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Strengthening and Deepening ASEAN Economic Integration through the ASEAN Free Trade Area : Legal Aspects of the Implementation of AFTA

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Strengthening and Deepening ASEAN Economic Integration

Through the

ASEAN Free Trade Area: Legal Aspects of the Implementation of AFTA

By

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To My Family and My Beloved Grandmother

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Nimnual Piewthongngam

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ABBREVIATIONS/ACRONYMS

AEC	**ASEAN Economic Community**
AEM	**ASEAN Economic Meeting**
AFAS	**ASEAN Free Trade Agreement in Services**
AFTA	**ASEAN Free Trade Area**
AIA	**ASEAN Investment Area**
ASEAN	**Association of Southeast Asian Nations**
ASEAN-6	**Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore and Thailand**
CEPT Scheme	**Agreement on Common Effective Scheme for**
CLMV	**Cambodia, Lao PDR, Myanmar, Vietnam**
CTC	**change of tariff classification**
CTH	**change of tariff heading**
CU	**custom union**
EU	**European Union**
FTA	**free trade area**
GATT	**General Agreement on Tariffs and Trades**
HSL	**highly sensitive list**
MFN	**Most-Favoured-Nation**
NAFTA	**North American Free Trade Agreement**
NTB	**non-tariff-barrier**

NTM	**non-tariff-measure**
PTA	**Preferential Trade Arrangement**
QR	**quantitative restriction**
ROO	**rules of origin**
RTA	**regional trade arrangement**
SEOM	**Senior Economic Officials Meeting**
SL	**sensitive list**
TB	**tariff barrier**
TEL	**temporary exclusion list**
WTO	**World Trade Organization**

Introduction

The Association of Southeast Asia Nations or ASEAN is an inter-governmental organization with ten Member States namely: Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam. ASEAN was found in 1967 to "establish a firm foundation for common action to promote regional cooperation in South-East Asia in the spirit of equality and partnership and thereby contribute towards peace, progress and prosperity in the region".[1] After its birth in 1967, ASEAN Member States have been focusing their economic cooperation along with political and social cooperation. In 1992, ASEAN Founding Members[2] and Brunei Darussalam signed the Agreement on the Preferential Tariff Scheme for ASEAN Free Trade Area[3] to establish a free trade area among ASEAN Members. The main objectives of AFTA are to strengthen economic integration of ASEAN Member, create a free movement of good, and increase intra-ASEAN trade. AFTA is expected to increase the ASEAN region's competitive advantage as a single production unit geared for the world market by liberalization of trade through the elimination of tariffs and non-tariff barriers among ASEAN members. The elimination of tariff and non-tariff barriers among

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[1] Preamble of ASEAN Declaration, Bangkok, 8 August 1967, available at http://www.aseansec.org/1212.htm.

[2] Indonesia, Malaysia, Philippines, Singapore and Thailand.

[3] Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area, 28 January 1992 Singapore as amended by Protocol to Amend Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area, 15 December 1995 Thailand and Protocol to Amend Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area for the Elimination of Import Duties, 31 January 2003, available at http://www.aseansec.org, [hereinafter CEPT Scheme].

ASEAN Member States would promote greater economic efficiency, productivity, and competitiveness. The new Members, Cambodia, Laos, Myanmar and Vietnam consented to join AFTA and other economic agreements upon their accessions to ASEAN. The CEPT Scheme calls for intra-region trade liberalization by eliminate tariff barriers, quantitative restrictions and other non-tariff barriers.

There are four conditions for a product to be eligible for preferential tariff treatment under the CEPT Scheme. First condition, an exported product must be in the Inclusion List (IL) of exporting and importing ASEAN Members and must have a tariff of 20% or below. Second, an exported product must be qualified as an ASEAN product under the Rules of Origin for the Agreement on the CEPT Scheme.[4] Third, an imported product must be directly consigned from exporting Member to importing Member under direct consignment rules of the CEPT Scheme.[5] The forth, and last, condition is that an imported product must be accompanied with a certificate of ASEAN origin[6] issued by a government authority of exporting Member State.[7] A certificate of origin is a proof of ASEAN origin that exporter must present to the customs authority of the importing Member State.

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[4] Rules of Origin for the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, available at http://www.aseansec.org/17293.pdf , last visited March 10, 2010, [hereinafter CEPT-AFTA ROO].

[5] CEPT-AFTA ROO, *supra* note 3 at art.7 (1) states " preferential tariff treatment shall be applied to a good satisfying the requirements of this CEPT-AFTA-ROO and which is consigned directly between the territories of the exporting Member State and the importing Member State.

[6] ASEAN certificate of origin is called Form D. The ASEAN certification with be referred as Form D through out this study.

[7] Operational Certification Procedures for the Rules of Origin of the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, Appendix D of CEPT-AFTA ROO.

This dissertation is to view ASEAN Free Trade Area from its evolutionary perspective, as the evolution of ASEAN is, and should be, one of the keys to economic cooperation that will move ASEAN to become the ASEAN Economic Community by the year 2015.[8] The ASEAN Economic Community is the newest and the most ambiguous project of ASEAN economic integration. "ASEAN Economic Community will transform ASEAN into a single market and production, a highly competitive economic region, a region of equitable economic development, and ad region fully integrated into global economy".[9]

The dissertation discusses the formation of ASEAN and AFTA, the underlying principles of AFTA, and particularly the tenor and timeframe for the implementation of the commitments of Member States under the Agreement on Common Effective Scheme for ASEAN Free Trade Area. The inventory of their development and evolution, in which an overview of AFTA-especially in regard to the CEPT Scheme, maybe an impression of *déjà vu*-will be inevitable. Otherwise, the trend in the evolution and development of AFTA will not be discernable. In view of this consideration, the outline of this dissertation shall provisionally be as follows:

Chapter I introduces the Association of Southeast Asian Nations (ASEAN), and discusses how it was envisioned and came into being. This chapter also discusses the political, social and economic cooperation among ASEAN Member States and briefly details the cooperation between those States so as to provide a better overall understanding of ASEAN. ASEAN Member States have agreed to deepen their regional organization integration by establishing the ASEAN Community in the year 2015. That entity will consist

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[8] The original goal to establish the ASEAN Economic Community was 2020.

[9] Declaration on the ASEAN Economic Community Blueprint, Singapore, signed on November 20, 2007, ASEAN Secretariat, Jakarta Indonesia, January 2008.

of three pillars, namely: the ASEAN Political-Security Community, the ASEAN Social-Cultural Community and the ASEAN Economic Community. In order to reach this goal, ASEAN Member States have created a blue print for each pillar to serve as coherent master plans in guiding the establishment of the aforementioned communities in 2015. Once the blueprints have been implemented, the ASEAN Community will be fully established and functioning.

Section Two of Chapter I discusses the establishment of the ASEAN Free Trade Area (AFTA), as well as a series of agreements concluded by ASEAN Member States relating to the formation of this free trade area. The third section of Chapter I examines the institutional and structural aspects of AFTA. The institutional structure of AFTA is the combination of AFTA, the AFTA Council, and ASEAN institutions such as the ASEAN Secretariat and the Senior Economic Officials Meeting (SEOM). These institutions are responsible for providing support to the AFTA Council. This section will focus on the cooperation among the institutions at the regional level and at the national level. This chapter ends with Conclusion section.

Chapter II provides detailed description and analysis of the legal principles and the one exception in the implementation of AFTA. Chapter II consists of two sections; Section One provides a detailed description and analysis of obligations of Member States to the implementation of the CEPT Scheme. These obligations are the elimination of tariffs, and non-tariff barriers for all products. Products under the CEPT Scheme are divided into four lists: the Inclusion List, the Sensitive Products under the Temporary Exclusion List, the Unprocessed Agricultural Products under the Sensitive List, and the General Exception List. Section One also examines the eliminations of tariff-barriers and non-tariff barrier of

ASEAN-6 namely: Indonesia, Malaysia, the Philippines, Singapore, Thailand, and Brunei Darussalam.[10] Moreover, this section also discusses the principles and grace periods for implementing the CEPT Scheme for the new ASEAN Members, which are Vietnam, Lao PDR, Myanmar and Cambodia.[11]

Section Two discusses the exceptions to the obligation to implement the CEPT Scheme. Member States may exclude sensitive products from obligations under the CEPT Scheme if they consider necessary to protect national security, public morals, human, animal or plant life, and health. They may also exclude those products they deem necessary for the protection of articles of artistic, historic, and archaeological value. The above items will be placed on the General Exception (GE) List. This section will also discuss the Emergency Measures, which allow the suspension of the preferences on imports of particular products and the creation of measures on imported products. This chapter will be summarized in Conclusion section which will also provides some comments and suggestions for this chapter.

Chapter III analyzes and describes the Rules of Origin under international trade law for better understand the need of rules of origin in every free trade and criterion to determine origin of a product that have been used widely in international trading system. Section Two of this chapter will study ASEAN Rules of Origin in depth including the origin criteria, consignment and packing conditions and certification and verification of ASEAN Rules of Origin. Conclusion will summarize the content and point out some observations of this chapter then give recommendations.

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[10] Original Members of AFTA are often called **ASEAN-6**. This dissertation will use ASEAN-6 to refer to Indonesia, Malaysia, the Philippines, Singapore, Thailand, and Brunei Darussalam.

[11] The newer Members of ASEAN are often called **CLMV**. This dissertation will use CLMV to refer to Cambodia, Lao PDR, Myanmar and Vietnam.

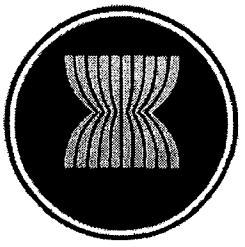
Chapter IV discusses the dispute settlement procedures under the CEPT Scheme for the AFTA Agreement, as well as, the ASEAN Protocol on Enhanced Dispute Settlement Mechanism 2003, which is the revised version of the Protocol on Dispute Settlement of 1996.

Chapter V: Conclusion and Recommendations will be devoted to the study and legal analysis of the consequences of the above-mentioned variants. These variants have substantially changed the orientation and cadence in the development of AFTA. The conclusion of bilateral free trade agreements may be an economic matter, but there is also a legal aspect, and has thus to be studied and analyzed from an inter-disciplinary (*i.e.* juridico-economic) perspective in order to better understand the future prospect of AFTA in the contemporary world. For instance, the impact of the conclusion of bilateral free trade agreements on the potential and ability of AFTA to attain its objective. The conclusion will point out some challenges and obstacles of the implementation of AFTA that have been found in this study. Moreover, this study will propose some recommendations to improve and develop the effectiveness of AFTA.

Chapter I: Introduction to the Association of Southeast Asian Nations and the ASEAN Free Trade Area

The formation of the Association of Southeast Asian Nations (ASEAN) and the ASEAN economic integration though ASEAN Free Trade Area will be studied in this chapter. For the best illustration of ASEAN and AFTA, this chapter will be divided into three sections: Section One will talk about the establishment of the Association of Southeast Asian Nations (ASEAN); Section Two will focus on the economic integration of ASEAN under establishment of ASEAN Free Trade Area. The last section of this chapter examines the institutional and structural aspects of AFTA.

I. The Association of Southeast Asian Nations: ASEAN



"ONE VISION, ONE IDENTITY, ONE COMMUNITY" [1]

A.. The Establishment Association of Southeast Asian Nations

This section will study how ASEAN came into being as well as membership of ASEAN. ASEAN Member States cooperate in three areas namely: Political, Social and Economic cooperation. This section will not only study the historical background of ASEAN and the ASEAN cooperation but also study the new development of ASEAN integration under the ASEAN Charter to create ASEAN Community in 2015.

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[1] ASEAN Logo and Motto.

In 1967 Thanat Khoman,[2] Foreign Minister of Thailand, suggested to the Association of Southeast Asia, the formation of an organization for regional co-operation in Southeast Asia. On the 8th of August 1967, the Foreign Ministers of Indonesia, Malaysia, the Philippines, Singapore and Thailand,[3] signed a historic agreement the "ASEAN Declaration."[4] The purpose of the agreement was to establish the regional organization that became known as the Association of Southeast Asian Nations (ASEAN). The primary purpose of ASEAN was "to establish a firm foundation for common action to promote regional cooperation in South-East Asia in the spirit of equality and partnership and thereby contribute to peace, progress, and prosperity in the region".[5]

The Bangkok Declaration established an inter-governmental organization of the region known as the Association of South-East Asian Nations (ASEAN). The aims and purposes of founding ASEAN included the promotion of cooperation in the economic, social, cultural, technical, educational and other fields. Moreover, ASEAN aims to promote regional peace and stability through abiding respect for justice and the rule of law and adherence to the principles of the United Nations Charter. The Bangkok Declaration was a first historic achievement among Southeast Asian countries. Flores and Abad describe a characteristic of

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[2] Dr. Thanat Khoman, the Minister of Foreign Affairs, of Thailand, who bought up the idea of establishing an inter-governmental organization in Southeast Asian region. He was often referred as the father of ASEAN.

[3] Adam Malik of Indonesia, Narciso R. Ramos of the Philippines, Tun Abdul Razak of Malaysia, S. Rajaratnam of Singapore, and Thanat Khoman of Thailand - would subsequently be hailed as the Founding Fathers of probably the most successful inter-governmental organization in the developing world today.

Jamil Maiden Flores and Jun Abad, *The Founding of ASEAN*, in a publication of the Association of Southeast Asian Nations in commemoration of its 30th Anniversary on 8 August 1997, available at http://www.aseansec.org/11835.htm (last visited January 15th, 2010).

[4] ASEAN Declaration known as Bangkok Declaration signed August 8th 1967, available at http://www.aseansec.org/1212.htm [hereinafter **Bangkok Declaration**].

[5] *Id.*

the Bangkok Declaration:

> [T]he two-page Bangkok Declaration not only contains the rationale for the establishment of ASEAN and its specific objectives. It represents the organization's modus operandi of building on small steps, voluntary, and informal arrangements towards more binding and institutionalized agreements. All the founding member states and the newer members have stood fast to the spirit of the Bangkok Declaration.[6]

The aims and purposes of the founding of ASEAN, as stated in the Bangkok Declaration, are as follows:

> 1. To accelerate the economic growth, social progress and cultural development in the region through joint endeavors in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of South-East Asian Nations;
>
> 2. To promote regional peace and stability through abiding respect for justice and the rule of law in the relationship among countries of the region and adherence to the principles of the United Nations Charter;
>
> 3. To promote active collaboration and mutual assistance on matters of common interest in the economic, social, cultural, technical, scientific and administrative fields;
>
> 4. To provide assistance to each other in the form of training and research

[6] Flores & Abad, *Supra* note 3.

facilities in the educational, professional, technical and administrative spheres;

5. To collaborate more effectively for the greater utilization of their agriculture and industries, the expansion of their trade, including the study of the problems of international commodity trade, the improvement of their transportation and communications facilities and the raising of the living standards of their peoples;

6. To promote South-East Asian studies;

7. To maintain close and beneficial cooperation with existing international and regional organizations with similar aims and purposes, and explore all avenues for even closer cooperation among themselves.[7]

The Bangkok Declaration confirmed the intention of the five Founding Members that ASEAN is open for participation to all States in the Southeast Asian Region who subscribe to the aforementioned aims, principles, and purposes.[8] Brunei Darussalam joined ASEAN on the 8th of January 1984, Vietnam on the 28th of July 1995, Lao PDR and Myanmar on the 23rd of July 1997, and Cambodia on the 30th of April 1999, thereby increasing ASEAN membership from five to ten Member States.[9]

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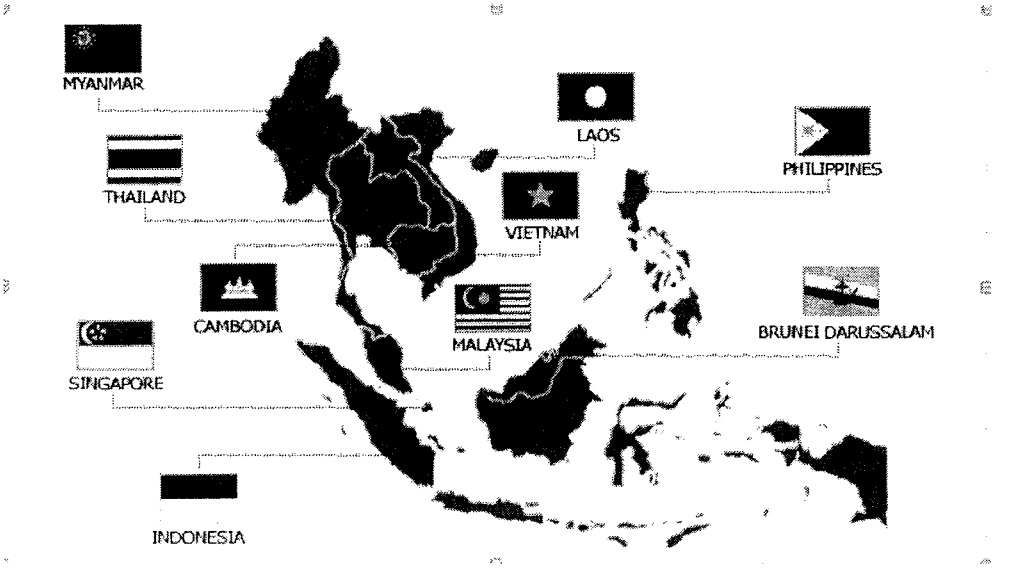
[7] Bangkok Declaration, *supra* note 4.

[8] Bangkok Declaration, *supra* note 4, at art. 4.

[9] The Founding Members of ASEAN and Brunei are often referred as ASEAN-6. The **ASEAN-6** will be used through out this dissertation to refer to Brunei, Indonesia, Malaysia, Philippines, Singapore and Thailand.

The four newer Members are called CLMV. The **CLMV** will be used throughout this study to refer to Cambodia, Myanmar, Lao PDR and Vietnam.



Source www.aseansec.org

Termsak Chalermpanupap[10] comments on the ASEAN membership that

> Having included the ten Southeast Asian nations in its membership, therefore, represents a historic achievement of ASEAN as a confidence-building mechanism in the region. The fact that its members have different political systems, including some with opposite ideologies, makes the achievement even more remarkable. ASEAN appears to be the only regional organization with such unique political diversity.[11]

Thanat Khoman, who introduced the idea of creating an international organization in Southeast Asia that led to the foundation of ASEAN, explained the reason why the Southeast

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[10] Dr. Termsak Chalermpalanupap is a Director and Head of Research, Office of Secretary-General of ASEAN.

[11] Termsak Chalermpalanupap, *ASEAN-10: Meeting the Challenges*, This paper was presented at the Asia-Pacific Roundtable held in Kuala Lumpur on June 1st 1999, available at http://www.aseansec.org/2833.htm.

