. In the first part of this chapter, the viability and the potential benefits of those suggested mechanisms are evaluated in order to deal with the major cross-border business barriers existing in the ASEAN Member Countries based on their protectionist techniques. The findings are as follows: (1) adopting an agreement on mutual recognition of foreign companies under ASEAN does not suffice to attack the protectionist policies; (2) the protection of rights of establishment relies on the institutional development of ASEAN, which cannot be seriously considered as an option at this stage of ASEAN’s evolution; (3) harmonisation

270 Setting up an ASEAN-level judicial institution is also extremely crucial to realise all the ASEAN initiatives for their consistent interpretation and enforcement; see Chapter 2 for this point.
of ASEAN company laws and business regulations will take a long time, which all the
ASEAN experts regarded as a non-starter due to big differences in economic and legal
developments of its Member Countries; and (4) creating an ABCP or an APC as a
common national corporate form across ASEAN, which, once adopted, would make
foreign investors overcome the protectionist barriers imposed by the ASEAN Member
Countries by being registered and recognised as a national entity in each Member
Country. I propose that the most useful measure, promising practical benefits, would be
the introduction of uniform and universally recognised business entities to facilitate
collaboration and cooperation within ASEAN. Recognition of such entities as national
entities within every Member Country will help to obviate these protectionist tendencies
and improve the development of intra-ASEAN trade. Therefore, in the rest of the
chapter, for the future creation of those entities, I dealt with the ABCP Agreement and
the APC Agreement in depth by comparison with the EEIG Regulation and the EPC
Proposal respectively.

In the process of assessing the viability of the suggested mechanisms and
coming to the conclusion of proposing the ABCP and APC to facilitate corporate
collaboration within ASEAN, I paid attention to several other points as well. Firstly, the
chosen mechanisms should contribute to promoting the competitiveness and growth of
the local entrepreneurship and SMEs in the ASEAN region.271 This is in line with the
common interests of the ASEAN Member Countries for the potential of easing SME
start-ups as a major source of job creation and overall economic growth of the ASEAN
region.272 This is valuable because most domestic firms in Southeast Asia are
predominantly SMEs and also, SMEs could offer the best prospects for local
employment and poverty alleviation in many ASEAN Member Countries.273

271 Wattanapruttipaisan, ‘Four Proposals for Improved Financing of SME Development in ASEAN’,
supra note 76, p. 68; Harvie, supra note 76, p. 16.
272 ASEAN Policy Blueprint for SME Development (APBSD), 2004-2014; supra note 491.
273 Harvie, supra note 76, pp. 5-7.
Accordingly, it has been regarded that SMEs would play an integral role in supporting the next stage of growth in transitional economies in Southeast Asian countries.\(^\text{274}\)

However, there are issues in the host country environment of transitional economies in Southeast Asia that inhibit the development of greater entrepreneurial and SME activity in ASEAN. Local SMEs in ASEAN experience difficulty in: (i) availability of factor markets, particularly in getting access to financing sources for investment by SMEs or in adequate supply of trained human capital; (ii) relatively small domestic markets for products and services; (iii) establishing strong linkages with the foreign-investor sector; (iv) regulatory and taxation issues; or (v) burdensome bureaucracy and corruption.\(^\text{275}\)

Interestingly, some ASEAN Member Countries, as a method of protectionist techniques, explicitly restrict foreign investments in some sectors on the basis of being ‘reserved for domestic SMEs’,\(^\text{276}\) which does not solve any of the issues mentioned. Adopting the ABCP and APC could support domestic private sector and SMEs development more directly by way of reducing the business cost and by enhance their cross-border business activities within the region. Secondly, despite the fact that the prime objective of the thesis lies in finding mechanisms that increase the intra-ASEAN trade by facilitating cross-border business activities within ASEAN, the suggested mechanisms should not exclude investments coming from outside ASEAN. This is because the economic growth in Southeast Asia heavily depends upon foreign investors outside of ASEAN. Thirdly, the suggested mechanisms shall not only increase cross-border

\(^{274}\) Denis Hew and Loi Wee Nee, *Entrepreneurship and SMEs in Southeast Asia*, supra note 147, xxvi; *supra* note 359.