Asia region needed an organization for co-operation as follows:

> [T]he most important of them was the fact that, with the withdrawal of the colonial powers, there would have been a power vacuum which could have attracted outsiders to step in for political gains. As the colonial masters had discouraged any form of intra-regional contact, the idea of neighbors working together in a joint effort was thus to be encouraged.[12]

Figure 1.1 demonstrates statistic of selected main basic ASEAN indicators to give better view of ASEAN basic information by member country and as a whole such as area, population, gross domestic product (GDP) and foreign direct investment inflow (FDI).

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[12] Moreover, Khoman observes that "co-operation among disparate members located in distant lands could be ineffective. Therefore to strive to build co-operation among those who lived close to one another and shared common interests. Another reason was the need to join forces became imperative for the Southeast Asian countries in order to be heard and to be effective. Lastly, Khoman concluded that it is common knowledge that co-operation and ultimately integration serve the interests of all- something that individual efforts can never achieve.

Thanat Khoman, *ASEAN Conception and Evolution*, available at http://www.aseansec.org/thanat.htm.

The author was the Foreign Minister of Thailand when ASEAN was founded in Bangkok in 1967. He was also the one who bought up the idea of establishing an international organization in Southeast Asian region. This article was reprinted from the ASEAN Reader, Institute of Southeast Asian Studies, Singapore, 1992.

Figure 1.1 Selected Basic ASEAN Indicators, Source: ASEAN Statistic

Selected basic ASEAN indicators
as of 4 January 2010

Brunei Darussalam	5,765	398	69	1.8	14,146.7	35,544.5	48,554.6	8,754.2	2,106.0	11,860.2	260.2	239.2
Cambodia	181,035	14,856	81	2.0	11,149.9	760.8	1,924.7	4,358.5	4,417.0	8,775.6	867.3	815.2
Indonesia	1,860,360	226,523	123	1.3	511,174.4	2,236.9	3,949.8	137,020.4	129,197.3	266,217.7	6,928.3	7,918.5
Lao PDR	236,800	5,763	24	2.8	5,403.4	937.6	2,322.3	827.7	1,803.2	2,630.9	323.5	227.8
Malaysia	330,252	27,729	84	2.3	222,057.2	8,008.2	13,862.4	194,495.9	144,298.8	338,794.7	8,401.2	7,318.4
Myanmar	676,577	58,510	86	1.7	26,205.0	447.9	1,161.6	6,620.6	3,794.9	10,415.4	714.8	283.0
The Philippines	300,000	90,457	302	2.1	166,772.8	1,843.7	3,515.2	49,025.4	56,645.6	105,671.0	2,916.0	1,520.0
Singapore	710	4,839	6,844	5.6	182,102.7	37,629.2	49,418.6	241,404.7	230,760.3	472,165.0	31,550.3	22,801.8
Thailand	513,120	66,482	130	0.7	273,728.6	4,117.3	8,230.1	174,966.7	177,567.5	352,534.2	11,238.1	9,834.5
Viet Nam	331,212	86,160	260	1.2	90,700.8	1,052.7	2,821.4	61,777.8	79,579.2	141,357.0	6,739.0	8,050.0
ASEAN	4,435,830	583,518	132	1.5	1,503,441.5	2,576.5	4,735.5	879,251.9	831,169.9	1,710,421.7	69,938.8	59,008.3

Symbols used:
.. not available as of publication time
n.a. not applicable/not ascertained/not compiled
Data in italics are the latest updated/revised figures from previous posting

Notes:
1/ Refers to Based on mid-year total population based on country projections
2/ 2008 annual figures for Cambodia, Lao PDR and Myanmar are taken from the IMF WEO Database October 2009
3/ Recomputed based on IMF WEO Database October 2009 estimates and the latest actual country data
4/ Unless otherwise indicated, figures include equity, reinvested earnings and inter-company loans. Singapore data for 2008 covers only equity and reinvested earnings.

The next subsection will examine the ASEAN cooperation and the attempt to establish ASEAN Community in 2015.

B.. ASEAN Cooperation

Since its birth in 1967, ASEAN continues to grow in maturity in political, social as well as economic co-operation; this will be discussed later in this work. On the 30th Anniversary of ASEAN, the ASEAN Leaders adopted ASEAN Vision 2020,[13] which envisions ASEAN as a concert of Southeast Asian nations, outward looking, living in peace, stability and prosperity, and bonded together in partnership in dynamic development within a community of caring societies. At the Ninth ASEAN Summit in 2003 at Bali Indonesia,

[13] ASEAN Vision 2020 signed on December 15th 1997, Kuala Lumpur, available at http://www.aseansec.org/1814.htm (last visited March 20, 2010).

ASEAN Leaders signed the Declaration of ASEAN Concord II or Bali Concord II.[14] Their goal was to establish an ASEAN Community in the year 2020. The Bali Concord II provides that the ASEAN Community comprises three pillars, namely political and security cooperation (ASEAN Political-Social Community), economic cooperation (ASEAN Economic Community), and socio-cultural cooperation (ASEAN Socio-Cultural Community). These institutions are closely intertwined and mutually reinforcing for the purpose of ensuring durable peace, stability and shared prosperity in the region.

Subsequently, at the 12th ASEAN Summit in January 2007, ASEAN Leaders affirmed their strong commitment to accelerating the establishment of an ASEAN Community by 2015 and signed the Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015.[15] In 2007, ASEAN Leaders of the 10 ASEAN Members States celebrate the 40th anniversary of ASEAN's founding in 1967 by signing the ASEAN Charter at the 13th ASEAN Summit in Singapore.[16] "The ASEAN Charter serves as a firm foundation of the ASEAN Community by providing legal status and institutional framework for ASEAN. The charter also codifies ASEAN norms, rules and values; it sets clear targets for ASEAN; and it presents accountability and compliance."[17]

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[14] ASEAN Declaration of Bali Concord II, signed on 17th October 2003 at Bali, Indonesia, available at http://www.aseansec.org/15159.htm (last visited January 15, 2010) [hereinafter **Bali Concord II**].

[15] Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015 signed on January 13th 2007 at Cebu, Philippines, available at http://www.aseansec.org/19260.htm (last visited February 1, 2010).

[16] ASEAN Charter signed on 20th November 2007 and entered into force on 15 December 2008, available at http://www.aseansec.org/about_ASEAN.html (visited January 16, 2010).

[17] http://www.aseansec.org/21829.htm (visited January 28, 2010).

The ASEAN Charter is the second historic agreement after the Bangkok Declaration 1967. ASEAN Member States agreed to establish the legal and institutional framework for ASEAN as the premier inter-governmental organization of the region. The ASEAN Charter consists of 13 Chapters, 55 Articles, and 4 annexes in the ASEAN Charter. In addition, each pillar has its own Blueprint that contains commitments of Members, and implementation guidelines, and as well, a roadmap to get to the finish line in 2015. ASEAN Members expected that strengthening political, social and economic cooperation would lead them to the greater level of regional integration of an ASEAN Community.

1. Political Cooperation

Since the founding of ASEAN in 1967, ASEAN has forged numbers of major political accords. Such political cooperation has greatly contributed to peace and stability in the Southeast Asian region. In 1971, the foreign ministers of the five ASEAN founding members signed the Zone of Peace, Freedom and Neutrality (ZOPFAN) Declaration to exert efforts to secure the recognition of and respect for Southeast Asia as a Zone of Peace, Freedom and Neutrality, free from any manner of interference by outside powers and also to make concerted efforts to broaden the areas of cooperation, which would contribute to their strength, solidarity and closer relationship. The ZOPFAN recognizes "the right of every state, large or small, to lead its national existence free from outside interference in its internal affairs as this interference will adversely affect its freedom, independence and integrity."[18]

Subsequently, ASEAN Member States affirmed the fundamental principles in their

[18] Overview of ASEAN Political-Security Cooperation, http://www.aseansec.org/92.htm (last visited February 10, 2010).

relations by signing the Treaty of Amity and Cooperation in Southeast Asia (TAC) [19] in February 1976. The TAC stated clearly that in their relations with one another regarding political and security dialogue and cooperation, members should aim to promote regional peace and stability by enhancing regional resilience. Moreover, the TAC confirmed that regional resilience would be achieved by cooperation in all fields based on the principles of self-confidence, self-reliance, mutual respect, cooperation, and solidarity, all of which constitute the foundation for a strong and viable community of Southeast Asian nations. The TAC also provides a code of conduct for the peaceful settlement of disputes, and mandates, as a dispute-settlement mechanism, the establishment of a high council composed of ministerial representatives from the parties. "To this day, TAC remains the only indigenous regional diplomatic instrument providing a mechanism and processes for the peaceful settlement of disputes".[20] There have been many major political accords of ASEAN since its birth; these include the Zone of Peace, Freedom and Neutrality Declaration, signed on 27 November 1971; the Declaration of ASEAN Concord, signed on 24 February 1976; the Treaty on the Southeast Asia Nuclear Weapon-Free Zone, signed on 15 December 1997; and the ASEAN Vision 2020, signed on 15 December 1997.

The ASEAN Security Community was designed and implemented to bring ASEAN's political and security cooperation to a higher plane to ensure that countries in the region live at peace with one another and with the world at large in a just, democratic and harmonious environment. To continue and strengthen political and security cooperation among ASEAN Members, the ASEAN Leaders agreed to establish the ASEAN Political-Security Community

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[19] The Treaty of Amity and Cooperation (TAC) in Southeast Asia signed on February 24,1976, available at http://www.aseansec.org/64.htm (last visited February 15, 2010) [hereinafter TAC].

[20] *Id.*

(APSC) by 2015. The purpose of establishing the APSC is to ensure that countries in the region live at peace with one another and with the world in a just, democratic and harmonious environment. The ASEAN Political-Security Community Blueprint[21] was signed by the ASEAN Leaders to provide a roadmap and timetable to establish the APSC. Moreover, aiming to retain its significance and have an enduring quality, the APSC Blueprint also has the flexibility to continue programs/activities beyond 2015. The APSC Blueprint envisages ASEAN to be a rules-based community of shared values and norms; a cohesive, peaceful, stable and resilient region with shared responsibility for comprehensive security; as well as a dynamic and outward-looking region in an increasingly integrated and interdependent world.[22] ASEAN Members expect that the full implementation of ASEAN Political-Security Community Blueprint will bring out the prosperity to protect the interests and welfare of ASEAN people.

1. Social Cooperation

ASEAN founding Members stated, in the Bangkok Declaration of 1967, that the social cooperation among Members intends to promote social progress and cultural development in the region through joint endeavors in the spirit of equality and partnership in order to strengthen the foundation for a prosperous and peaceful community of Southeast Asian Nations.[23] ASEAN Member States have been developing their social cooperation in many areas, which include, but are not limited to the following: culture and arts, disaster

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[21] ASEAN Political-Security Community Blueprint: Jakarta: ASEAN Secretariat, June 2009. The ASEAN Leaders at the 14th ASEAN Summit adopted the APSC Blueprint on 1 March 2009 in Cha-am/Hua Hin, Thailand, available at http://www.aseansec.org/5187-18.pdf (last visited February 8, 2010) [hereinafter **APSC Blueprint**].

[22] *Id.* art.10.

[23] Bangkok Declaration, *supra* note 4.

management, education, environment, health, information, labor, rural development and poverty eradication, science and technology, and social welfare.

Social cooperation was also included in ASEAN cooperation under the ASEAN Community as one of its three pillars by establishing ASEAN Socio-Cultural Community (ASCC). At the 13th ASEAN Summit held in Singapore on the 20th of November 2007, ASEAN Members agreed to develop the ASEAN Socio-Cultural Community Blueprint[24] to ensure that concrete actions are undertaken to promote the establishment of an ASEAN Socio-Cultural Community. The ASEAN Socio-Cultural Community Blueprint declares the goal of ASEAN Members is

> to contribute to realizing an ASEAN Community that is people-centered and socially responsible with a view to achieving enduring solidarity and unity among the nations and peoples of ASEAN by forging a common identity and building a caring and sharing society which is inclusive and harmonious where the well-being, livelihood, and welfare of the peoples are enhanced.[25]

2. Economic Cooperation

Economic cooperation has always been a foremost among ASEAN Member States. Even though trade among the Member States was insignificant in the early stage of their relationship, the ASEAN Secretariat estimated intra-ASEAN trade from the total trade of the Member States between 1967 and the early 1970s at between 12 and 15 percent. Therefore,

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[24] ASEAN Socio-Cultural Community Blueprint: Jakarta: ASEAN Secretariat, June 2009, available at http://www.aseansec.org/5187-19.pdf (last visited February 2, 2010).The ASCC Blueprint was adopted by the ASEAN Leaders at the 14th ASEAN Summit on 1 March 2009 in Cha-am/Hua Hin, Thailand. [hereinafter **ASCC Blueprint**].

[25] *Id.*

ASEAN Members focused on increasing intra-ASEAN trade in ASEAN economic cooperation. Khoman suggests that "For the months and years to come, gradual economic integration should be the credo for ASEAN if we want our enterprise to remain viable and continue to progress. Otherwise, it may become stagnant, unable to keep up with the pace of global activity."[26] Khoman also affirms that ASEAN Members need to focus their cooperation in economic to create ASEAN trade zone. He states:

> We must set ourselves on the economic track we designed for the Association. This is necessary, even imperative, now more then ever as the world is being carved into powerful trade zones that deal with one another instead of with individual nations. At present, many countries outside our region are prodding us to integrate so that a single or more unified market will simplify and facilitate trade.[27]

In 1977, ASEAN signed an ASEAN Preferential Trading Arrangement[28], which accorded tariff preferences for trade among ASEAN economies. The ASEAN-PTA was designed as a framework for trade promotion among ASEAN States to extend trade preferences to each other through preferential tariffs, long-term quantity contracts, to purchase finance support at preferential interest rates and preference in procurement by Government entities. Subsequently in 1987, ASEAN Members adopted the Enhanced Preferential Trading Arrangement Program at the Third ASEAN Summit in Manila. This

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[26] Khoman, *supra* note 12.

[27] Khoman, *supra* note 12.

[28] Agreement on ASEAN Preferential Trading Arrangements signed on February 24th 1977, Manila, available at http://www.aseansec.org/1376.htm (last visited January 12, 20100 [hereinafter **ASEAN-PTA**].

program further increased intra-ASEAN trade. However, a study of the Centre for ASEAN Studies in 1996 by Ludo Cuyver and Wisarn Pupphavesa[29] find that the ASEAN PTA had only a limited impact because of the following reasons:

- the product groups that get a preferential treatment in an ASEAN country, often are of little importance as imports,
- ASEAN countries could easily exclude product groups from the PTA, leading to long exclusion lists,
- preference margins (tariff reductions of 20-25 %) are too low (the more so if the low price elasticity of demand for PTA goods is taken into account).[30]

Jose L. Tongzen[31] studies intra-ASEAN trade statistics after ASEAN came up with the ASEAN PTA program in 1977 and finds that "the ASEAN-PTA clearly failed to increase the share of intra-ASEAN imports which dropped slightly from 20.8 percent (of total imports) in 1984 to 19.0 percent in 1992, and which dropped again to 18.4 percent and 16.9 percent in 1994 and 1995 respectively."[32] The failure of the ASEAN-PTA forced ASEAN

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[29] **Ludo Cuyvers** is Professor in International Economics, Chairman of the Department of International Economics, International Management and Diplomacy at the Faculty of Applied Economics, and Director of the Centre on ASEAN Studies at the University of Antwerp.

Dr. W isarn Pupphavesa is Dean of the School of Development Economics at the National Institute of Development Administration, Bangkok, Thailand. He was also a Member of the High Level Task Force on AFTA-CER FTA (1999-2000).

[30] Ludo Cuyvers and Wisarn Pupphavesa, *From ASEAN to AFTA,* DISCUSSION PAPER NO. 6, Centre for International Management and Development Antwerp (1996).

[31] Jose L. Tongzen is Associate Professor, Department of Economics, National University of Singapore.

[32] JOSE L. TONGZEN, THE ECONOMIES OF SOUTHEAST ASIA, 2nd ed., Edward Elgar Publishing LTD., Reprinted 2002, 46.

Member Counties to design a new project that could help them continue their economic co-operation. In addition, in the 1990s, a number of changes in the international economic circumstance, such as the strengthening of regional integration in Europe and the North American Free Trade Agreement, which came into force in 1994, posed threats to ASEAN's economic goals.

With the fear of trade diversions to Europe and North America, ASEAN Members strengthened their economic co-operation by signing the Framework Agreement on Enhancing Economic Cooperation. This agreement was adopted at the Fourth ASEAN Summit in Singapore in 1992. Additionally, the agreement included the launching of a scheme toward the creation of a free trade area in ASEAN, which is called the ASEAN Free Trade Area or AFTA.

In 1992, Thai Prime Minister Anand Panyarachun[33] proposed the ASEAN Free Trade Area [34]to fellow ASEAN Members. The Agreement Common Effective Preferential Tariff scheme for ASEAN Free Trade Area was the main mechanism for establishing the ASEAN Free Trade Area (AFTA). Significantly, when the CEPT for AFTA agreement was originally signed, ASEAN had six members: Brunei, Indonesia, Malaysia, Philippines, Singapore, and Thailand. All the four latecomers, Vietnam, Lao PDR, Myanmar and Cambodia were required to sign on to the CEPT Scheme in order to join ASEAN. Nevertheless, the new Members were given longer time frames than the original members to implement tariff

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[33] Dr. Anand Panyarachun proposed the idea of creating a free trade area among ASEAN Member States in 1992 when he served as a Prime Minister of Thailand.

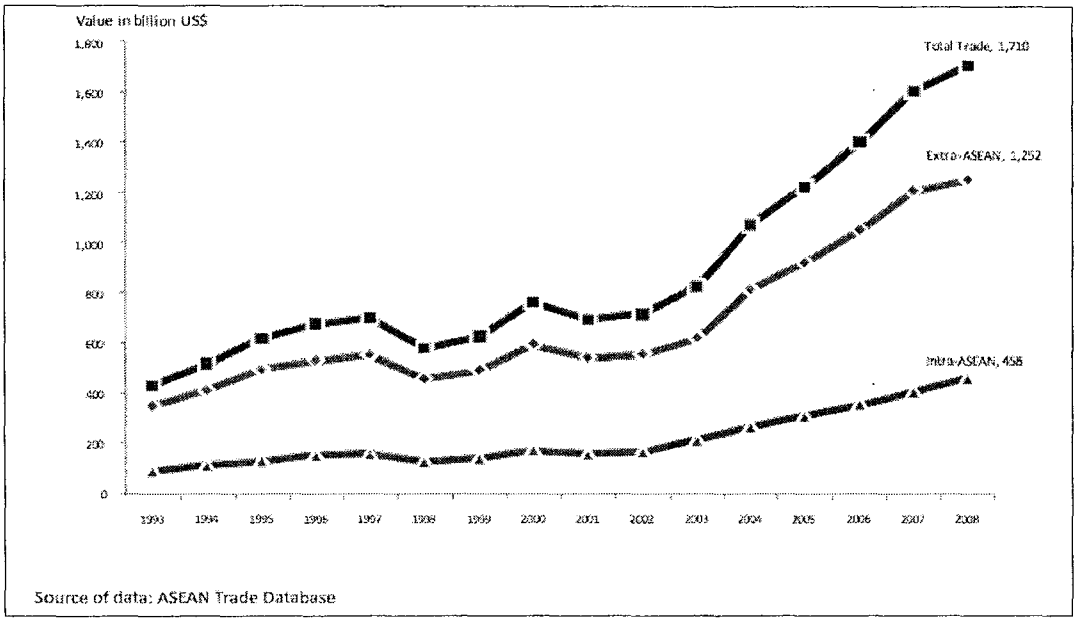
[34] Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area, 28 January 1992 Singapore as amended by Protocol to Amend Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area, 15 December 1995 Thailand and Protocol to Amend Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area for the Elimination of Import Duties, 31 January 2003, available at http://www.aseansec.org (last visited March 20, 2010) [hereinafter **CEPT Scheme**].

reduction obligations under the CEPT Scheme. In joining ASEAN the four new Members agreed and acceded to all the existing and relevant conditions, as well as consented to extending Most-Favored-Nation (MFN) treatment to other ASEAN members, and national treatment to ASEAN products imported into its domestic market.

The objective of AFTA is to increase the ASEAN region's competitive advantage as a single production unit geared for the world market by liberalization of trade through the elimination of tariffs and non-tariff barriers among ASEAN members. The elimination of tariff and non-tariff barriers among ASEAN Member States is expected to promote greater economic efficiency, productivity, and competitiveness. By creating AFTA, ASEAN Members aim to accelerate the liberalization of intra-ASEAN trade and investment to further cooperate in the economic growth of the region. "ASEAN cooperation has resulted in greater regional integration. Within three years from the launching of AFTA, exports among ASEAN countries grew from US$43.26 billion in 1993 to almost US$80 billion in 1996, an average yearly growth rate of 28.3 percent."[35] The volume of intra-ASEAN trade has grown continuously since the emergence of the CEPT Scheme. The creation of AFTA will be studied in detail in the next section of this Chapter. The figures 1.2 and 1.3 below show that intra ASEAN trade has been increased every year from the beginning of the implementation of the CEPT Scheme in year 1993 to 2008. However, the increasing rates were not quite impressive.

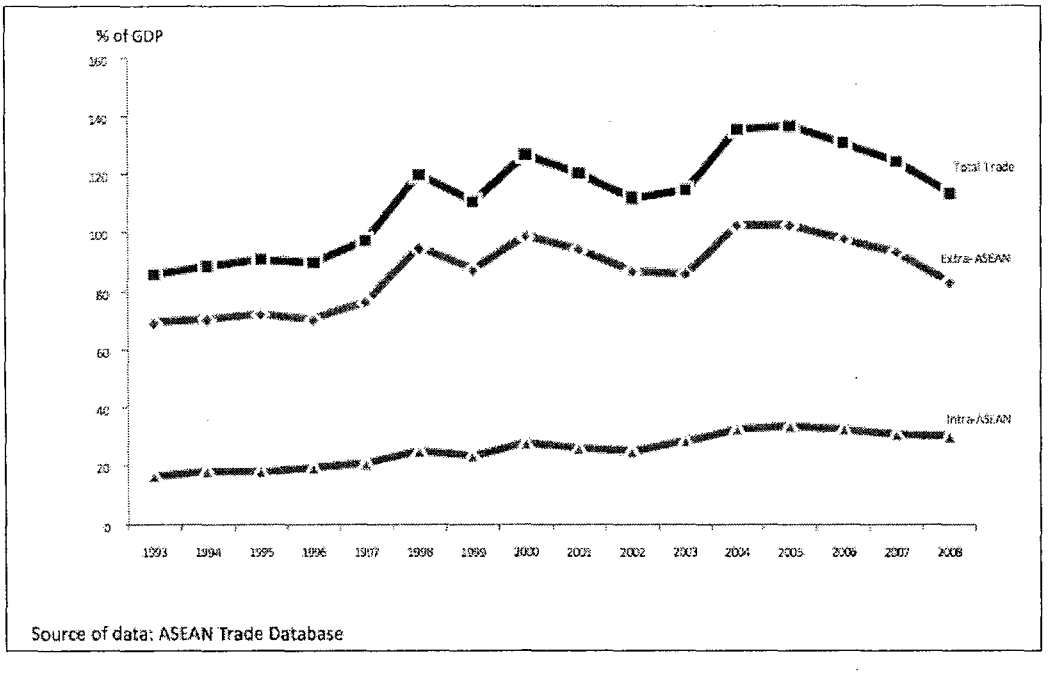
[35] ASEAN Secretariat.

Figure 1.2 Trend of ASEAN Trade



Source of chart: ASEAN Economic Community Chartbook 2009: ASEAN Secretariat.

Figure 1.3 Trend of ASEAN trade value as percentage of GDP

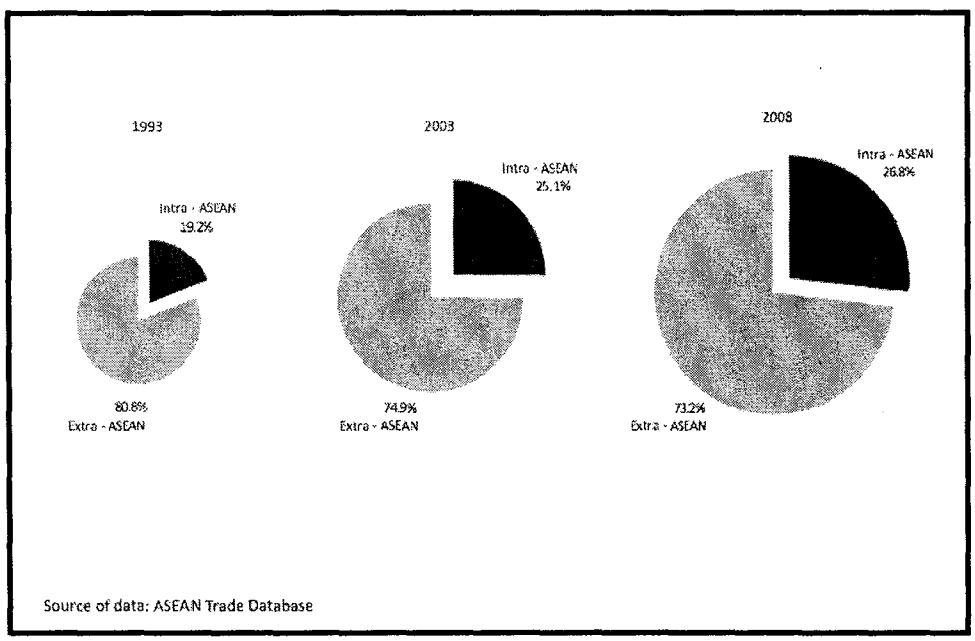


Source of chart: ASEAN Economic Community Chartbook 2009: ASEAN Secretariat.

In addition to trade and investment liberalization through the creation of AFTA, many economic cooperation agreements have been implemented by ASEAN Member States to promote greater economic cooperation. The regional economic integration is being pursued through the development of economic cooperation in many areas in trade, investment, industry, services, finance, agriculture, forestry, energy, transportation and communication, intellectual property, small and medium enterprises, and tourism.

The main ASEAN economic cooperation agreements are the ASEAN Framework Agreement on Services (1995), the ASEAN Framework Agreement on Intellectual Properties (1995), the Framework Agreement on the ASEAN Investment Area which was replaced by the ASEAN Comprehensive Investment Agreement (ACIA) in February 2009, and the ASEAN Framework Agreement on Mutual Recognition Arrangements (1998). Economic cooperation in many areas has improved number of intra ASEAN trade from 19.2 % in 1994 to 26.8% in 2008 as shown in Figure 1.4.

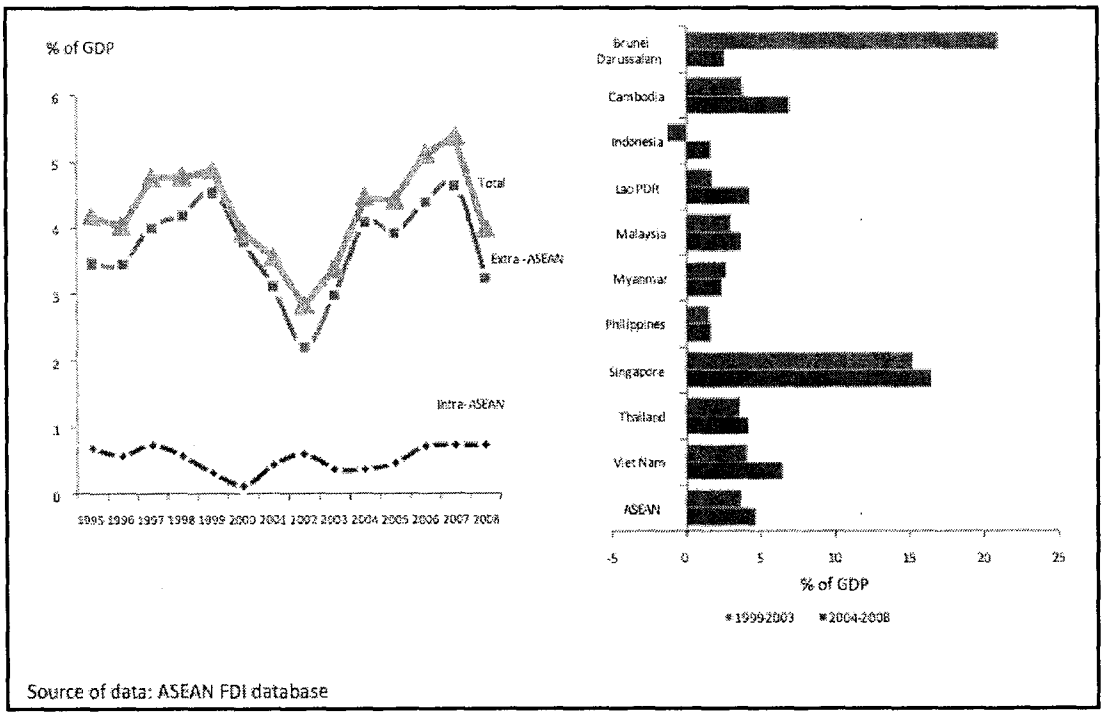
Figure 1.4 Intra-and-extra-ASEAN trades



Source of chart: ASEAN Economic Community Chartbook 2009: ASEAN Secretariat.

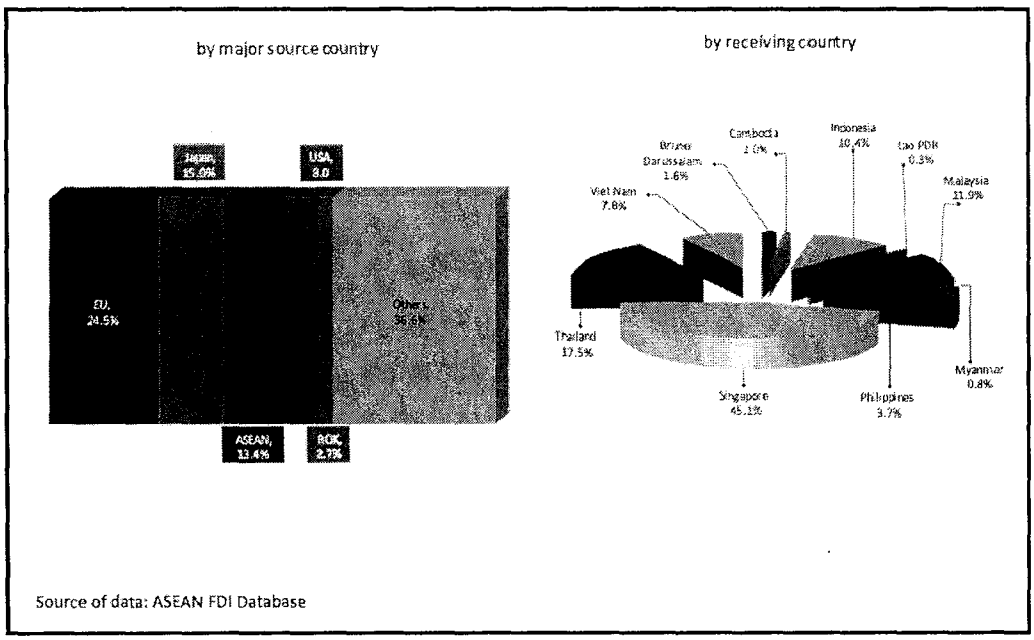
The progress of economic development in Southeast Asian region also depends on foreign direct investment. Deeping economic cooperation in ASEAN not only increase intra ASEAN trade but also increase foreign direct investment (FDI) in Southeast Asian region as demonstrated in the figure 1.5, 1.6 and 1.7 below.

Figure 1.5 Foreign Direct Investment net inflow to ASEAN and ASEAN Member States as percentage of GDP



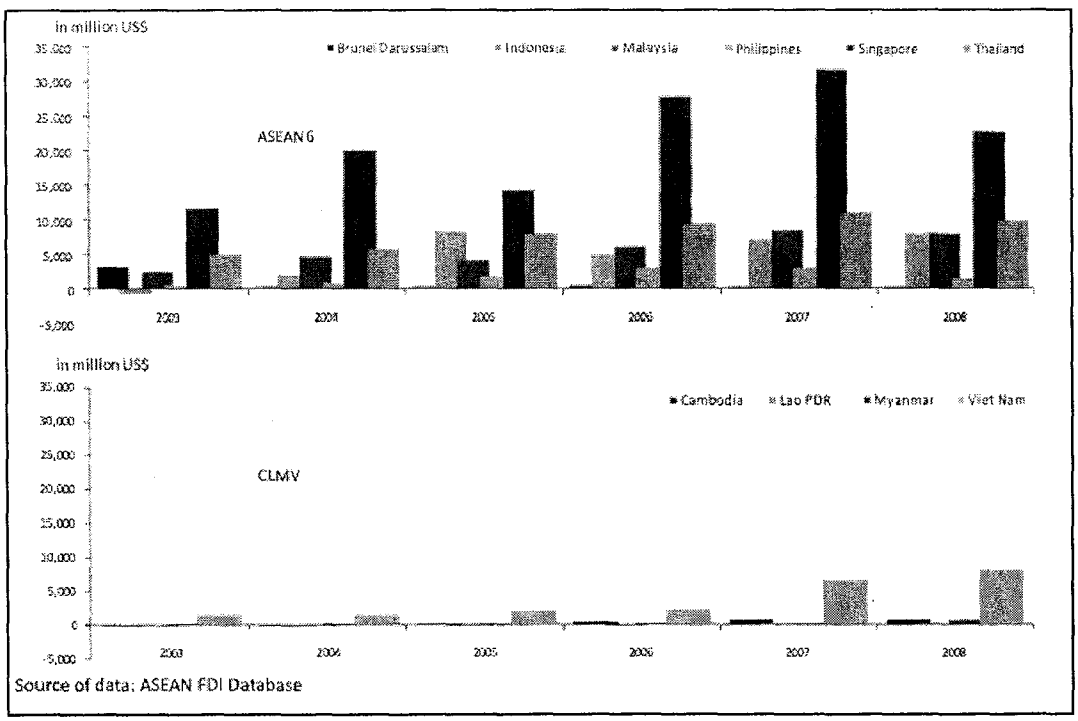
Source of chart: ASEAN Economic Community Chartbook 2009: ASEAN Secretariat.

Figure 1. 6 Cummulative foreign direct investment net inflow to ASEAN, 2003-2008



Source of chart: ASEAN Economic Community Chartbook 2009: ASEAN Secretariat.

Figure 1.7 Foreign direct investment net inflow in ASEAN-6 and CLMV



Source of chart: ASEAN Economic Community Chartbook 2009: ASEAN Secretariat.

In December 1997, ASEAN confirmed their serious intension to deepen their integration by signing on the ASEAN Vision 2020. The ASEAN Vision 2002 aimed at forging closer economic integration within the region as well as creating a stable, prosperous and highly competitive ASEAN Economic Region, in which there would be a free flow of goods, services, investments, capital, and equitable economic development and reduced poverty and socio-economic disparities. The Hanoi Plan of Action, adopted in 1998, serves as the first in a series of plans of action leading up to the realization of the ASEAN vision.

Determining to accelerate ASEAN regional integration, ASEAN Leaders announced the creation of the ASEAN Economic Community as one of the three pillars needed to establish the ASEAN Community. Perhaps, the ASEAN Economic Community is the most important pillar that ASEAN Members have focused on. The ASEAN Leaders adopted the ASEAN Economic Blueprint[36] at the 13th ASEAN Summit on 20 November 2007 in Singapore to serve as a coherent master plan guiding the eventual formation of the ASEAN Economic Community (AEC). The AEC Blueprint is a single comprehensive document, which identifies the characteristics and elements of AEC with clear implementation targets and timelines for the various economic integration measures within ASEAN. ASEAN Member States are committed to implement the AEC Blueprint to transform the ASEAN region into a single market and production base, in a highly competitive economic region. The overall objective of the AEC is to create a region of equitable economic development with free movement of goods, services, investment, skilled labor, and free flow of capital in the year 2015.

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[36] ASEAN Economic Community Blueprint Jakarta: ASEAN Secretariat 2008, available at http://www.aseansec.org/5187-10.pdf (last visited January 31st 2010) [hereinafter **AEC Blueprint**].

To achieve such a daunting goal by that deadline, ASEAN Members are cooperating in many areas, which include human resources development and capacity building; recognition of professional qualifications, closer consultation on macroeconomic and financial policies, trade financing measures, enhanced infrastructure and communications connectivity, development of electronic transactions through e-ASEAN, and integrating industries across the region to promote regional sourcing. Furthermore, the ASEAN Members will enhance private sector involvement for the building of the AEC.

The Declaration of ASEAN Economic Blueprint stated clearly that "the AEC Blueprint will transform ASEAN into a single market and production base, a highly competitive economic region, a region of equitable economic development, and a region fully integrated into the global economy."[37] The objectives of the ASEAN Economic Community have been reaffirmed in Article 6 of the ASEAN Economic Community Blueprint which provides the following:

> [T]he AEC will establish ASEAN as a single market and production base 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.[38]

The AEC envisages the following four key characteristics: (a) a single market and production

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[37] Declaration on the ASEAN Economic Community Blueprint, Singapore, signed on November 20, 2007, ASEAN Secretariat, Jakarta Indonesia, January 2008.