\(^{276}\) See, for example, Article 13 of the Foreign Investment Law (Number 25 of 1007) under chapter VIII, Investment development to micro, small and medium-sized enterprises, and cooperatives; or The current negative list of the Philippines, the 7th Regular Foreign Investment Negative List (EO No. 584 dated 08 December 2006); ASEAN Secretariat (2010) *ASEAN Investment Guidebook 2009* (Jakarta: ASEAN Secretariat), p. 197
business activities overcoming the obstacles coming from the legal diversities of company laws and business regulations among the ASEAN Member Countries but also contribute to reducing the large gaps in levels of economic development, which is a challenge to the AEC project.
Chapter 7 Conclusion

The clearest manifestation of the common interests and values shared by the EU Member States and the Member Countries of ASEAN is their commitment to regional integration. Countries of both regions have realised that creating a regional entity is the best way to sustain economic development, to reinforce their security, both between themselves and with their neighbours, and to have a strong voice in world affairs. Particularly since 1992, in response to the establishment of the EU in Maastricht, ASEAN accelerated its efforts to enhance intra-ASEAN trade, recognising the necessities of cohesive and effective performance of intra-ASEAN economic cooperation and the removal of barriers which constituted impediments to intra-ASEAN trade and investment flows. In the EU, the 1957 Treaty of Rome set its aim at the completion of a common market and furthered its objective by the single market programme. Likewise, ASEAN, in 2007, adopted the AEC Blueprint to transform ASEAN into an AEC, i.e. a single market and production base.

The single market integration in the EU was pursued because market fragmentation generated unnecessary costs and caused lost opportunities for European industries limiting their competitive capacity in the global market, against countries such as the US and Japan. Similarly in ASEAN, the competition with rising economies, particularly China and India, stimulated faster and deeper integration. Within the

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1 European Commission, New Partnership with South-East Asia: Communication from the Commission, COM (2003) 399 final, p. 13
4 See Declaration on the ASEAN Economic Community Blueprint 2007 (AEC Blueprint); available at: <http://www.aseansec.org/21081.htm>
6 See supra note 9 of chapter 2
single market, equipped with free movement of goods, persons, services and capital, businesses cross frontiers to choose conditions best suited to their commercial needs and so contribute to the optimal allocation of production factors. Broad participation by the private sector was seen as one of the critical ingredients for the success of the EU experience. The ASEAN experience has also demonstrated that an active role by the private sector is the key to the success of the ASEAN economic cooperation programmes. ASEAN also included the movement of business persons for effective facilitation for trade and investment in a single market and production base.

The success of regional integration requires political commitment of the Members and the institutions that are sufficiently strong and have a clear mandate. Unlike the EU, ASEAN has never accepted any possibility of pooling national sovereignty to exercise in common based on supranationalism. Even though the ASEAN Charter was adopted in 2007, together with the ASEAN Economic Community (AEC) Blueprint, to strengthen the institutional framework and to realise the establishment of the AEC by 2015, ASEAN has never shifted away from consensus-based decision-making, leading to broad general agreements with no clear mechanisms of commitments for the ASEAN initiatives, leaving individual Member Countries with scope for unilateral interpretation of agreements. In addition to the lack of compliance mechanisms, there is no working mechanism of judicial review to deal with those problems in ASEAN. It is noteworthy that the process of integration was revived from the periods of stagnation in European integration in the late 1970s and early 1980s by strengthening the decision-making powers through qualified majority

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7 Art. 8a EEC; now Art. 26 TFEU (ex. Art. 14 EC)
8 Summary of Commission of the European Communities, ‘Communication from the Commission: European Community Support for Regional Economic Integration Efforts among Developing Countries,’ COM (95) 219 final. Brussels, 16.06.1995; see also recognition of the private sector http://www.aseansec.org/5612.htm
9 AEC Blueprint, para. 6; Article 1 (5) of the ASEAN Charter
10 See Declaration on the ASEAN Economic Community Blueprint 2007 (AEC Blueprint); available at: <http://www.aseansec.org/21081.htm>
11 See supra note 83 in chapter 2; Gita Nandan (2006), ASEAN: Building an Economic Community (Canberra: Australian Government, Aus AID), p. ix
voting (QMV) under the Single European Act (SEA) for processing the single market programme.\(^{12}\) It also has to be highlighted that the Court of Justice has played a critical role in the EU legal integration, particularly in developing the internal market.

Chapter 5 showed that the main obstacles in the path leading to achievement of the internal market in the area of corporate collaboration and cross-border mobility within the EU essentially are non-tariff barriers (NTBs), company law differences and conflicts of law problem.\(^{13}\) The different company laws and business regulations including separate legislation to regulate foreign investments and business activities in ASEAN Member Countries obstruct cross-border business cooperation and collaboration within ASEAN as well. Chapter 3 presented the four types of the protectionist techniques taken by the ASEAN Member Countries drawn from the relevant legislation to control inward foreign investments with a view to preserve the national interests and to protect indigenous industries from foreign competition.\(^{14}\) All of the four types of the protectionist techniques are perceived as NTBs on the path of building the AEC. However, ASEAN, both in the AEC initiatives and the ASEAN industrial economic cooperation programmes, is having difficulties in identifying and eliminating NTBs even though they are more harmful in restricting trade than tariff barriers are. From its early days, NTBs were also seen as serious obstacles to market integration in the EU and thus, the single market programme drawn up by the 1985 White Paper on completing the internal market represented an effort on removing them.\(^{15}\) The emphasis under the 1985 White Paper on the obstruction of the unanimity requirement in decision-making in the Council in dealing with those barriers led to the adoption of the QMV under the SEA.\(^{16}\)

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\(^{12}\) See Section 5.1 Introduction.

\(^{13}\) See Section 5.2 Barriers for Business and Corporate Collaboration and Cross-border Corporate Mobility within the EU.

\(^{14}\) See Section 3.2 Barriers Affecting All Foreign Investors in ASEAN.

\(^{15}\) Cecchini, supra note 5, p. 3

\(^{16}\) White Paper from the Commission to the European Council, Brussels, 14 June, 1985, COM (85) 310, para. 13
Establishment of a single market clearly has legal implications in the domain of company law. Facing the fact that neither of the current AEC initiatives and the ASEAN industrial economic cooperation programmes are making progress in increasing intra-ASEAN trade and investments, I explored whether ASEAN could benefit from the EU mechanisms regarding freedom of establishment for companies and corporate cross-border mobility within the EU. The EU, without doubt, represents the most developed and successful example of regional integration but ASEAN is yet on its way of developing its institutions, still lacking a working judicial institution and the compliance mechanism to ensure its Member Countries to keep their commitments. ASEAN’s institutional infrastructure is not strong enough to protect freedom of establishment for companies with legally binding arrangements through its institutions and also, to provide the legal basis of harmonisation in company and business laws in ASEAN. Adoption of an agreement or a convention on the mutual recognition of foreign companies may well fail to address the protectionist barriers presented in Chapter 3. I therefore suggest adopting an agreement that creates a supranational corporate entity: an ASEAN Business Cooperation Partnership (ABCP) similar to the European Economic Interest Grouping (EEIG); and/or an ASEAN Private Company (APC) similar to the European Private Company (EPC) or Societas Privata Europea (SPE). Despite the unfamiliarity of these mechanisms to ASEAN, I hold that this option is most efficient in tackling the protectionist barriers for foreign business activities, in particular, the screening and bureaucratic process-related restrictions, because those vehicles will be treated as national entities in ASEAN Member Countries. In addition, these supranational entities are additional optional corporate vehicles that would be complementary to the national legal forms in the host state for the purpose of facilitating cross-border businesses and promoting intra-ASEAN trade and investments within ASEAN. These vehicles have both supranational and transnational characteristics but they are essentially national corporate entities. This means that the
ASEAN Member Countries do not need to give up their sovereignty. Because they are registered and governed by the law of the country of their official address, they do not necessarily require ASEAN to establish supranational institutional structure for their running.