[38] AEC Blueprint, *supra* note 36 at art.6.

base, (b) a highly competitive economic region, (c) a region of equitable economic development, and (d) a region fully integrated into the global economy. "These characteristics are inter-related and mutually reinforcing. Incorporating the required elements of each characteristic in one Blueprint ensures the consistency and coherence of these elements as well as their implementation and proper coordination among relevant stakeholders."[39] The followings are requirements that ASEAN Member will implement to fully integrate their economic integration under the ASEASN Economic Community by 2015.

a. Single Market and Production Base: According to the AEC Blueprint, an ASEAN Single Market and Production Base comprises of five core elements: (i) free flow of goods; (ii) free flow of services; (iii) free flow of investment; (iv) freer flow of capital; and (v) free flow of skilled labor. In addition, the single market and production base also include two important components, namely, the priority integration sectors, and food, agriculture and forestry.

b. Competitive Economic Region: in order to crate a competitive economic in ASEAN region, the AEC Blueprint requires these following elements; competitive policy, consumer protection, Intellectual Property Right (IPR), infrastructure development, taxation and e-commerce.

c. Equitable Economic Development: under the AEC Blueprint calls for equitable economic development that requires SME development and Initiative for ASEAN Integration (IAI).

d. Integration into the Global Economy: the AEC Blueprint requires

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[39] AEC Blueprint, *supra* note 36 at art.8.

ASEAN Members to take these actions; coherent approach toward external economic relations and enhanced participation in global supply network.[40]

The ASEAN Economic Blueprint encloses actions that need to be taken in order to fulfill commitments and requirements that will lead to the greatest economic integration in ASEAN's history: the ASEAN Economic Community. Moreover, the AEC Blueprint also includes the Strategic Schedule for ASEAN Economic Community contains strategic approach, priority actions and what needs to be done as well as timeframe to complete each action. The main targets of the AEC are four markets: goods, services, investment and capital, and skilled labor. However, it will be far beyond scope of this dissertation to examine all the commitments and requirements contained in the AEC Blueprint. Therefore, this study will consider the AEC Blueprint requirements mandating the creation of a free movement of goods in ASEAN under the ASEAN Free Trade Area. The next section of this chapter discusses the formation of a free trade area among ASEAN Member States.

II. The ASEAN Free Trade Area: AFTA

This section will learn the formation of ASEAN Free Trade Area as well as Interim Agreements Leading to the Formation of AFTA.

A.. The Establishment of ASEAN Free Trade Area

As discussed in the previous section, the idea of creating a free trade area in ASEAN was brought to ASEAN by the Former Thai Prime Minister, Anand Panyarachun. It was, in

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[40] Source: AEC Blueprint, *supra* note 36.

effect, at the Fourth ASEAN Summit in Singapore on January 1992 that ASEAN Countries entered into an agreement to establish AFTA. ASEAN Member States aim to further cooperate in the economic growth of the region by accelerating the liberalization of intra-ASEAN trade and investment with the objective of creating AFTA by using the CEPT Scheme.

Dr. Sompong Sucharitkul,[41] a drafter of Bangkok Declaration, explains the main objective of the creation of ASEAN as follows:

> [F]rom the very start, it's arguable that ASEAN leaders intended that ASEAN would become a Common Market. They fully realized the diversities and contrasts inherent to their countries' economic structures and national legal frame-works. Even a more modest goal like a free trade area appeared to be out of reach for reasons of existing differences in the fiscal structures and policies. But that should not deter ASEAN determination to continue to co-operate.[42]

Another reason behind the establishment of AFTA was to prevent the trade diversions from Southeast Asian region to other regions. The creation of North American Free Trade

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[41] Distinguished Professor Emeritus of International and Comparative Law, former Director of GGU LLM and SJD International Legal Studies Programs, Former Director of the Sompong Sucharitkul Center for Advanced International Legal Studies. Served as Thailand's Ambassador to Japan, Italy, Greece, Israel, France, Portugal, and the Benelux countries, as well as the European Union and UNESCO. Represented Thailand in the UN General Assembly for nearly three decades. Currently a member of the Commercial Arbitration Centre at Cairo and the Regional Centre for Arbitration at Kuala Lumpur, Malaysia Member of the Panels of Arbitrators and of Conciliators of the International Centre for the Settlement of Investment Disputes, World Bank, Washington, DC. An elected member of the Institute of International Law (Geneva), Vice President of the International Academy of Human Rights (Paris). Prof. Dr. Sucharitkul has taught international law at universities throughout the world. In additional, He serves on the U.N. Compensation Commission, formed to process claims against Iraq for actions during the 1990 invasion of Kuwait.
Source: Interview of Professor Dr. Sucharitkul in The Journal of East Asia and International Law, May 2008.

[42] Sompong Sucharitkul, *ASEAN Society, A Dynamic Experiment for South-East Asian Regional Co-operation*, ASIAN YEARBOOK OF INTERNATIONAL LAW, 113-148,(Ko Swan Sik et al.eds.,1993).

The programme closest to the establishment of a Free Trade Area was the adoption of Preferential Trading Arrangements which ASEAN in fact launched. It also intensified its tightening efforts to encourage intra ASEAN trade by creating complementarity where none had existed in the past.

Agreement and European Economic Community diverted trades and foreign direct investments to Mexico and some member countries of European Economic Community.

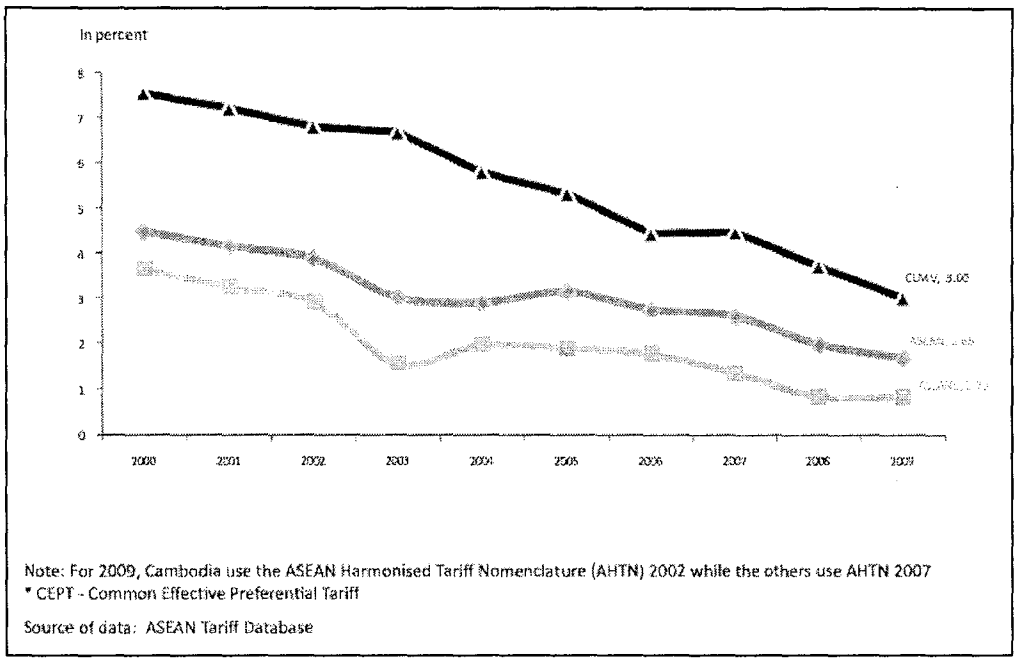
The CEPT Scheme is the main mechanism to form a free trade area in ASEAN. The initial timeframe by ASEAN leaders in 1992 was to complete AFTA by reducing tariffs to between 0% - 5% in 15 years, from 1993 to 2008. The Fifth ASEAN Summit held in Bangkok in 1995 adopted the Agenda for Greater Economic Integration, which included the acceleration of the timetable for the realization of AFTA from the original 15-year timeframe to 10 years, by which the completion date was moved to January 1st, 2003. At the 6th ASEAN Summit in Hanoi, this deadline was subsequently moved toward 2002. Recently, ASEAN changed the completion date to zero-tariffs by 2010 for the ASEAN-6, and by 2018 for the new Member States, CLMV. The deadline to complete implementation of the CEPT Scheme to create AFTA has been accelerated several times. According to the original goal, AFTA would have been fully established by 2008 (15 years from 1993). However, as of March 2010, AFTA has not fully established yet. The deadlines for CLMV to comply with their commitments to reduce tariffs for products under the Inclusion List to 0-5% were year 2006 for Vietnam, year 2008 for Lao PDR and Myanmar, and Cambodia has year 2010 as her deadline. This mean that tariff rates levied on ASEAN products traded within the region would be reduced to 0-5%. The CLMV must eliminate any quantitative restrictions as soon as such product was placed in Inclusion List. Other non-tariff barriers are to be eliminated as well. The latest update was ASEAN decided that import duties on intra-ASEAN trade would be completely eliminated by 2010 for ASEAN-6 and by 2015 for CLMV. Moreover, to deepen their economic integration through AFTA, ASEAN Member States agreed to bring down the last phase of tariff reductions from 0-5% to 0 percent in order to effect an integrated market with free circulation of ASEAN's goods.

Over the course of the next several years, the program of tariff reductions was broadened and accelerated, and a host of "AFTA Plus" activities were initiated, including efforts to eliminate non-tariff barriers and quantitative restrictions, and harmonization custom nomenclature, valuation, and procedures, and develop common product certification standards.[43]

The formation of AFTA aims to increase ASEAN's competitive advantage as a production base geared to the world market. Moreover, the elimination of intra-regional trade barriers, both tariff and non-tariff, among Member States are expected to promote greater economic efficiency, productivity and competitiveness. When the CEPT Scheme is fully implemented, AFTA will help increase intra-regional trade and investment, and rapid economic development in the region, as well as facilitate efficient utilization of scarce resources and provide opportunities for the ASEAN Member States to further strengthen their competitive advantage. The Figure 1.8 shows the declining of average tariff rate on imports from ASEAN Member States from 2000 to 2009. This shows that ASEAN has been moving toward the free trade area which tariff rates among Members will drop to 0 percent in almost all products. The tariff reduction program under the CEPT Scheme will be discussed in depth in Chapter II.

[43] http://www.us-asean.org/afta.asp (last visited February 10, 2010).

Figure 1.8 Average tariff rates on imports from ASEAN



Source of chart: ASEAN Economic Community Chartbook 2009: ASEAN Secretariat.

B.. Interim Agreements Leading to the Formation of ASEAN Free Trade Area

As a common practice, ASEAN members prefer to agree on a project by declaring its cooperation first and deal with details of such cooperation later. This is one of the common characteristics in ASEAN co-operation that earned it the nickname of "Agree First Talk After."[44] This unique style also reflected in the CEPT Scheme comprised of only 10 articles, which are the only framework used to create AFTA. Cuyvers and Pupphavesa comment that "the decision to create AFTA, as well as the decisions about the instrument, the CEPT, has been a politic decision at the highest level. Once this decision was made, the respective

[44] Hadi Soesastro, *Accelerating ASEAN Economic Integration: Moving Beyond AFTA*, 2 ECONOMIC WORKING PAPER SERIES NO. WPE 091, Centre for Strategic and International Studies, 17 March 2005.

Dr. Hadi Soesastro is the Executive Director of the Center for Strategic and International Studies (CSIS) in Indonesia.

national administrations were responsible for the implementation."[45] The inadequacy of detailed guidelines and clarification were unimpressive at the start of the AFTA project. However, Cuyvers and Pupphavesa also conclude that

> [T]his is a strength and a weakness at the same time. It is a strength as it enables a political breakthrough by consensus, with the essence of the message conveyed in all the clarity needed. It is a weakness as there are so many accompanying measure and implementation modalities still to be developed and adopted.[46]

To provide more detailed guidelines in implementing the CEPT Scheme, ASEAN Member States have concluded a series of agreements relating to the formation of this free trade area. For example, the CEPT Scheme requires ASEAN Members to eliminate tariff and non-tariff barriers on all manufactured products, including capital goods, and processed agricultural products.

The Rules of Origin for the Agreement on the Common Effective Preferential Scheme for the ASEAN Free Trade Area (CEPT-AFTA ROO) is designed to determine the origin of products eligible for preferential tariffs pursuant to the CEPT Scheme. Moreover, the CEPT-AFTA ROO provides originating verification procedures of ASEAN Products. The unprocessed agricultural products are placed in Sensitive List for Unprocessed Agricultural Products and are treated differently under a Protocol on the Special Arrangement for the Sensitive and Highly Sensitive Products. The ASEAN Member States also agreed on a Protocol Regarding the Implementation of the CEPT Scheme Temporary Exclusion List to

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[45] Cuyvers & Pupphavesa, *supra* note 30 at p. 7.

[46] Cuyvers & Pupphavesa, *supra* note 30 at p. 7.

provide some flexibility to countries facing real problems with their manufactured products that are not ready to place into Inclusion List yet. The Temporary Exclusion List was created for this purpose.

A Protocol on Notification Procedures has been established and requires advance warning of actions or measures that can have an adverse effect on concessions granted under an existing ASEAN agreement.[47] ASEAN has adopted the Protocol on Dispute Settlement Mechanism that covers all disputes arising from implementation of the economic agreements in ASEAN, including the CEPT Scheme. Such agreements and documents related to the implementation of the CEPT Scheme will be studied later in next chapters. All the obligations under the CEPT Scheme will be examined in Chapter II. The next section focuses on the institutions that monitor and assist the implementations of the CEPT Scheme.

III. Institutional and Structural Aspects of AFTA

A.. Institutions at Regional Level

It may be beyond the scope of study of ASEAN activities to attempt even a simple outline of the organizational aspects of the Association that truly deserves a separate treatment showing a gradual progress from a modest start with multiple national secretariats to the establishment of a common general secretariat with a regular annual budget and an international staff. Suffice it to state that the Association has been growing in strength with regard to its internal organization, staffing pattern, and the funds provided by member States. ASEAN Members meet in various levels; *e.g.* the Head of States/Governments Summit, the Annual Ministerial Meetings, the Economic Minister's Meetings, the meeting of other

[47] ASEAN Secretariat, *Southeast Asia: A Free Trade Area, 2002.*

Ministers, the meeting of Senior Officials, the meeting of the Standing Committee and the meetings of various permanent and ad hoc committees.

The private sector also organized their ASEAN meetings, such as the ASEAN Chambers of Commerce and Industry, which had met even before the official launching of ASEAN. A Special Co-coordinating Committee was also established to stream line pending projects and minimize overlapping activities of various committees and bodies. At various levels of official and private-sector meetings, the Association has undertaken a great number of ASEAN projects. With leaps and bounds, ASEAN has expanded or contracted in response to the need to concentrate on the development of certain areas requiring special attention.[48]

There are four institutions[49] at the regional level that are in charge of the formulation of policy guidelines and for the encouragement of various economic cooperation initiatives among the members namely: AFTA Council, the Meeting of the ASEAN Heads of Government (ASEAN Summit), the ASEAN Economic Ministers Meeting (AEMM), and the ASEAN Economic Officials Meeting (SEOM). Some of them also have the decision making power in implementing the CEPT Scheme which will be discussed later in this chapter. Actually, the institutions of AFTA do not have complicated methods because they rely on the consensus of Member States, not on the voting rules like in other International Organizations and they do not lay down much detail and particulars for its organs relating to their structure, so the study of ASEAN's practice on AFTA will be needed.

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[48] Sucharitkul, *supra* note 42 at 124.

[49] These institutions are in forms for Meeting of delegates from each Member in different issues and levels. They already have duties regarding economic cooperation in ASEAN and also were given additional duties regarding the implementation of AFTA.

1. Meeting of the ASEAN Heads of Government (ASEAN Summit)

The Meeting of the ASEAN Heads of Government or "ASEAN Summit" is the highest level of ASEAN, and is responsible for laying down the directives and initiatives for all of ASEAN activities. In 1992, the Fourth ASEAN Summit in Singapore decided that the ASEAN Heads of Government were to meet formally every three years and that their economies would be integrated by the creation of a free trade area among ASEAN nations; *i.e.,* AFTA. At the Fifth ASEAN Summit in Bangkok ASEAN Countries agreed to hold annually Informal Summits in between formal ASEAN Summit, which took place every 3 years. However, ASEAN realized that having ASEAN Summit, which is the supreme policy-making body of ASEAN, every 3 years was not adequate to move forward to create ASEAN Community in 2015. Therefore, ASEAN Members stated in ASEAN Charter Article 7.3 that the ASEAN Summit Meeting would be held twice annually.

2. ASEAN Economic Ministers Meeting (AEM)

The ASEAN Economic Ministers Meeting (AEM) consists of ASEAN Member States economic ministers. Apart from their annual meetings, the ASEAN Economic Ministers meet both formally and informally to consult and look for ASEAN economic cooperation. The AEM was institutionalized at the Kuala Lumpur Summit, 1977. The role of AEM under the CEPT Scheme is to provide guidance to Member States in respect to any matter for which it has not been possible to find a satisfactory solution during the previous consultation.[50] Under the Protocol on Settlement of Dispute 1996, AEM served as an Appellate Body, which was the highest decision-making body under this DSM. However, under the ASEAN Protocol on

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[50] CEPT Scheme for AFTA, *supra* note 34 at art.8 (1).

Enhanced Dispute Settlement Mechanism[51], the AEM is in charge of establishing an Appellate Body for the ASEAN Dispute Settlement Mechanism. The ASEAN Economic Ministers Meeting reports all matters to the ASEAN Heads of Government during the ASEAN Summit.

3. AFTA Council

The AFTA Council is a ministerial-level Council having a representative from each Member Country and the Secretary General of the ASEAN Secretariat. The AFTA Council was established by the AEM as the highest-level institution implementing the CEPT Scheme, and to deal with all matters dealing with AFTA. The AFTA Council has the responsibility of supervising, coordinating and reviewing the implementation of the CEPT Agreement. Furthermore, the AFTA Council is also responsible for monitoring AFTA as well as coordinating with other institutions.

The Senior Economic Officials Meeting (SEOM) and the ASEAN Secretariat are assigned by the CEPT Scheme to assist the AFTA Council in the performance of those aforementioned functions. The AFTA Council meets at least once a year. In practice, the AFTA Council is an institution that formulates the policies about AFTA and has authority in all matters concerning AFTA. Even though the AFTA Council is the most important institution in implementing the CEPT Scheme of AFTA, it lacks of details procedures how to perform its duties under the CEPT Scheme. Furthermore, there is no special rule on how the AFTA Council will be monitored under the CEPT Scheme such as what should they do if the amendment or expansion to the CEPT Agreement is needed? There is no specific detail about its voting rules. The lack of guidelines for the efficient operation of the ATFA Council can

[51] ASEAN Protocol on Enhanced Dispute Settlement Mechanism signed on November 29th 2004 at Vientiane, Lao PDR, available at http://www.aseansec.org/16754.htm. It replaced the Protocol on Dispute Settlement Mechanism 1996. [hereinafter Protocol on DSM 2004].

slow down the progress of implementation of the CEPT Scheme. Member States must take care of these problems by reforming AFTA Council roles in order to ensure the efficiency of AFTA Council.