The different levels of legal system development originating from the big economic development gap among the ASEAN Member Countries are mentioned as one of the key implementation challenges for the AEC initiatives. This inherently not only prohibits legal harmonisation of business laws and procedures that affect foreign investors but also obstruct cross-border business activities in ASEAN. However, legally lesser developed ASEAN Member Countries may have fewer clashes with other legal systems in ASEAN,\(^\text{17}\) which conversely may have the potential to avail the regional integration as a chance of developing more harmonised rules. If ASEAN Member Countries, particularly those who are currently developing their legal systems, could look beyond developing their own national systems and consider the possibility of their systems being integrated into a regional framework at the same time, the lack of legal development in those countries can turn into an opportunity of adopting a modern and leading legislation without time-consuming trials in legal development. The implementation of the APC project would enable some ASEAN Member Countries to improve their domestic regulations in the relevant area, because it will introduce a modern and up-to-date set of company law rules.\(^\text{18}\)

There were difficult times in sustaining the political will of the EU Member States towards integration. Similar to ASEAN, there were also indications of protectionism in Europe, such as the governments’ interventionist approach to increasing economic growth, which placed impediments in the path of developing the

\(^{17}\) The conflicts of law problem as in the EU does not exist in ASEAN; see the interview with Michael Ewing-Chow mentioned in section 6.2. Evaluation of the Suggested Mechanisms

internal market. However, the impediments have been overcome by the firm political will of the Members as represented by the revival of their political commitment in the SEA. Although the EU’s experience may not be regarded as a prescription for ASEAN due to its different situation, it was rightly recognised that one of the most valuable lessons to be learnt from the European experience was the importance of a strong political will and a common vision to build the EU. It is not always easy to sustain the political will of the ASEAN Member Countries on building the AEC. It is sometimes affected by the unwillingness to go beyond a free trade area (FTA) originating from the disparity of the Members or by the competition in exports or attracting foreign direct investments (FDIs) to each other. However, I noticed that there have been constant works and initiatives produced by ASEAN for building the AEC and for economic cooperation to increase intra-ASEAN trade. The ASEAN Charter put in place rules-based systems for ASEAN to establish the AEC. Since establishment of the AFTA in 1992, ASEAN has focused on developing further intra-ASEAN trade. With the common recognition of the prospects of the small medium sized enterprises (SMEs) development in the overall regional economic growth, the cooperation on the SME development can be regarded as a good example of the ASEAN governments’ political will on regional economic development to promote intra-ASEAN trade.

For a successful regional integration, having common interests among the Members to the initiatives and the political commitment to effect the initiatives are preconditions. ASEAN Member Countries share the common interests of building the AEC particularly in response to the competition with China and India. The current financial crisis highlighted the importance of enhancing intra-ASEAN trade and

20 Denis Hew, ‘Introduction: Roadmap to an ASEAN Economic Community’ in Denis Hew (ed.) *Roadmap to an ASEAN Economic Community* (Singapore: ISEAS), 1, p. 11
21 See Section 2.2.1 Establishment of ASEAN Economic Community
22 See Declaration on the ASEAN Economic Community Blueprint 2007 (AEC Blueprint); available at: <http://www.aseansec.org/21081.htm>
regional resilience, giving more weight towards creating synergies through ASEAN integration. From 2007 to 2008, despite the decline in FDI flows, intra-ASEAN investment flows increased.\textsuperscript{24} This was noticed, to a certain extent, thanks to the rising confidence of ASEAN investors in investing in ASEAN Member Countries as ASEAN economies become more integrated and barriers to trade and investment come down.\textsuperscript{25} Therefore, the strong political will in ASEAN on building a single market and production base should be sustained in order to be credible for economic actors and facilitate their cross-border business activities, which will increase intra-ASEAN trade and enhance ASEAN’s global competitiveness.

\textsuperscript{25} Ibid., para. 21
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Appendix A: Interview Questions for ASEAN Experts

1. Please tell me briefly when and how your interests in ASEAN began.

2. Would you say that building an ASEAN Economic Community would mean having a ‘Single Market’ in ASEAN? Is having a ‘Single Market’ in ASEAN appropriate for Southeast Asian countries? Would it be beneficial for the economy within the region? How would it be so?

3. Do you think national private sector and/or foreign investors are becoming more mobile within ASEAN Member States? Are there now more frequent joint venture movements or mergers, or any kind of cross-frontier business collaboration in the private sector within the region than before? Please provide reasons or explanations for why you think so.

4. Would you consider the following market integration projects - the Singapore-Kunming Rail Link (SKRL), ASEAN highway network, ASEAN Power Grid and the Trans-ASEAN Gas Pipeline Network, the Greater Mekong Sub-region (GMS) Economic Cooperation, as cross-border business collaboration? Have you been involved in any of these projects? Or is there any other project that you regard as cross-border business collaboration?

5. Do you think that there are legal or non-legal (e.g. psychological) barriers to businesses performing cross-border activities among ASEAN Member States? Could you provide some examples from your own knowledge or experience, please? Among those you mentioned, in your personal view, which would you regard as the most significant barrier?

6. Would enabling a company to move from one ASEAN State to another be beneficial to the Southeast Asian economies and enhance intra-ASEAN trade? Do you think that ASEAN under the development of the ASEAN Economic Community should provide some mechanisms for such corporate mobility under the institutional framework?

7. What have the Southeast Asian countries done so far to improve such corporate mobility within the region? What are the barriers or problems of running the ASEAN Industrial Cooperation (AICO) Scheme? Do you believe the AICO Scheme is applied now more frequently than before?

8. There are two differing theories in European laws regarding the definition and
recognition of ‘foreign’ companies and the rights conferred upon them, i.e. one links a company to its place of incorporation and the other links the company to the location of its central administration or real seat. Are there similar conflicts of law problems among ASEAN Member States?

9. Among these four mechanisms to enhance corporate mobility, which one in your opinion would work within ASEAN? (Either comment on each of the options or just name the most appropriate.
   i) Adopting an agreement/convention on the mutual recognition of foreign companies
   ii) Protecting rights of establishment (primary/secondary) through ASEAN institutions
   iii) Harmonisation of ASEAN company laws
   iv) Creating a supranational ASEAN Private Company similar to the European Private Company

10. In order to support institutional development and speed up economic integration, scholars have suggested setting up two supranational bodies: An ASEAN Court, to be responsible for dispute settlements; and an ASEAN Economic Secretariat, to be responsible for economic affairs pertaining to ASEAN economic integration. Do you agree with this idea? If so, to what extent, do you think, supranationalism within ASEAN can or should be achieved?

11. The European Commission has the right to implement the European legislation, budget, and programme adopted by the Parliament and Council. The ASEAN Secretariat however lacks the power to enforce the implementation of ASEAN agreements. Some argue that as the list of tasks the ASEAN Secretariat is currently responsible for is rather similar to that of the European Commission, the ASEAN Secretariat could function in the way the European Commission does, particularly on economic affairs or matters pertaining to ASEAN economic integration. Do you think this is a good idea? Do you have any other suggestions for ASEAN Member States to improve upholding their commitments to ASEAN?

12. Would ASEAN benefit from the European Union’s experience in the field of facilitating corporate collaboration and freedom of establishment?

13. Do you have any other comments you would like to share with regard to the freedom of establishment for companies within ASEAN?
14. Could you suggest any further reading for me, please?
Appendix B: Interview Questions for Businessmen

1. Does your company run businesses involving cross-border activities within the Southeast Asian region and ASEAN Member States?

2. Do you think having a ‘Single Market’ in ASEAN appropriate for Southeast Asian countries? Would it be beneficial for you to perform businesses within the region? How would it be so?

3. Do you think national private sector and/or foreign investors are becoming more mobile within ASEAN Member States? In your opinion, are there now more frequent joint venture movements or mergers, or any kind of cross-frontier business collaboration in the private sector within the region than before?

4. Do you think that there are legal or non-legal (e.g. psychological) barriers to businesses performing cross-border activities among ASEAN Member States? Could you provide some examples from your own knowledge or experience, please? Among those you mentioned, in your personal view, which would you regard as the most significant barrier?