4. Senior Economic Officials Meeting (SEOM)

The SEOM is comprised of the senior officials who have duties in the economy of the Member States. The SEOM has the duty to provide support for the AFTA Council. It meets every three months to coordinate the implementation of CEPT for each Member Country, and reports directly to the AEM. Some parts of its duties are supported by the Interim Technical Working Group (ITWG) on the CEPT Scheme, which consists of representatives from various responsible government agencies such as the officials from the Department of Customs as well as those from the Ministries involved with trade.[52]

The ASEAN Protocol on Enhanced Dispute Settlement Mechanism provides that the SEOM administers this Protocol and, except as otherwise provided in a covered agreement, the consultation and dispute settlement provisions of the covered agreements. Accordingly, the SEOM has the authority to establish panels, adopt panel and Appellate Body reports as well as maintain surveillance of implementation of findings and recommendations of panel and Appellate Body reports adopted by the SEOM. Furthermore, the SEOM is in charge of authorizing suspension of concessions and other obligations under the covered agreements.

5. ASEAN Secretariat

The ASEAN Secretariat was established by an Agreement signed by the ASEAN Foreign Ministers during the 1976 Bali Summit to enhance the coordination and implementation of the policies, projects and activities of the various ASAEN bodies. The

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[52] *Institutional Arrangements of CEPT for AFTA*, AFTA READER II, Jakarta: ASEAN Secretariat: p.24-25.

1992 Singapore Summit agreed to strengthen the ASEAN Secretariat so that it would effectively support the Summit's initiatives. The Protocol Amending the Agreement on the Establishment of the ASEAN Secretariat, was signed at the 25th ASEAN Ministerial Meeting (AMM) in Manila on 22nd July 1992. Such Protocol provides the ASEAN Secretariat with a new structure. The Protocol vested the Secretariat with an expanded set of functions and responsibilities to initiate, advise, coordinate, and implement ASEAN activities. The ASEAN Secretariat provides support to the AFTA Council for supervising, coordinating, and reviewing the implementation of the CEPT Scheme, and assisting the AEM in all matters relating thereto.[53]

The ASEAN AFTA Unit was created in the ASEAN Secretariat to handle the implementation and monitoring of AFTA as well as other related issues such as the elimination of non-tariff barriers, the harmonizing of the tariff nomenclature, standards and conformance, and customs valuation and procedures. The following are the functions of the ASEAN AFTA Unit in the ASEAN Secretariat:[54]

(a) **Monitoring:** includes monitoring of intra- and extra-ASEAN trade as well as problems that occur in the implementation of the CEPT Scheme. Any problems faced in the implementation of the CEPT Scheme will be raised at the ASEAN Meetings.

(b) **Coordinating:** the ASEAN AFTA Unit will coordinate with the National AFTA Units on issues pertaining to the CEPT for AFTA.

(c) **Research:** Conducting policy-oriented researches either in-house or in

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[53] CEPT Scheme, *supra* note 34 at art.7.

[54] See AFTA and National AFTA Units at http://www.aseansec.org/10112.htm (last visited February 10, 2010).

collaboration with regional research institutions.

(d) **Public Relations:** These activities include dealing with private sector inquiries and complaints, and organizing AFTA promotion ventures.

The ASEAN AFTA Unit compiles tariff reduction schedules, products in the Inclusion List, Temporary Exclusion List, Sensitive and General Exception List which was prepared by the National Units for the Products and Tariff Reduction Programmes under the Common Effective Preferential Tariff (CEPT) Scheme. The ASEAN Protocol on Enhanced Dispute Settlement Mechanism[55] provides that the ASEAN Secretariat has the responsibility of assisting the panels and the Appellate Body, especially on the legal, historical and the procedural aspects of the matters dealt with, and of providing secretarial and technical support. Furthermore, the ASEAN Secretariat will assist the SEOM monitoring and maintaining surveillance of the implementation of the findings and recommendations of the panel and Appellate Body reports adopted by it. The ASEAN Secretariat is the focal point for reception of all documentation in relation to disputes and shall deal with them as appropriate.

The ASEAN Secretariat in consultation with the SEOM will administratively update the list of covered agreements in Appendix I of the ASEAN Protocol on Enhanced Dispute Settlement Mechanism, as may be required from time to time. The Secretariat will inform Member States as and when the changes have been made. The Secretary General of ASEAN is appointed by the ASEAN Heads of Government (ASEAN Summit) with the recommendation of the ASEAN Economic Ministers for a non-renewable term of office of

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[55] Protocol on DSM 2004, *supra* note at 51 art. 19.

five years. The Secretary General of ASEAN will be selected from a qualified national of the ASEAN Member States based on alphabetical rotation. He or she is accorded ministerial status with the mandate to initiate, advise, coordinate and implement ASEAN activities, and is responsible to the Heads of Government Meeting and to all Meetings of ASEAN Ministers when they are in session.[56] The Secretary General of ASEAN is a member of AFTA Council.[57] The Secretary-General of ASEAN 2008-2012 is Dr Surin Pitsuwan from Thailand.

6. Coordinating Committee on the Implementation of the CEPT Scheme for AFTA (CCCA)

This is the lowest institution at the regional level of AFTA consisting of the representatives from Member States. The CCCA is the general technical officers meeting on the implementation of the CEPT Scheme. The main task of the CCCA is coordinating the positions of National AFTA Units on issues involving AFTA affairs. In practice, the CCCA will make all efforts to reach an acceptable conclusion and common position before reporting to the SEOM which in turn, after its review will submit the proposals to the AFTA Council.

B. Institutions at National Levels

The organs at the national levels have the duties to implement the CEPT Scheme at the level of Member States and to coordinate with the organs in each Member Country under the monitoring of the AFTA Council. These organs are AFTA Implementation Committee, ASEAN AFTA Unit in ASEAN Secretariat and National AFTA Unit in each Member

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[56] Protocol Amending the Agreement on the Establishment of the ASEAN Secretariat, signed at 25th AMM in Manila in on 22 July 1992.

[57] *Id.*, art.7.

Country.

7. AFTA Implementation Committee (AIC)

The AFTA Implementation Committee (AIC) was established in each Member Country and is the highest institution responsible for AFTA affairs at the national level. The AIC is the policy-making organ of the country and determines Thailand's positions in all matters regarding AFTA. In fact, it has the authority to determine the position of the country in all issues without having to wait for Cabinet Meetings.[58] In the case of Thailand, the AIC is comprised of the Minister of Finance who is the President of the Committee, Minister of Commerce Minister of Industry, who is the Vice President and 14 other members, who are the senior officers of the relevant Ministries. The President of the Thai Chamber of Commerce and the President of Industries Council are the representatives from the private sectors. The Director of the Office of Public Finance is the Committee's Secretary General. Its decision will be transmitted to the National AFTA Unit that works in cooperation with the National AFTA Units of the other Member States.

8. ASEAN AFTA Unit and National AFTA Units

The 26th ASEAN Economic Ministers Meeting established an AFTA Unit in the ASEAN Secretariat and National AFTA Units in respective Member Governments. The main purpose of creating both organs is to create the necessary institutional infrastructure to support the implementation of the CEPT Scheme. The primary objective of these AFTA Units is to ensure the smooth implementation of the CEPT Scheme. The AFTA Unit in the ASEAN Secretariat establishes permanent and close links with the National AFTA Units in Member Governments thereby increasing coordination among the bodies charged with

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[58] *Supra* note 52 at p. 20.

implementing CEPT for AFTA. The functions of the National AFTA Units are as follows:

(a) Implementation of the CEPT for AFTA. This involves, *inter alia*, the determination of the products to be placed on the Inclusion, Temporary Exclusion, Sensitive and General Exception Lists, tariff reduction schedules and the CEPT Concessions Exchange Manual (CCEM). The Units also have to make sure that the necessary enactment for the tariff reduction is legislated and implemented.

(b) Public Relations whereby private sectors inquiries and complaints are dealt with.

(c) Channel of Communication. The National AFTA Units also serves as an important channel of communication to the Governments of Member States.

The ASEAN AFTA Unit and National AFTA Units also have functions that deal specifically with the private sector. Any queries, complaints or information needed on CEPT for AFTA can be directed to these various Units. Complaints or problem areas will be raised at the various ASEAN meetings.[59] When the AIC adopts a particular position, National AFTA Units will endeavor to coordinate its positions with the other National AFTA Units until they reach a common goal. Basically, ASEAN AFTA Unit and National AFTA Units are focal points for handling AFTA and any AFTA-related matters. These Units were expected to play active roles in promoting, supporting and facilitating greater private sector participation in the AFTA process and in enhancing greater trading activities in the region.

However, this study does not find that ASEAN AFTA Unit and National AFTA Units are effective keys to promote or support private sectors with information and data through an

[59] http:// www.aseansec.org

internet website. The ASEAN official website is the best available online source to get information about AFTA and the implementations of the CEPT Scheme. However, it does not provide sufficient and update information. One needs to check for updates of implementing of the CEPT Scheme from Meetings which is very difficult to follow and understand what is happening. Moreover, this study also experiences difficulty from requesting AFTA information from ASEAN Secretariat (ASEAN AFTA Unit) many times but has never received any information. These experiences reflect ineffective supports from ASEAN Secretariat to private sectors.

AEAN should consider creating AFTA database available for private sectors to get all information and updates from meetings and implementations of the CEPT Scheme especially tariff reduction programs and certification of ASEAN's Products. The database center should be created not only in ASEAN Secretariat (ASEAN AFTA Unit), but also in an AFTA Unit in each Member Country. Each Member Country should provide update information about AFTA and its commitments such tariff line in Inclusion List, tariff reduction schedules, certification procedures for the CEPT-AFTA Rule of Origin as well as all rules and regulations regarding AFTA. Moreover, it should provide information of the preferential tariff treatments available for private sectors such as which products benefit from low tariff rates under the CEPT Scheme and how private sectors can enjoy such benefits from AFTA. This information should be made available for private sectors through the internet as over AFTA Unit's website. Creating an official website as a One Stop Service center for any matter concerning AFTA will be an effective way to promote and support private sectors to participate in AFTA. All information regarding AFTA should be provided through its website. Having an individual call in or physically go to request information from AFTA Unit would not be an effective way to promote AFTA to private sectors. For example, a Thai furniture company that wants to enjoy the benefit of AFTA can go to this AFTA Unit's

website to get information regarding all requirements to make its product qualify to get preferential treatment under AFTA without having to go to get information at National AFTA Unit.

ASEAN AFTA Unit and National AFTA Unit do not provide adequate information available for private sectors. This is a major disadvantage that ASEAN should take care immediately. ASEAN should have all news and updates information regarding AFTA available for not only private sectors, but also for academic scholars who want to study AFTA. The fact is private sector is the one who do business activities. Without participation of private sector, AFTA and other economic agreements are worthless and ASEAN won't be able to reach its goal to establish ASEAN Economic Community in 2015.

IV. Conclusion: Chapter I

ASEAN as an intergovernmental organization that consists of countries from different political, cultural and economic backgrounds has been developing cooperation for over four decades. Economic cooperation is the core area that ASEAN has focused on since its birth in 1967. By announcing their intent to deepen their cooperation in all areas: political, social and economic to establish an ASEAN Community in 2015,[60]ASEAN will become the most attractive and the biggest market in Asia for foreign investors and multinational manufacturers. When the ASEAN Economic Community Blueprint has been implemented in 2015, ASEAN will create a free movement of goods, services and investments in the ten Member States.

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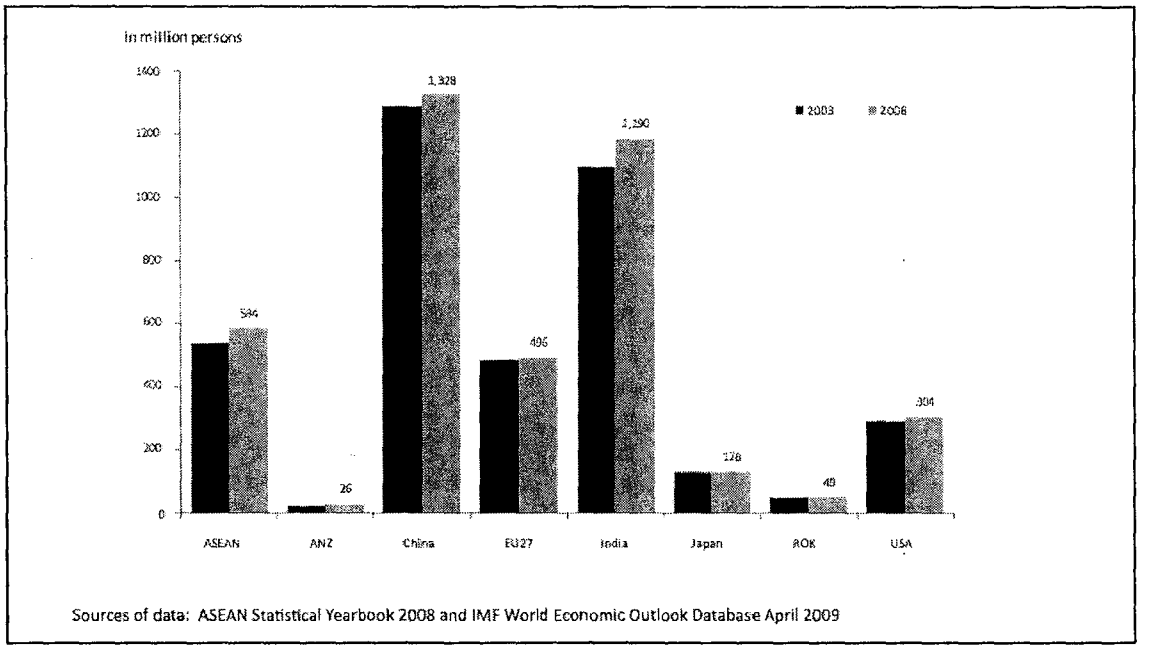
[60] The previous timeframe was 2020.

The ASEAN population reached 584 million persons in 2008. The Chart of Population of ASEAN and selected trade partner countries/region below shows that ASEAN has almost 600 million people. ASEAN is the largest inter-governmental organization of the Asian region. This means that ASEAN market is larger that European Union and the United State in terms of population. Figure 1.9 shows the ASEAN population compared to selected trade partners and other countries and regions.

Figure 1.9 Population of ASEAN and selected trade partner countries/regions



Source of Figure: ASEAN Economic Community Chartbook 2009, ASEAN Secretariat.

ASEAN is moving toward a most important transformation, ASEAN Community that is to become one vision, one identity, and one community by 2015. However, the process and implementation of that ultimate goal will not be easy task for ASEAN. The differences in economic level among Members, especially the new comers, will make this dream difficult to

come true. ASEAN not only needs great action plans, roadmaps and genuine commitments to implement to the Blueprints of three pillars, but also needs to help the CLMV to move forward to the goal together. ASEAN must have great assistant plans for the CLMV to make sure that those new members are ready to walk together toward the finish line in 2015 with all possible mean of assistance such as technical assistants, educations and trainings. This wonderful goal might get slowed down if the CLMV could not follow the action plans lead to ASEAN Community. The slow progress of the implementation of the three Blueprints, especially under the ASEAN Economic Community Blueprint, will affect the credibility of ASEAN for the rest of the world. In the past, the main economic integration cooperation of ASEAN in many areas such as AFTA, ASEAN Investment Area or the ASEAN Framework Agreement on Services were not so impressive and not fully implemented yet due to problems with implementations.

Moreover, the timelines to fully implement the CEPT Scheme have been postponed too many times just to give flexibility or more time to members in implementing particular projects. For example, AFTA was started in 1993 with a finish timeline to occur in 2008. However, the original goal was that the CEPT Scheme would be fully implemented in 2008. Later, such timeline was accelerated many times to show that ASEAN took this project seriously. ASEAN took almost eighteen years to come to this point but AFTA still has not been fully established yet. ASEAN started a free trade area project with such a short agreement with only twelve imprecise provisions instead of having a comprehensive interim agreement leading to the formation of a free-trade area among ASEAN Member States.

The core problems of implementation of the CEPT Scheme are lacking effective organs and lacking good agreement of the implementation of AFTA. The development of AFTA project and the implementation of the CEPT Scheme totally depend on Meetings at different levels; *i.e.*, the AFTA Council, ASEAN Economic Ministers Meeting and ASEAN

Summit meetings that usually involve political will. Furthermore, lack of efficient instrument has played an important role in AFTA progressive. Such an important project needs a detailed agreement that contains solid commitments, a roadmap and a timeline, as well as details explaining how to reach that goal. It was unfortunate that the most important economic cooperation of all times by ASEAN Member States did not start with an effective instrument.

However, the AFTA project is still moving forward since it began almost two decades ago. The ASEAN Free Trade Area (AFTA) has now been virtually established. ASEAN Member States have made significant progress in the lowering of intra-regional tariffs through the Common Effective Preferential Tariff (CEPT) Scheme for AFTA. ASEAN Member States have learned many lessons from many unsuccessful attempts to integrate their economy through many projects in the past. ASEAN has experienced many difficulties and unsuccessful projects even with a long, winding and bumpy road to create AFTA. ASEAN Member States have agreed to deepen and broaden their economic integration. This time ASEAN created detailed contents and action plans in ASEAN Economic Community Blueprints. The AEC Blueprint was created with clear guidelines and action plans. ASEAN intends to use AFTA as a main project to roll a red carpet out for the ASEAN Economic Community. However, there are so many actions that each ASEAN Member needs to carry out, such as revising the internal rules and regulations that are not complied with in commitments with other Members, institutional reform and simplify rules of origin etc.

Leaning on the AFTA as a main instrument to help ASEAN move toward the ASEAN Economic Community seems to be the most possible and most practical option at this point. AFTA project was going slowly at the beginning, but is still moving along, and has almost reached its goal. Tariffs on many products have been brought down to 0-5 % and intra-

ASEAN trade has been increased. The free movement of goods in ASEAN will not only entice foreign investors and multinational cooperation to come and invest or manufacture in ASEAN countries, but also investors from ASEAN Countries will enjoy such benefits of free movement of goods under AFTA. Moreover, ASEAN domestic consumers will purchase good quality products with inexpensive price. With these advantages of creating AFTA itself, and the aim to move ASEAN to become an ASEAN Economic Community through AFTA, there is no doubt of the need to study the legal aspects of AFTA.

Member States should evaluate the current situation of implementation of the CEPT Scheme of each country in order to find out what problems of implementing the CEPT Scheme are and find the way to solve such problems. Moreover, each ASEAN Member needs to educate all private sectors about AFTA and what ASEAN is moving toward. Not only large size businesses could take advantages of AFTA, but also small and medium sized businesses. Therefore, the government of each Member should have at least one government unit available to help business sectors from the beginning comply with all rules and regulations under the CEPT Scheme. Thus, the intra-ASEAN trade will be increased significantly and ASEAN people will benefit from ASEAN Free Trade Area. The following chapters discuss all legal aspects of the CEPT Scheme and supporting agreements that will lead the Southeast Asian region to become the largest market in Asia with free movement of goods among the ten Member States.