5. Would enabling a company to move from one ASEAN State to another be beneficial for your company? Do you think that if ASEAN under the development of the ASEAN Economic Community provide some mechanisms for such corporate mobility under the institutional framework, would you consider using those mechanisms?

6. Have you heard of the ASEAN Industrial Cooperation (AICO) Scheme or involved in this project?

7. Among these four mechanisms to enhance corporate mobility, which one would you prefer? (Either comment on each of the options or just name the most appropriate.)
   i) Adopting an agreement/convention on the mutual recognition of foreign companies
   ii) Protecting rights of establishment (primary/secondary) through ASEAN institutions
   iii) Harmonisation of ASEAN company laws
   iv) Creating a supranational ASEAN Private Company similar to the European Private Company
Appendix C: Interview Supplementary Note

Question 8: The conflicts of law problem in European law

Article 48 of the EC Treaty, in addition to defining ‘companies or firms’, provides that companies or firms, formed in accordance with the law of a Member State and having their registered office, central administration, or principle place of business within the Community, are to be treated in the same way as natural persons who are nationals of a Member State. The freedom of establishment for companies under the Treaty consists of two elements; one is that Member States must recognise the existence of a foreign company if it is formed in accordance with the laws of one Member State, and the other is that the companies should fulfil one of three criteria set out above as a connecting factor with the legal system of a State.

Since the recognition of foreign legal entities as legal persons is a prerequisite to the freedom of establishment of foreign companies, the analysis of freedom of establishment begins with an exploration of the regime for recognition of foreign entities. In Europe, there is a division between the jurisdictions which use the place of incorporation theory and those which use the real seat theory to determine the law of the Member State governing a company. The determination of national legal system under which recognition is to be made is important because it also regulates the company’s validity, legal formation, internal and external administration and its nationality as well as its function, dissolution and winding-up.

According to the real seat doctrine, the law of the country where the company has the location of its central administration or its real seat is the law applicable to company relationships. Those in charge of the company’s management are not free to choose the law which governs company’s law relationships. The centre of administration, as an objective factor, is based on the assumption that a company transacts most of its business in the state where its centre of administration is located. And the use of objective and mandatory connecting factor reflects the relevant conflicts policies pursued, e.g. protection of creditors and minority shareholders, or the regulation on employee representation in German company law. The adoption of the real seat theory was actually motivated by concerns over the practical implications of the consequences of the place of incorporation theory in order to protect the essential national interests of the country where the corporation conducts its business; the company’s potential evasion for the application of the law which is most closely connected with the operations of the company, and the fear of fraud.

According to the incorporation theory, the company is governed by the law of the country where it is incorporated or registered. In the incorporation theory, those in
charge of the company’s management are free to choose which legal system applies to its company law relationship. Regardless of whether an existing company decides to transfer its real seat to the incorporation country while maintaining its status, or whether the company is duly established under a foreign system of law, the company is recognised anywhere as long as the company has met the formation requirements according to the system of law chosen. Due to the formal nature of the decisive factor, it offers high legal certainty and predictability. Because economic trade can be fostered by the lenient and liberal character of the incorporation theory, it also suits well the common interest of accomplishing the Single Market in the European Union. It favours the recognition of foreign companies, and even facilitates the cross-border migration of a company’s management and control office without loss of identity.

In general, the countries applying the place of incorporation principle allow a company to transfer its head office to another Member State without dissolution and without a change of the legal regime of the said company. However, the cross-border transfer of the registered office from the incorporation country results in a change of the applicable company law to that company and requires the dissolution of the company in the home State and its reincorporation in the host State. In contrast, countries applying the real seat principle usually forbid the transfer of registered office unless the company’s head office is also transferred. And, until recently, in France and Germany, the cross-border transfer of the head office was legally impossible as it resulted in winding-up. Italy has adopted a mixed system. The co-existence of these two different approaches made it practically difficult for the companies to move the head office or registered office to another Member State.¹

Question 9: Four mechanisms to enhance corporate mobility

i) Adopting an agreement/convention on the mutual recognition of foreign companies

Article 293 of the EC Treaty provides for negotiations between the Member States to secure, *inter alia*, the mutual recognition of companies and firms, transfer or the seat of companies, and cross-border mergers. The draft Convention on Mutual Recognition of Companies² remains stillborn.