Chapter II Legal Principles and Exceptions to the Implementation of the CEPT Scheme for AFTA

The ultimate objectives of AFTA are to increase ASEAN's competitive edge as a production base geared for the world market and to liberalize trade in goods in the ASEAN region through the elimination of intra-regional trade barriers on both tariff and non-tariff barriers for ASEAN products. The elimination of trade barriers among Member States is expected to promote greater economic efficiency, productivity and competitiveness, which should create a larger market in the Southeast Asian region. Thus, investors will benefit from economies of scales productions, and moreover, consumers in ASEAN Member States will enjoy lower-priced products. ASEAN expects that AFTA will attract more foreign investment into the ASEAN region, and this investment will stimulate the growth of supporting industries. The Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area[1] is the main implementing mechanism by which the ASEAN Free Trade Area seeks to eliminate intra-regional tariffs and non-tariff barriers.

This chapter is divided into 2 sections. The first section will discuss the obligations of ASEAN Members to eliminate tariff, quantitative restrictions and other non-tariff barriers. The second section will examine exceptions of the obligation to implementation of the CEPT Scheme, which are general exception and emergency measures.

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[1] Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area, 28 January 1992 Singapore as amended by Protocol to Amend Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area, 15 December 1995 Thailand and Protocol to Amend Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area for the Elimination of Import Duties, 31 January 2003, available at http://www.aseansec.org [hereinafter **CEPT Scheme**].

I. Obligations to Implementation the CEPT Scheme for AFTA

To create ASEAN Free Trade Area, Member States are obligated to comply with the legal principles set forth in the CEPT Scheme, which require Member States to eliminate the tariffs and non-tariff barriers in the intra-ASEAN trades for manufactured products, capital goods, and agricultural products including unprocessed agricultural products.[2] Those products must be included in program tariff reductions called the Inclusion List.[3]

Products on the Inclusion List are those that have to undergo immediate liberalization through reduction in intra-regional (CEPT) tariff rates, removal of quantitative restrictions and other non-tariff barriers. Nonetheless, the timetables for reducing tariffs and removing quantitative restrictions and other non-tariff barriers differ. In general, all products must be placed on the IL to start preferential tariff reduction program. However, the CEPT Scheme, with respect to tariff reduction, allows exclusions for certain sensitive products. Consequently, products fall into different tariff reduction timetables as classified into four categories: the Inclusion List, the Temporarily Exclusion List, the Sensitive List and the General Exceptions List. For this reason, tariff barriers and non-tariff barriers elimination among ASEAN Member States are quite complicated.

This section is divided into two subsections, subsection A "Obligation to Eliminate Tariff Barriers and subsection B "Obligation to Eliminate Non-Tariff Barriers", to better analyze and understand the commitments to eliminate tariff barriers and non-tariff barriers under the CEPT Scheme.

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[2] The 1992 CEPT Agreement excluded unprocessed agricultural products from the CEPT Scheme. Later, the 26th AEMM in Chiang Mai on 22-23 September 1994 agreed to include unprocessed agricultural products under the coverage of the CEPT Scheme.

[3] IL will be used through out this dissertation to refer to Inclusion List under the CEPT Scheme for AFTA.

A.. Obligations to Eliminate Tariff Barriers

Tariff on products in IL for Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore and Thailand were reduced to between 0-5% in year 2002. For the new Member States (CLMV), the target dates for achieving the 0-5% tariff rates for Vietnam was 2006, Lao PDR and Myanmar had a target date of 2008, and 2010 for Cambodia. At the Third Informal Summit on 28 November 1999, ASEAN Leaders announced that import tariffs of those products in the Inclusion List (IL) would be reduced to zero percent by 2010 for the original six members and 2015 for the new members.[4]

As stated above, goods were divided in four categories: Inclusion List (Fast Track and Normal Track); Temporary Exclusion List (TEL); Sensitive List (SL); and General Exceptions (GE List) List. The characteristics as well as tariff reductions programs of these lists will be examined in this section. However, the General Exclusion List is a list of products that are excluded from the eliminations of tariff and non-tariff barriers under the CEPT Scheme on national security, morals, health, aesthetic, and archaeological grounds. Thus, the exception of the CEPT Scheme is discussed in the next section.

1. Principle and Program of Tariff Reduction for All Products under Inclusion List

Starting from the 1st of January 1993, ASEAN Members have been implementing the commitment to eliminate tariff barriers for products under preferential tariff reduction programs of the CEPT of Scheme by making commitments through the Time Schedule of Tariff Reductions (Consolidated CEPT Products List) for each year. The AFTA Council meeting will consider and approve the Time Schedule of Tariff Reduction of each Member. At the Forth ASEAN Summit, ASEAN Leaders showed a clear indication of their

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[4] ASEAN Secretariat, http://www.aseansec.org/5026.htm.

commitment to implement the CEPT Scheme by assigning fifteen product groups to be placed in an accelerate tariff reduction program called Fast Track. The product groups in the Fast Track program were ceramics, glass products, cement, chemicals, pharmaceuticals, copper cathodes, electronics, fertilizer, plastics, gems and jewelry products, textiles, pulp and paper, leather products, rubber products, vegetable oils and wooden and rattan furniture. Under the Fast Track program, selected products that had tariffs above 20 % were scheduled to reduce that tariff to 0-5% by the 1st of January 2000. For products with tariff rates below 20%, they were to be reduced to 0-5% by 1 January 1998.[5]

Any other products that were included in the Fast Track would be placed into a tariff reduction program called Normal Track Inclusion List.[6] The Normal Track Program includes all products under the coverage of the CEPT Scheme, other than the products in the Fast Track program, Temporary Exclusion List, General Exception List and Sensitive List for Unprocessed Agricultural Products. The tariff reduction schedule of the Normal Track under the CEPT Scheme was arranged in two steps: first for products that had tariffs above 20%, they would be reduced to 20% by the 1st of January 1998, and subsequently reduced from 20% to 0-5% by the 1st of January 2002. For products with tariff rates at 20% or below, they would be reduced to 0-5% by January 1st 2000.

However, not all products were included in the Inclusion List for tariff reduction under the above schedules. Members Countries agreed to give some flexible to sensitive products that were not ready to be placed on the Inclusion List. Those products that were temporary excluded from the CEPT Scheme are divided into two lists: the Temporary

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[5] The 26th ASEAN Economic Ministers Meeting Joint Press Statement, Thailand, 22-23 September 1994, http://www.aseansec.org/2115.htm visited March 6, 2010.

[6] Except products in TEL, SL and GE (List).

Exclusion List (TEL)[7], and the Sensitive List (SL)[8] depending on how sensitive they are to economic well-being of each Member Country. At this point there is no product under the TEL. Nevertheless, some discussion about the TEL is required in order that we have a better understanding of the effect this list has in the progressive implementation of the AFTA agreement.

2. Principle and Program of Tariff Reduction for the Sensitive Products under Temporary Exclusion List

A number of products were sensitive and not ready to be included in the tariff reduction program of the CEPT Scheme; therefore, ASEAN Member States recognized that they were not ready to include all products in the tariff reduction program under Inclusion List. Article 2 (3) of the CEPT Scheme allowed temporary exclusion for sensitive products that were not ready to be included in Inclusion List; thus, a Member Country may temporarily exclude products from the CEPT Scheme by placing it in the TEL.[9] In pursuant to Article 1(6) of the CEPT Scheme, "Exclusion List" means a list contains products that are excluded from the extension of tariff preferences under the CEPT.[10] However, as the name implies, all products in the TEL can only be temporarily exempted from the commitments of the CEPT Scheme. Therefore, such products were required to be phased into the IL by the 1st of January 2000. However, ASEAN Members agreed that products in the TEL would be included in five equal installments of 20% annually, within five years beginning 1 January 1995 and ending

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[7] TEL will be used through out this dissertation to refer to Temporary Exclusion List.

[8] SL will be used through out this dissertation to refer to Sensitive List.

[9] CEPT Scheme, *supra* note 1, at art. 2(3).

[10] CEPT Scheme, *supra* note 1, at 1(6).

by 1 January 2000.

The CEPT Scheme allowed Member States to temporary exclude sensitive products from the IL without any guidelines or scope of this exception. This event caused serious delay to the implementation of AFTA. Some Members Countries used this loophole to temporary exclude their products from the CEPT Scheme to protect domestic producers who were not ready to complete with imported products from other Members. By doing so, Members put a large numbers of sensitive products in TEL. Thus, having a long product lists in TEL made the liberalization of intra-ASEAN trade under the tariff reduction program of the CEPT Scheme was so unimpressive. For instance, to protect its state-controlled carmaker "Proton," Malaysia placed its completely built up (CBUs) and completely knocked down (CKDs) automotive units on the TEL but later refused to comply with the AFTA deadline to place such products on the IL and it kept levying tariffs on those products. Thailand who has a fast-growing automotive industry was not very pleased that Malaysia caused such significant delay in trade liberalization on its automotive industry.[11] Finally, on 1 January 2005, Malaysia fully transferred its CBUs and CKDs onto the Inclusion List; ASEAN-6 has no more products under the TEL.[12]

At the Forth ASEAN Informal Summit in Singapore on November 2000,[13] Member States signed the Protocol Regarding the Implementation of the CEPT Scheme Temporary

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[11] Cuyvers Ludo, De Lombaerde Philippe, Verherstraeten Stijn, From AFTA towards an ASEAN Economic Community....and beyond, Centre for ASEAN Studies, CAS Discussion paper No 46, 4 2005.

[12] Joint Media Statement of the Nineteenth Meeting of the ASEAN Free Trade Area (AFTA) Council, Vientiane, Lao PDR 27 September 2005 at http://www.aseansec.org/17775.htm visited March 6, 2010.

[13] The Forth Informal ASEAN Summit, Singapore, 22-25 November 2000.

Exclusion List.[14] The TEL Protocol not only allowed a Member State to temporarily delay the transfer of a product from its TEL onto the IL, but also allowed Members to temporarily suspend their concessions on a product already transferred onto the IL if such a transfer or concession would cause, or have caused real problems, by reasons which are not covered by Emergency Measures of the CEPT Scheme.[15]

However, the TEL Protocol requires that if a member wishes to transfer a product onto the TEL, it must make a written submission for approval from the AFTA Council. Moreover, the written submission must include information about said product, the duration of the delay or the suspension requested, and the reason for the request and the real problems faced.[16] The ASEAN Secretariat will extend a copy of the Submission to the Senior Economic Officials' Meeting (SEOM) and to the Coordinating Committee on the Implementation of the CEPT Scheme.[17] Nevertheless, the provisions of the TEL Protocol applied only to the last tranche of TEL manufactured products that were in the TEL as of 31 December 1999. The TEL Protocol would prevent Member from using the sensitiveness of a product as an excuse to temporary exclude a product from phasing onto IL, or temporarily suspend its concession on a product already transferred onto the IL without a reasonable explanation.

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[14] Protocol Regarding the Implementation of the CEPT Scheme Temporary Exclusion List, Singapore 23rd November (available at http://www.aseansec.org/12365.htm visited March 7, 2010) hereinafter TEL Protocol.

[15] TEL Protocol article 1 provides that "the objective of this Protocol is to allow a Member State to temporarily delay the transfer of a product from its TEL into the Inclusion List (hereinafter referred to as "IL"), or to temporarily suspend its concession on a product already transferred into the IL, if such a transfer or concession would cause or have caused real problems, by reasons which are not covered by Article 6 (Emergency Measures) of the Agreement".

[16] TEL Protocol, *supra* note 14 at art.2.

[17] *Id.*,

These provisions came quite late after Members had placed too many products that they claimed as their sensitive products, on the TEL. The damage to the progress of the implementation of AFTA had already been done, and this caused a very slow progress of tariff reduction under the CEPT Scheme. But coming late is better than never coming at all; the TEL Protocol made clear that it gave some flexibility to sensitive products but all Members who wish to temporary suspend their products from IL on sensitive product ground must comply with rules set forth in the TEL Protocol.

The Philippines invoked the provisions of the TEL Protocol with respect to its petrochemical industry in December 2002 by submitting notification to the AFTA Council to suspend the tariff concessions on petrochemical products that already transferred onto tariff reduction program in the IL. Those petrochemical products comprised polymers of polyethylene, propylene, polyvinyl chloride, polystyrene; PVC floor coverings; sheets, plates, film, foil and strip of PVC; twine, cordage, rope, and cables of polyethylene and polypropylene. With the AFTA Council's approval, those petrochemical products were temporarily suspended from the CEPT Scheme until 2006.[18] Consequently, on 9 January 2003, the Government of the Philippines issued Executive Order No. 161 implementing the suspension of the tariff reduction schedule on certain plastic products. In spite of this, the Philippines had also agreed to compensate Singapore, who claimed lost of market revenue on petrochemical products because of the Philippine's decision.[19] "The suspension of tariff reduction on petrochemical products was meant to assist the establishment of the country's

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[18] Joint Media Statement of the 20th Meeting of the ASEAN Free Trade Area (AFTA) Council, Kuala Lumpur, 21 August 2006 (available at http://www.aseansec.org/20863.htm visited March 7, 2010).

[19] TEL Protocol, supra note 14 at art. 5 "Any compensatory adjustment negotiated in relation to the Submission, in whatever form, to be provided by the applicant Member State, shall be extended on the most favoured nation basis to all other Member States, where applicable".

supposedly first naphtha cracker plant by the Gokongwei-owned JG Summit Petrochemical Corp., but which did not materialize".[20]

As of 2005,[21] the ASEAN-6 has no more sensitive products on the TEL. Vietnam also transferred all its remaining products under TEL onto Inclusion List on 1 January 2006. Lao PDR has had no products on the TEL since 2006. Cambodia transferred the last remaining TEL items onto the IL in 2007. Myanmar transferred her un-processed agriculture products from TEL onto the Inclusion List in 2006. Herewith, there are no more products on the TEL.[22] As a result, an ASEAN Member is no longer be able to invoke the TEL Protocol to temporarily delay or suspend its concession on a product that already transferred onto the IL.

3. Principle and Program of Tariff Reduction for Unprocessed Agricultural Products under Sensitive List: SL

The CEPT Scheme Agreement of 1992 did not include unprocessed agricultural products from the CEPT Scheme. Consequently, the 26th AEM Meeting held in Chiang Mai in September 1994 decided to include all unprocessed agricultural products into tariff reduction program under the CEPT Scheme.[23] Member States classified unprocessed agricultural products into three lists: the Immediate Inclusion List; the Temporary Exclusion

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[20] BioFuel Information-Local News, Promised sugar tariff cut delay now unlikely, 19 January 2009 (available at http://www.bar.gov.ph/biofuelsinfo/news&events/ln20090119.asp visited March 6, 2010).

[21] Source: Joint Media Statement of the Nineteenth Meeting of the ASEAN Free Trade Area (AFTA) Council, Vientiane, 27 September 2005, (available at http://www.aseansec.org/17775.htm visited March 18, 2010).
: Joint Media Statement of the Twenty-First Meeting of the ASEAN Free Trade Area (AFTA) council, Philippines, 23 August 2007, (available at http://www.aseansec.org/20862.htm visited March 18, 2010).

[22] ASEAN Secretariat.

[23] "This Agreement shall apply to all manufactured products including capital goods, and agricultural products." Protocol to Amend the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, Done at Bangkok, December 15th 1995,

(available at http://www.aseansec.org/12371.htm visited March 7, 2010).

List; and the Sensitive List.[24]

a). Immediate Inclusion List for Unprocessed Agricultural Products

Unprocessed agricultural products in the Immediate Inclusion List were transferred to either the Normal Track or Fast Track scheme by the 1st of January 1996. Members had a tariff reduction schedule to bring tariff rates of these products down to 0-5% by 2003. It was also required that quantitative restrictions and other non-tariff barriers on these products were to be removed.

b). Temporary Exclusion List for Unprocessed Agricultural Products

Products on the TEL were kept out of the Normal or Fast-Track Program only for a limited time. Any unprocessed agricultural product on the TEL were transferred to the Inclusion List in equal installments each year and subjected to the same tariff reduction schedule as other CEPT products. These products, however, were transferred onto the Inclusion List by 2003.

c). Sensitive List for Unprocessed Agricultural Products

Unprocessed agricultural products on the Sensitive List were classified as "Sensitive Products" and "Highly Sensitive". These products were treated differently under the "Protocol on the Special Arrangement for Sensitive and Highly Sensitive Products".[25] Pursuant to the Protocol on Sensitive and Highly Sensitive Products, ASEAN-6 phased in

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[24] Inclusion of Unprocessed Agricultural Products, AFTA Reader III, ASEAN Secretariat, 1995.

[25] Protocol on the Special Arrangement for Sensitive and Highly Sensitive Products, Singapore, September 31, 1999 (available at http://www.aseansec.org/12414.htm visited March 6, 2010) hereinafter Protocol on Sensitive and Highly Sensitive Products.

sensitive unprocessed agricultural products under the CEPT Scheme beginning on the 1st of January 2001 and completed their phasing in by the 1st of January 2010. Moreover, They committed to eliminate all quantitative restrictions[26] and all other non-tariff barriers on sensitive and highly sensitive products by the 1st of January 2010. Vietnam began phasing its sensitive unprocessed agricultural products on the 1st of January 2004 and committed to complete the process by the 1st of January 2013. In additional, Vietnam obligated herself to eliminate all QRs and other NTBs on sensitive unprocessed agricultural products and highly unprocessed agricultural products by the 1st of January 2013.[27]

Lao PDR and Myanmar started phasing in sensitive products to the CEPT Scheme beginning on the 1st of January 2006 and will complete the process by the 1st of January 2013. Both Members obligated themselves to eliminate all QRs and all other NTBs on sensitive products by 1st January 2015. Nevertheless, Myanmar transferred its un-processed agriculture products from the SL onto the IL on the 23rd of November 2006. Cambodia began phasing in sensitive products to the CEPT Scheme on the 1st of January 2008 and obligated itself to complete the process by the 1st of January 2017. Cambodia will eliminate all quantitative restrictions and all other NTBs on sensitive products by the 1st of January 2015.[28]

Rice and sugar are considered highly sensitive commodities for some members, especially Indonesia and the Philippines. ASEAN allows flexibilities in tariff cuts for the two sensitive commodities by signing the Protocol to Provide Special Consideration for Rice and

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[26] Hereinafter QRs.

[27] Source: ASEAN Secretariat http://www.aseansec.org.

[28] Source: ASEAN Secretariat http://www.aseansec.org.

Sugar.[29] The objective of the Protocol for Rice and Sugar is to allow an ASEAN Member State to, under exceptional cases, with regard to rice and sugar, request a waiver from the obligations imposed under the CEPT Agreement and its related Protocols.[30] In order to waive rice or sugar products from the implementation of AFTA, an ASEAN Member State must make a written submission to AFTA Council to obtain AFTA Council approval at least ninety days prior to the date the wavier is to take effect.[31] Indonesia is the only member that has sugar on the Highly Sensitive List. However, Indonesia promised to reduce import tariff on sugar from 30-40% to 5-10% by 2015. In 2009, the Philippines decided to negotiate for slower tariff reductions on sugar. Tariffs for sugar products from the Philippines traded under AFTA-CEPT are currently at 38 percent.[32]

For rice, Indonesia and the Philippines are the only two countries that placed rice on the Highly Sensitive List. Nonetheless, Indonesia promised the other Members in the 15th ASEAN Summit that it would reduce tariffs on rice imports to 25% in 2015. On the other hand, The Philippines, which is the world's largest rice importer, is still not ready to reduce the tariffs on rice and retains a high import duty of forty-per cent on rice imports and still imposes quotas on rice import. Thailand was very upset that the Philippines did not comply with the commitment of the CEPT Scheme. High tariffs on rice imports will affect Thailand, the world's sixth-largest producer of rice, following China, Indonesia, Bangladesh and

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[29] Protocol to Provide Special Consideration for Rice and Sugar, done at Makati City, the Philippines, 2 August 2007 (available at http://www.aseansec.org/22975.pdf visited March 7, 2010), hereinafter Protocol for Rice and Sugar.

[30] *Id.*, art. 1.

[31] *Id.*, art. 2(1).

[32] Philippines suggests ASEAN keeping rice tariff between 35-40%, ASEAN Affairs, 18 October 2009 (available at http://www.aseanaffairs.com visited March 8, 2010).

Vietnam.[33] Finally in March 2010, the Philippines resolved a long-standing rice tariff issue specifically with Thailand. "Under the deal, Thailand will be allowed to sell as much as 367,000 tons of duty-free rice a year through 2014 to the Philippines, which will maintain a forty-percent import tariff until 2015"[34]

B.. Obligation to Eliminate of Non-Tariff Barriers

To implement the CEPT Scheme, Member States are not only obligated to reduce tariff barriers, but also to eliminate quantitative restrictions and non-tariff barriers. As of 2010, ASEAN Member States have made impressive progress in eliminating tariffs under the CEPT Scheme, especially ASEAN-6. The newer Members, CLMV, are not so far behind in implementing their commitments as discussed above. Attention has now shifted to implementation of the CEPT Scheme to eliminate non-tariff barriers.[35] The following comment shows that there is many measures found in practices of ASEAN Members that barrier to intra-ASEAN trade.

> The impediments to the increase of the volume of intra-trade among ASEAN countries include quota (or quantitative restrictions), stringent standard testing procedures, customs classifications and valuation procedures, subsidy scheme for domestic producers and purchasers, local content rules, and health

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[33] "Rice tariffs snarl ASEAN single market", Asia Times Online, October 27, 2009, (available at http://www.atimes.com/atimes/Southeast_Asia/KJ27Ae01.html visited March 18, 2010).

[34] Thailand, Philippines resolve rice tariff issue, Commodity Online 1 March 2010 (available at http://www.commodityonline.com/news/Thailand-Philippines-resolve-rice-tariff-issue-26060-3-1.html visited March 10, 2010).

[35] Hereinafter NTBs.

and safety standards. They are measures, which are not directly related to commercial policy but which are intentionally employed to restrict imports or to stimulate exports. In some cases such as licensing requirements and monopoly positions of State Enterprises, they have been instrumental in preventing the expansion of trade within the region and beyond.[36]

In the light of the above observation, ASEAN Members have been reducing tariff barriers that are in form of percentage of import duties. However, non-tariff barriers are much more dangerous to trade liberalization than import duties. Tariff barriers are in percentage of import duties but NTBs can be in any form of domestic rules of regulations that barrier to trade liberalization. Unlike tariff barriers, it is not quite easy to identify which rules or regulations are NTBs.

1. Eliminating Quantitative Restrictions

According to Article 1 (3) of the CEPT Scheme, quantitative restrictions are defined as prohibitions or restrictions on trade with Member States, whether made effective through quotas, licenses or other measures with equivalent effect, including administrative measures and requirements, which restrict trade.[37] Pursuant to Article 5 (A) (1) of the CEPT Scheme, Member States are committed to eliminate all quantitative restrictions in respect of products under the CEPT Scheme upon enjoyment of the concessions applicable to those products.[38] This means that Member States are obligated to eliminate all quantitative restrictions once a product was placed on the Inclusion List. Member States were required to notify the AFTA

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[36] Jaturon Thirawat, Salient Aspects and Issues Concerning AFTA, (2002) (unpublished manuscript).

[37] CEPT Scheme for AFTA, *supra* note 1 at art. 1(3)

[38] CEPT Scheme for AFTA, *supra* note 1 at art.5 (A) (1).

Council through the ASEAN Secretariat on their existing quantitative restrictions by the 31st of December 1992 [39].

2. Elimination of Other Non-Tariff Barriers

In the context of Article 1 (2) of the CEPT Scheme, non-tariff barriers are measures other than tariff barriers, which effectively prohibit or restrict import or export of products within Member States.[40] What is more, Article 5 (A) (2) sets out that Member States have the obligation to eliminate other non-tariff barriers on a gradual basis within a period of five years after the enjoyment of concessions applicable to those products.[41] Although the CEPT Agreement calls for the elimination of NTBs within five years after enjoyment of the concession, the Eighth AFTA Council decided that Member States should aim to eliminate the NTBs earlier than currently allowed for and no later than the year 2003.[42]

In 1993, AFTA Council realized that most non-tariff barriers that affect intra-ASEAN trade were technical measures and customs surcharges. Therefore, at the 9th AFTA Council meeting in Singapore in 1996, ASEAN Members agreed to take action in eliminating of Other NTBs by these following measures:

- Create a prioritized list of products to achieve transparency, harmonization and mutual recognition of technical standards.
- Use the ASEAN-CCI to liaise with their industry clubs to gather information on

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[39] Interpretative Notes to the Agreement on the CEPT Scheme for the AFTA, art.5 (A) (1).

[40] CEPT Scheme, *supra* note 1, at art. 1(2).

[41] CEPT Scheme for AFTA, *supra* note 1 at art.5 (A) (2).

[42] http://www.aseansec.org.

NTBs in these major sectors for transmission to the ASEAN Secretariat.

- Assigned the AFTA Units to establish regular dialogues with the private sector and encouraged the private sectors of ASEAN to raise any AFTA-related complaints to these Units.[43]

Member States put a lot of efforts to create effective ways to eliminate non-tariff barriers among intra-ASEAN trade. One of the efforts was to create the Interim Technical Working Group (ITWG) on CEPT to undertake the Preparatory Work for the elimination of the NTBs for AFTA. Moreover, the ASEAN Secretariat also took action on eliminating NTBs by concluding major NTBs that affect the most widely traded products in ASEAN: custom surcharges, technical measures and product characteristic requirements, and monopolistic measure.[44] The ITWG classified major NTBs that it found in intra-ASEAN trade into 5 categories:[45]

a). Para-tariff Measures

Para-tariff measures are other measures that increase the cost of imports in a manner similar to tariff measures; e.g., custom surcharges/import surcharges, additional charges, and decreed custom valuation.

b). Price Control Measures

These measures are intended to control the price of imported articles. Examples of the price control measures are administrative price fixing of import prices, voluntary export price

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[43] http://www.aseansec.org/12404.htm.

[44] ASEAN Secretariat.

[45] For more details information about non-tariff barriers in intra-ASEAN trade visit http://www.aseansec.org.

restraint and variable charges.

c). Finance Measures

Finance measures are measures that regulate the access to and cost of foreign exchange for imports and define the terms of payments such as advance payment requirements, advance import deposits, cash margin requirements and advance payments of custom duties.

d). Monopolistic Measures

These measures mean measures that create a monopolistic situation., by giving exclusive right to one or a limited group of economic operators for instance, single channel for imports and compulsory national services.

e). Technical Measure

The technical measures that have been used in intra-ASEAN trade are, for instance, technical requirements, product characteristics requirements, marking requirements and packaging and labeling requirements.

Conclusion

Both tariff barriers and non-tariff barriers cause problems in trade liberalization. The non-tariff barriers appear in many forms as described some of the NTBs in ASEAN trade in the previous subsection. Moreover, NTBs can be created constantly in new forms, especially in bureaucratic and administrative barriers that obstruct trade liberalization. Hence, it is not quite an easy task to eliminate NTBs. ASEAN Members use information from various sources to identify and define NTBs that are barriers to trade. ASEAN does not only count on works of the Interim Technical Working Group (ITWG) on CEPT but it has also called for private sectors to be part of the process of identifying and defining NTBs in ASEAN trade. At the 11th AFTA Council Meeting, ASEAN Members called for the ASEAN Chambers of

Commerce and Industry and ASEAN private sectors to identify these barriers for reporting to the next AFTA Council meeting with the view to possible elimination.[46] This is very effective way to identify NTBs in intra-region trade because private sector from each Member will be the best source that experiences the NTBs that have been hidden in domestic measures of other Members. Frankly speaking, no one would admit that its domestic rules and regulations are barriers to trade liberalization in ASEAN.

The AFTA Council has mandated the ASEAN Secretariat to undertake an in-depth monitoring of potential NTBs in ASEAN with the view to their elimination. The AFTA Council Meeting has also endorsed a mechanism to effectively address private sector complaints on NTBs and has further agreed that private sectors could also address their complaints directly to the ASEAN Member States.[47] Moreover, ASEAN has recognized the importance of private sector inputs in the identification of NTBs; therefore, therefore, it called on ASEAN business sectors to forward any complaints on NTBs to the Member States and the ASEAN Secretariat. ASEAN encourages businesses and investors to who experience any non-tariff barrier to complain either in its own country or in ASEAN Secretariat. This sounds very efficient but there is no information about complaining procedures or assigned authorities in each country available for private sector to report use of NTBs. Thus, how can private sector know what to do or where to go to make a complaint? Again, ASEAN came out with excellent idea to have private sector help ASEAN identify NTBs but no real action plan or procedures to follow. AFTA Council should give detailed procedures how and where private sector can make a complaint about NTBs.

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[46] Joint Press Statement of the Eleventh AFTA Council Meeting, 15 October 1997, Subang Jaya, Malaysia, available at http://www.aseansec.org/12407.htm (visited March 18, 2010).

[47] Source: ASEAN Secretariat.

To keep the process transparent, the ASEAN Secretariat makes publicly available the list of potential NTBs and their verifications by the Member Governments. Even though the elimination of NTBs in intra-ASEAN trade has been conducted in various ways, it has been unable make impressive progress to eliminate NTBs. The 17th AFTA Council Meeting in 2003 mentioned a serious concern over the slow progress in the work on the elimination of unnecessary and unjustifiable non-tariff measures. At the 18th Meeting of the AFTA Council, ASEAN Ministers agreed to establish a Database on ASEAN Non-Tariff Measures, which can be accessed at the ASEAN Secretariat website (http://www.aseansec.org).[48] This Database on ASEAN Non-Tariff Measure contains NTBs list from each Member States. Moreover, the same meeting called for "greater business sector involvement in the process so that unknown or unlisted NTMs can be notified and cross-notified within the region and those posing as barriers to trade subsequently eliminated".[49]

The creating of Database on ASEAN Non-Tariff Measure was a big step for ASEAN that gather existing NTBs from various sources. The data does not only come from Member States but also come from business and investor communities. That was pretty open minded of ASEAN to include private sector to get involved with removing NTBs from intra-ASEAN trade. However, as of March 18, 2010, the Database on ASEAN Non-Tariff Measure still shows data of NTBs form each Member from year 2007. The data provided should be up-to date information which at least gets updated every year.

ASEAN Members have used any number of resources to help them fulfill their obligation to eliminate non-tariff barriers; for instance, establishing a working group to

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[48] http://www.aseansec.org/16355.htm.

[49] Joint Media Statement of the Eighteenth Meeting of the ASEAN Free Trade Area (AFTA) Council, 2 September 2004, Jakarta, Indonesia, available at http://www.aseansec.org/16349.htm (visited March 18, 2010).

indentify NTBs and requesting private sectors to report NTBs that they experience from trading in ASEAN. At the AFTA Council Meeting 2009, the Ministers commended Malaysia and Thailand for their submissions on specific NTBs to be eliminated under the Work Programme on the Elimination of NTBs, and urged others to submit their measures as soon as possible.[50] To implement the obligation to eliminate NTBs under the CEPT Scheme of products, ASEAN Members have remove unnecessary barriers to trade through efforts such as harmonization of product standards and mutual recognition of conformity assessment requirements, simplification of customs clearance procedures and harmonization of sanitary and phytosanitary standards.[51]

In light of the above, the eliminating of NTBs on intra-ASEAN trade is still a slow going process. After eighteen years since the implementation of the CEPT started in 1993, ASEAN Members have not come up with impressive ways, nor have solid plans to eliminate the NTBs in intra-ASEAN trade. For eliminating of tariff barriers, ASEAN Members have made significantly progress. Furthermore, many products from the Temporary Exclusion List and the Sensitive List have been placed onto the Inclusion List, where Members were required to eliminate NTBs within five years of the enjoyment of concessions applicable to those products. If ASEAN wants to become a single market, and a single production base in 2015, it should take serious action on this issue. In every AFTA Council Meeting, Members try to encourage each other to submit their measures that barrier trade, however, they still could not identify all of NTBs that exist in their trading practices. It absolutely is not efficient enough to get rid off all NTBs in intra-ASEAN trade. In the conclusion of this chapter, this

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[50] ASEAN Secretariat.

[51] Frequently Asked Questions on Non-Tariff Issues (NTIs), ASEAN Secretariat, a vailable at http://www.aseansec.org/12052.htm (visited March 10, 2010).

study will suggest more efficient ways to eliminate other non-tariff barriers.

II. Exceptions of the Obligations to Implementation of the CEPT Scheme for AFTA and Emergency Measures

As previously discussed, ASEAN Members are obligated to eliminate both tariff barriers and non-tariff barriers in all products. However, there might be some situations that create or threaten serious damages to a Member. To prevent unwanted situation, a Member may not be able implement its obligations under the CEPT Scheme. Therefore, like almost every international trade agreement-even in the GATT 1994,[52] the CEPT Scheme provides General Exception and Emergency Measures provisions to provide exceptions to a Member from the implementation of the CEPT Scheme. This section will discuss the exceptions under the CEPT Scheme namely General Exception and Emergency Measures.

A.. General Exceptions of the Obligations to Implementation of the CEPT Scheme for AFTA

1. Ground and Scope of the Exceptions

The CEPT Scheme provides a General Exception clause in its Article 9 that "a Member State is allowed to take action and adopt measures, which it considers necessary for the protection of its national security, the protection of public morals, the protection of human, animal or plant life and health, and the protection of articles of artistic, historic and

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[52] General Agreement of Tariff and Trade 1994, available at http://www.wto.org (last visited March 7, 2010) [hereinafter **GATT 1994**].

archaeological value".[53] The concept of this exception is consistent with Article XX of the General Agreement on Tariffs and Trade 1994[54] except the GATT 1994 provision allows more grounds to invoke exceptions under Article XX. On the other hand, Article 9 of the CEPT does not provide sufficient details for this exception but leaves it to Members to interpret, as they wish. Lack of specific detail of the exception will leave Members depend on self-interpretation that may lead to a disagreement among Members.

Moreover, ASEAN creates a General Exception List[55] on which to place any product that a Member considers necessary for the protection of its national security, public morals, human, animal or plant life and health, and articles of artistic, historic or archaeological value. Many regional economic integration agreements, as well as Article XX of the GATT 1994, have general exception provisions similar to those of Article 9 of the CEPT for AFTA; however, none create a General Exception List that allows a member to protect national security, public morals, human, animal or plant life and health, and articles of artistic, historic and archaeological value. ASEAN Members are allowed to invoke Article 9 of the CEPT Scheme when it is necessary not to create a whole list of products that they want to protect beforehand.

2. General Exclusion List

The products under the GE List are permanently excluded products from the obligation to eliminate trade barriers under the CEPT Scheme. Member States were required to inform the Council and the ASEAN Secretariat of their products that fall under the General

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[53] CEPT Scheme for AFTA *supra* note 1 at art.9.

[54] Article XX of the General Agreement of Tariff and Trade 1994, available at http://www.wto.org (last visited March 7, 2010).

[55] Hereinafter **GE List**.

Exceptions clause by the 31st of December 1992 and if there were any changes to the list of products, they should have been consistent with Article XX of the GATT.[56]

A number of problems arose from having this GE List when the AFTA project started. Some Member States had transferred products that already placed in the tariff reduction programs under IL and TEL to be excluded from any obligations of the CEPT Scheme under GE List. The list of products in the GE List is long and may include products placed there for reasons other than those stipulated in Article 9 of the CEPT Agreement. In earlier years, there were 829 tariff lines in the GE List. Brunei Darussalam had the longest GE List with 202 tariff lines while the shortest was Thailand's, which had no tariff line on the GE LIST. ASEAN has tried to shorten the list of products under the GE List.

At the 18th AFTA Council Meeting in 2004, ASEAN Ministers realized that there were too many tariff lines that had been excluded from the implementation of the CEPT Scheme under the GE List. Therefore, the AFTA Council called for reviewing the GE List and assigned the Senior Economic Officials Meeting (SEOM) to work towards instituting further improvements on the GE List in order to make it more consistent with the CEPT Agreement. Since then, ASEAN Ministers have reviewed the GE List at almost every AFTA Council Meeting and have tried to phase in products on the GE List back to the CEPT Scheme. The review of the GE List aims to institute further improvements, and make the GE List more consistent with the CEPT Agreement. With the completion of the review, the 20th AFTA Council Meeting in Kuala Lumpur 2006 noted that the products on the GE List have been significantly reduced to only 0.68% of total tariff lines.[57] The Ministers also endorsed

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[56] Interpretative Notes, *supra* note 39 at art.9 (1) (2).

[57] The 20th AFTA Council Meeting, Kuala Lumpur, 21 August 2006.

the modality of tariff reduction of these products and urged Member States to comply with the agreed schedule. As of 2010, tariffs on products on the GE List remain based on factors such as national security and morals/health/aesthetic/archaeological grounds (e.g.: weapons and opium).[58]

B.. Emergency Measures

ASEAN Members have obligations to strictly comply with their commitments to eliminate trade barriers, quantitative restrictions and non-tariff barriers under the CEPT Scheme. However, the CEPT Scheme provides a safeguard clause for ASEAN Members under its Article 6 to allow a Member to use emergency measures if in the event of unexpected changes or circumstances brought about by liberalization trade in goods in AFTA cause serious harm to domestic producers.[59] The emergency measures and conditions to

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[58]ASEAN-6 Achieves Zero Tariffs, ASEAN Secretariat, 31 December 2009, available at http://www.aseansec.org/24146.htm (last visited March 8, 2010).