ii) Protecting rights of establishment (primary/secondary) through ASEAN institutions

Within the meaning of the EC Treaty, freedom of establishment is defined as the actual pursuit of economic activity through a fixed establishment, with a physical location in a Member State on a permanent basis and integration into this country’s national economy. As far as companies are concerned, the right of establishment covers their setting up under any kind of form considered suitable by their founders, their administration and their management.\(^3\) Although the EC Treaty intended to include as many types of relevant companies as possible, the entities, to get benefits from the freedom of establishment under Article 48 of the EC Treaty, may need to meet certain criteria: They must be profit-making\(^4\); formed under the law of a Member State and have their registered office, central administration or principle place of business within the EU\(^5\); and they must have an effective and continuous link with the economy of a Member State.\(^6\)

The freedom of establishment may take the form of primary establishment, transferring central administration or registered office of a legal entity from the country of origin to the host country, or secondary establishment, extending its activities in other states by establishing a form of financial or commercial activity dependent, e.g. by setting up agencies, branches or subsidiaries, while the legal entity retains its home office in one state. Although no official definitions of the above secondary establishments have yet been established, the European Court of Justice defined the subsidiary, agency or any other establishment as operational centres with the power, authority and means to conduct business with third parties, who, assuming the link of these establishments with the parent company and not being able to enter into negotiations or contracts with the foreign company itself, prefer to deal with its extension, namely with its agency, branch, office or subsidiary.\(^7\)

In contrast to the primary establishment, the European Court of Justice appears to defend the company’s right to establish in order to pursue their activities in another Member State through a secondary establishment.\(^8\) In the Member States following the real seat doctrine, secondary establishment would be the only legal form of establishment within their boundaries, since the transfer of the company’s main office in another state would signify the dissolution of the existing company and the creation of a new entity with a new seat and a new nationality.

Since the recognition of the need for a common solution at the transnational

\(^4\) Second paragraph of Article 48 EC.
\(^5\) Article 43 EC.
level for corporate mobility in the EU in the Daily Mail judgment, the European Court of Justice in the decisions of Centros, Überseering, Inspire Art, SEVIC Systems and Cartesio has given an impetus to supply a regime of wider recognition and acceptance of corporate movement across frontiers through a variety of different mechanisms in the field of freedom of establishment within the EU.

iii) Harmonisation of ASEAN company laws

Competition between legal orders implies that enterprises and citizens are free to move to the jurisdiction that offers laws best adapted to their preferences. Such a competition between legislators allows individuals to choose the legal rule that most efficiently regulates their problem and implies the lowest costs to solve the conflict. Freedom of movement involves the risk that natural and legal persons will migrate to the Member States that offers the laxest legislation. Preventing a similar ‘race to the bottom’ as in the American experience was one of the original rationales for the European company law harmonisation.

iv) Creating a supranational ASEAN Private Company similar to the European Private Company

The adoption of the European Company Statute allows companies to merge across borders and to transfer their seat from one jurisdiction to another within the EU. Also, the Tenth Directive on cross-border merger and a proposal for the Fourteenth Company Law Directive on the cross-border transfer of the registered office of limited companies will enhance the corporate mobility in Europe. However, it is difficult to say most of these developments were friendly to small businesses. In this regard, particular attention should be given to a proposal for the Statute for a European Private Company, whose aim would be to provide a common legal framework for a European legal form facilitating the operation of business in several Member States of small and

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9 See Robert R. Drury, (2005) ‘The ‘Delaware Syndrome’: European Fears and Reactions’ Journal of Business Law, 709, p. 729; with regard to the minimum capital share, one might question whether the United Kingdom can play the role of a European Delaware, since it offers the most attractive incorporation service. However, other States have awakened to the call of competition. France has reduced the minimum capital requirement for the SARL. In Germany, a draft modernising the law concerning the GmbH and combating its abuse moderately cut down. The debate about the minimum capital rule has accelerated whether this is the right approach to offer protection to creditors and other third parties and has called a research on alternative creditor protection techniques has; Wymeersch, E., (2007) ‘Is a Directive on Corporate Mobility Needed?’ 8 European Business Organization Law Review, 161, pp. 162-163.
medium-sized companies.\textsuperscript{13}

Appendix D: Example of Information Sheet

Information Sheet

The researcher and the research questions

I am a PhD student in the School of Law at the University of Exeter and am undertaking some interviews with a number of experts/businessmen in the field to assist my research. The provisional title of my thesis is “Can ASEAN Benefit from the European Union’s Experience in the Field of Facilitating Corporate Collaboration and Freedom of Establishment?”