[59] Among the factors to be considered in determining whether injury to the domestic industry is serious are:

- decline in sales or prices; downward trends in production, profits, wages, or productivity;
- inability to generate capital for modernization or maintain existing levels of expenditures on research and development;
- inability of significant number of firms to carry out production at a profit; significant idling of production facilities including the closure of plants or underutilization of production capacity;
- significant unemployment/ underemployment; significant reduction in market share as a proportion of market demand; and
- growing inventories of subject article, whether maintained by domestic producers, importers, wholesalers or retailers.

For threat of serious injury, the following factors are considered:

- significant increase in imports (evidenced, among others, by the existence of letters of credit, supply/sales contracts, awards of a tender, irrevocable etc. similar contracts);
- decline in sales, prices or market share and downward trends in production, profits, wages, productivity or employment;
- inability to generate capital for modernization or maintain existing levels of expenditures on research and development;

invoke the Article 6 of the CEPT Scheme are to be studied next.

1. Suspend Preferences on Imports of Particular Products

Article 6 of the CEPT Scheme allows a Member to suspend preferences under the CEPT Scheme, if importing of a particular product eligible under the CEPT Scheme is increasing in such a manner as to cause or threaten to cause serious injury to sectors producing like, or directly competitive products in the importing Member States.[60] Nevertheless, Article 6 provides that the suspension of preferences can be used only for such time as may be necessary to prevent, or to remedy, such injury and without discrimination. Furthermore, such suspension of preferences must be consistent with the GATT.[61] This provision is consistent with the GATT 1994 Article XIX "Emergency Action on Imports of Particular Products."

2. Create or Intensify Quantitative Restrictions or Other Measures Limiting Imports

If there is a serious decline of a monetary reserve in an ASEAN Member Country, Article 6 (2) of the CEPT Scheme allows such Member to create or intensify quantitative restrictions or other measures limiting imports if necessary. ASEAN Members can use this preventive clause only to forestall the threat of, or stop such a serious decline of its monetary

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- sufficient freely disposable, or an imminent substantial increase in production capacity of foreign exporters including access conditions they face in third country markets indicating the likelihood of substantially increased exports to the Philippines; and
- growing inventories of subject article, whether maintained by domestic producers, importers, wholesalers or retailers.

Source: Tariff Commission, the Republic of the Philippines, at http://www.tariffcommission.gov.ph/afta-cep.html

[60] CEPT Scheme, *supra* note 1, at art.6

[61] CEPT Scheme, *supra* note 1 at art.6.

reserves. Moreover, Members must endeavor to do so in a manner, which safeguards the value of the concessions agreed upon.[62]

To invoke the Emergency Measures provisions under Article 6 (1) and (2) of the CEPT Scheme, a Member taking such emergency action is required to give immediate notice to the AFTA Council, and such action may be subject to consultations between concerned Member States.[63]

This kind of exception and safeguard clause are not new in international trade, but the vagueness of the relevant provisions constitutes a matter of concern for ASEAN Member States. ASEAN does not include clear conditions and limitations of the Safeguard Clause in the CEPT Scheme. To prevent any problem from lack of details of Emergency clause, the 11th AFTA Council Meeting decided that the application of these provisions have to be in conformity with the WTO's Agreement on Safeguard. [64] Additionally, ASEAN Member States are obligated to comply with provisions of the Protocol on Notification Procedures [65] and to notify AFTA Council any action or measure that they intend to take:

(a) may nullify or impair any benefit to other Member States, directly or indirectly under any ASEAN economic agreement; or

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[62] CEPT Scheme for AFTA, *supra* note 1 at art.6 (2).

[63] For more information about Safe Guard Agreement visit http://www.wto.org/english/res_e/booksp_e/analytic_index_e/safeguards_e.htm (last visited March 10, 2010).

[64] The Council agreed to further strengthen the CEPT Agreement by modifying the provisions of Article 6 (Emergency Measures) of the CEPT Agreement to specify more precisely under what conditions it can be invoked. The Council agreed that the use of emergency measures in the CEPT Agreement must be fully consistent with the WTO Agreement on Safeguards.
The Joint Press Statement of the11th AFTA Council Meeting 15 October 1997, Subang Jaya, Malaysia, available at http://www.aseansec.org/12407.htm (last visited March 10,2010).

[65] Protocol on Notification Procedures, 8 October 1998, the Philippines
(available at http://www.aseansec.org/12367.htm visited March 10, 2010).

(b) when the action or measure may impede the attainment of any objective of an ASEAN economic agreement.[66]

The requirement of the Protocol on Notification Procedures is applied to any ASEAN economic agreements including the CEPT Scheme to promote transparency and to improve the operation of notification procedures under all ASEAN economic agreements. Pursuant to Article 2 (1) of the Protocol on Notification Procedures, the required notification must be made at least sixty days before such action or measure is to take effect. Such notification must be made to the SEOM and the ASEAN Secretariat. Article 4 of the Protocol on Notification Procedures states that in submitting a notification, a Member State must provide sufficient information regarding the proposed action or measure to be taken, including a description of the action or measure to be taken, the reasons for undertaking the action or measure, and the intended date of implementation and the duration of the action or measure.[67] Additionally, before a Member State proposes to apply an action or measures, such Member must provide adequate opportunity for prior discussions with those Member States having an interest in the action or measure concerned.[68]

III. Conclusion: Chapter II

It was eighteen years ago that the ASEAN Member States began their economic integration to establish an ASEAN Free Trade Area. It was not quite a smooth ride from the beginning because ASEAN Members have similar natural resources and economies. Most of

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[66] *Id.*, art.1 (2).

[67] *Id.*, art.4.

[68] *Id.*, art.2 (1).

them are agricultural countries beside Singapore and Brunei. Their relationships were completive rather than complementary. The following observation confirms that ASEAN Members have shared the same intensives that attract foreign direct investors. "Most ASEAN countries share similar resource inputs and are similarly engaged in producing high-tech and labour-intensive export, which are mostly bought by non-ASEAN countries".[69] This statement reflected a previous situation in ASEAN trade. ASEAN Members were more like competitors than companions in intra-regional trade. It was not an easy task for them to commit to the implementation of the CEPT Scheme. ASEAN Member States had to compromise benefits and detriments among themselves, and respect their respective differences. Therefore, to make sure that each product from each Member would be treated fairly, but also comply with its commitments under the CEPT Scheme, Member States created four lists of products under the CEPT Scheme.

After 18 years of a long, bumpy, and winding road, ASEAN Member States have now claimed that the ASEAN Free Trade Area is now virtually established. Through the implementation of the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area, ASEAN Members have made impressive improvement in the intra-ASEAN trade as previously discussed in Chapter I. The numbers tell it all. The ASEAN Statistic provides 2 figures below to show that there is improvement on intra-ASEAN ASEAN trade. Figure 2.1 exemplifies numbers of ASEAN trade that has expanded in tandem. Total of ASEAN trade in 2007 was 1.6 billion US dollars then slightly went up to 1.7 billion US dollars in 2008. Figure 2.2

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[69] Lim, Hank and Matthew Walls, "ASEAN after AFTA: What's Next?" in the Occasional Papers Southeast Asia Europe, 3/2004 (Singapore: Friedrich Ebert Stiftung): 92.

Dr.Hank Lim is a Director of Research at Singapore Institute for International Affairs where Matthew Walls works as a researcher.

shows numbers of intra- and extra –ASEAN trade in year 2008 by each Member Country.

Figure 2.1 ASEAN Trade 2007-2008

ASEAN Trade, 2007-2008
as of 15 August 2009

value in US$ million; change in percent

Country	2007			2008			Year-on-year change		
	Exports	Imports	Total trade	Exports	Imports	Total trade	Exports	Imports	Total trade
Brunei Darussalam	7,653.2	2,096.7	9,749.9	8,754.2	3,106.0	11,860.2	14.4	48.1	21.6
Cambodia	3,905.5	3,675.1	7,580.6	4,358.5	4,417.0	8,775.5	11.6	20.2	15.8
Indonesia	114,100.9	74,473.4	188,574.3	137,020.4	129,197.3	266,217.7	20.1	73.5	41.2
Lao PDR	381.9	711.1	1,093.0	827.7	1,803.2	2,630.9	116.7	153.6	140.7
Malaysia	176,205.6	146,910.3	323,116.0	194,495.9	144,298.8	338,794.7	10.4	(1.8)	4.9
Myanmar	5,933.4	2,789.1	8,722.5	6,620.6	3,794.9	10,415.4	11.6	36.1	19.4
The Philippines	50,465.7	55,513.7	105,979.5	49,025.4	56,645.6	105,671.0	(2.9)	2.0	(0.3)
Singapore	299,297.4	263,154.9	562,452.4	241,404.7	230,760.3	472,165.0	(19.3)	(12.3)	(16.1)
Thailand	153,571.1	139,965.7	293,536.8	174,966.7	177,567.5	352,534.2	13.9	26.9	20.1
Viet Nam	48,288.9	61,693.6	109,982.5	61,777.8	79,579.2	141,357.0	27.9	29.0	28.5
ASEAN	**859,803.8**	**750,983.7**	**1,610,787.5**	**879,251.9**	**831,169.9**	**1,710,421.7**	**2.3**	**10.7**	**6.2**

Source: ASEAN Merchandise Trade Statistics Database (compiled/computed from data submission, publications and/or websites of ASEAN Member States' national ASEAN Free Trade Area (AFTA) units, national statistics offices, customs departments/agencies, or central banks)

Symbols used:
- not available as of publication time
n.a. not applicable/not available/not compiled
Data in italics are the latest updated/revised figures from previous posting

Notes:
All figures are preliminary
Details may not add up to totals due to rounding off errors.

Source: ASEAN Statistics at http://www.aseansec.org

Figure 2.2 Intra-and extra-ASEAN trade, 2008

Intra- and extra-ASEAN trade, 2008
as of 15 August 2009

value in US$ million; share in percent/share to percent

Country	Intra-ASEAN exports		Extra-ASEAN exports		Total exports	Intra-ASEAN imports		Extra-ASEAN imports		Total imports	Intra-ASEAN trade		Extra-ASEAN trade		Total trade
	Value	Share to total exports	Value	Share to total exports		Value	Share to total imports	Value	Share to total imports		Value	Share to total trade	Value	Share to total trade	
Brunei Darussalam	1,972.9	22.5	6,781.2	77.5	8,754.2	1,571.4	50.6	1,534.6	49.4	3,106.0	3,544.3	29.9	8,315.9	70.1	11,860.2
Cambodia	310.6	7.1	4,047.9	92.9	4,358.5	1,599.3	36.2	2,817.7	63.8	4,417.0	1,909.9	21.8	6,865.6	78.2	8,775.5
Indonesia	27,119.6	19.8	109,849.6	80.2	137,020.4	40,991.7	31.7	88,205.6	68.3	129,197.3	68,162.5	25.6	198,055.2	74.4	266,217.7
Lao PDR	724.4	87.5	103.3	12.5	827.7	1,490.9	82.7	312.4	17.3	1,803.2	2,215.3	84.2	415.6	15.8	2,630.9
Malaysia	50,401.4	25.9	144,094.5	74.1	194,495.9	34,675.3	24.0	109,623.5	76.0	144,298.8	85,076.7	25.1	253,718.0	74.9	338,794.7
Myanmar	3,853.4	58.2	2,767.2	41.8	6,620.6	1,728.2	45.5	2,066.7	54.5	3,794.9	5,581.6	53.6	4,833.9	46.4	10,415.4
The Philippines	7,081.7	14.4	41,943.7	85.6	49,025.4	14,316.7	25.3	42,328.9	74.7	56,645.6	21,398.4	20.3	84,272.6	79.7	105,671.0
Singapore	101,477.3	42.0	139,927.4	58.0	241,404.7	69,876.1	30.3	160,882.3	69.7	230,760.3	171,353.4	36.3	300,809.6	63.7	472,165.0
Thailand	39,487.0	22.6	135,479.8	77.4	174,966.7	29,888.2	16.8	147,679.3	83.2	177,567.5	69,375.3	19.7	283,158.9	80.3	352,534.2
Viet Nam	10,917.8	18.2	51,760.1	83.8	61,777.8	19,476.8	24.5	60,102.4	75.5	79,579.2	29,494.6	20.9	111,862.5	79.1	141,357.0
ASEAN	**242,487.5**	**27.6**	**636,754.4**	**72.4**	**879,251.9**	**215,616.5**	**25.9**	**615,553.4**	**74.1**	**831,169.9**	**458,113.9**	**26.8**	**1,252,307.8**	**73.2**	**1,710,421.7**

Source: ASEAN Merchandise Trade Statistics Database (compiled/computed from data submission, publications and/or websites of ASEAN Member States' national ASEAN Free Trade Area (AFTA) units, national statistics offices, customs departments/agencies, or central banks)

Symbols used:
- not available as of publication time
n.a. not applicable/not available/not compiled
Data in italics are the latest updated/revised figures from previous posting

Notes:
All figures are preliminary
Details may not add up to totals due to rounding off errors.

Source: ASEAN Statistics at http://www.aseansec.org

Starting the first day of 2010, Brunei Darussalam, Indonesia, Malaysia, Philippines, Singapore and Thailand can import and export almost all goods across their borders at no

tariff with the total tariff lines traded under the Common Effective Preferential Tariffs for ASEAN Free Trade Area (CEPT-AFTA) is 54,457 tariff lines or 99.11%. Additionally, with the reduction, the average tariff rate for these countries is expected to further decrease from 0.79% in 2009 to just 0.05% in 2010.[70] For tariff elimination of new Members namely, Cambodia, Lao PDR, Myanmar and Vietnam have reduced duties to 0-5 percent on 98.86 percent of products for intra-ASEAN Trade. Further, Vietnam has eliminated duties on 80 percent of the products on 1 January 2010 and the rest on new Members will be eliminating duties on all products by 2015.[71] Figure 2.3 shows that percent of tariff lines in the Inclusion List have been increased progressively. The newer Members, CLMV, have increased their tariff lines in Inclusion List from 52.1 percent in 2002 to 98.6 percent in 2009. Figure 2.4 demonstrates the Tentative 2010 CEPT Package by Tariff Category. It shows that in 2010, ASEAN-6 countries have over 99 percent of their in IL and the tariff rates are below 5%. As mentioned previously, as of January 2010, tariff rates of products under IL of the ASEAN-6 have been reduced to zero percent. The newer members, CLMV countries have placed 98.6 percent of their products into IL with tariff rates at below 5 percent.

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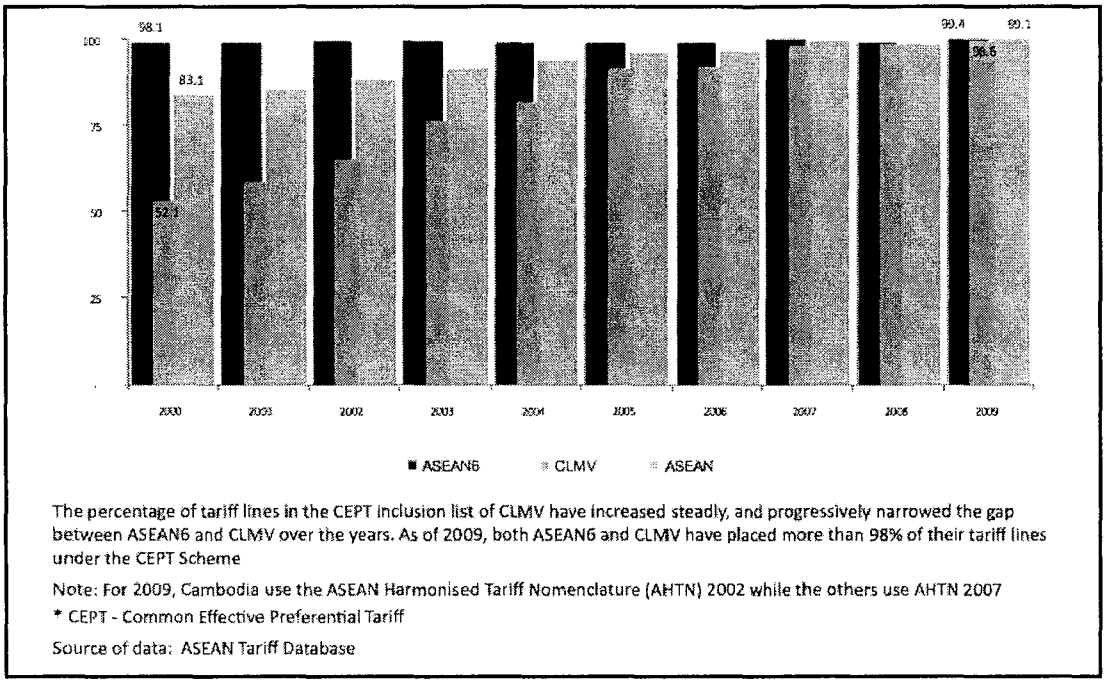
[70]ASEAN Secretariat, ASEAN-6 Achieve Zero Tariffs, 31 December 2009, available at http://www.aseansec.org/24146.htm (last visited March 1, 2010).

[71] 23rd AFTA Council Meeting, Bangkok Thailand, 13 August 2009.

Figure 2.3 Percent of Tariff lines in the CEPT Inclusion List.



Source: ASEAN Economic Community Chartbook 2009: ASEAN Secretariat.

Figure 2.4 Number of Tariff Lines in the Tentative 2010 CEPT Package by Tariff Category

Country	Number of Tariff Lines				Percentage			
	0-5%	> 5%	Other	Total	0-5%	>5%	Other	Total
Brunei D. (AHTN 2002)	8,223	-	-	8,223	100.00	-	-	100
Indonesia (AHTN 2007)	8,625	16	-	8,641	99.81	-	-	100
Malaysia (AHTN 2007)	12,227	12	-	12,239	99.90	0.10	-	100
Philippines (AHTN 2007)	8,919	34	-	8,953	99.62	0.38	-	100
Singapore (AHTN 2007)	8,300	-	-	8,300	100.00	-	-	100
Thailand (AHTN 2007)	8,300	-	-	8,300	100.00	-	-	100
ASEAN-6	54,594	62	0	54,656	99.89	0.11	0.00	100
Cambodia (AHTN 2002)	10,537	-	-	10,537	100.00	-	-	100
Lao PDR (AHTN 2007)	7,900	314	-	8,214	96.18	3.82	-	100
Myanmar (AHTN 2002)	8,240	-	-	8,240	100.00	-	-	100
Vietnam (AHTN 2007)	8,014	85	-	8,099	98.95	1.05	-	100
CLMV	34,691	399	-	35,090	98.86	1.14	-	100
ASEAN 10	89,285	461	0	89,746	99.49	0.51	0.00	100