The aim of my thesis is to put forward suggestions directed at the realisation of the ASEAN single market in the field of economic integration and cooperation in the business sector based upon the experience of the European Union. The thesis traces the development of certain policies and initiatives in the EU, which are aimed at promoting cooperation and collaboration of freedom of companies in the EU to establish themselves in another Member State. The thesis would conclude with a series of suggestions for implementation in ASEAN which may have a beneficial effect on business integration and freedoms.

In order to accomplish this objective, I am seeking to discover current conditions for business cooperation and collaboration among ASEAN Member Countries and analyses barriers to effective cooperation. I am interested in finding out whether private sector or foreign investors are becoming more mobile within ASEAN Member States as indicated by the frequency of joint venture movements, what legal/non-legal barriers exist to businesses performing cross-border activities within the ASEAN region, if enabling a company to move from one ASEAN State to another be beneficial and enhance intra-ASEAN trade, and in order to improve such corporate mobility, what kind of mechanisms ASEAN under the development of the ASEAN Economic Community would provide.

My research methods have been designed and approved under the University of Exeter Research Ethics procedures for the School of Law.

How were the participants selected?
You were selected to participate in this study because you are an expert in Southeast Asian studies and the ASEAN economic integration or performing cross-frontier
businesses with the ASEAN region.

**Arrangements for Withdrawal of Participants**
Your participation in the project is entirely voluntary and you are entitled to withdraw from the project (either in writing or verbally) at any point during the interview, and are not required to give your reasons for so doing. Please, be assured that you are completely free to decline to answer any question if you are not comfortable doing so.

**Arrangements to Ensure Confidentiality**
The interviews will be recorded and then transcribed, and the information contained in them is kept anonymous (unless you agree otherwise). The transcripts will be saved on a PC that will be password protected and stored in a locked room.

**Arrangements for Dissemination of Results**
Results will be mainly included into my thesis or published in the form of articles within respected academic journals. In addition, some of the findings may be disseminated in the form of conference papers, or a summary report. In all cases professional research ethics will be adhered to and appropriate confidentiality maintained; I will seek to provide a balanced and scholarly depiction of research findings.

**Arrangements for Provision of Results to Participants**
If you would like a summary of the outcome of my research project, including the conclusions I eventually draw from the data I have gathered, please inform me, and arrangements will be made to send one to you after my PhD award.

**Researcher Information**
If you have questions, please feel free ask now or contact me any time via Email.

Miss Soyeon Kim

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Appendix E: Example of Consent Form

Consent Form

1. I have read and had explained to me the accompanying Information Sheet relating to the PhD thesis of Miss Soyeon Kim.

2. I have had explained to me the purposes of the project and what will be required of me, and any questions I have had have been answered to my satisfaction. I agree to the arrangements described in the Information Sheet in so far as they relate to my participation.

3. I understand that participation is entirely voluntary and free of expense, and that I have the right to withdraw from the project at any time.

4. There are a number of reasons for which I may not prefer that my true name be used in Soyeon Kim’s thesis, her presentations and articles related to this research, or that this interview is recorded. (Please, delete as appropriate.)

(a) I would mind if my true name to be used in Soyeon Kim’s thesis, any oral presentations or written documents resulting from this research.

   I do not mind if my true name to be used in Soyeon Kim’s thesis, any oral presentations or written documents resulting from this research.

(b) I would mind if this interview is recorded.

   I do not mind if this interview is recorded.

5. I have received and read a copy of this Consent Form and of the accompanying Information Sheet.

   Name:

   Signed:

   Date: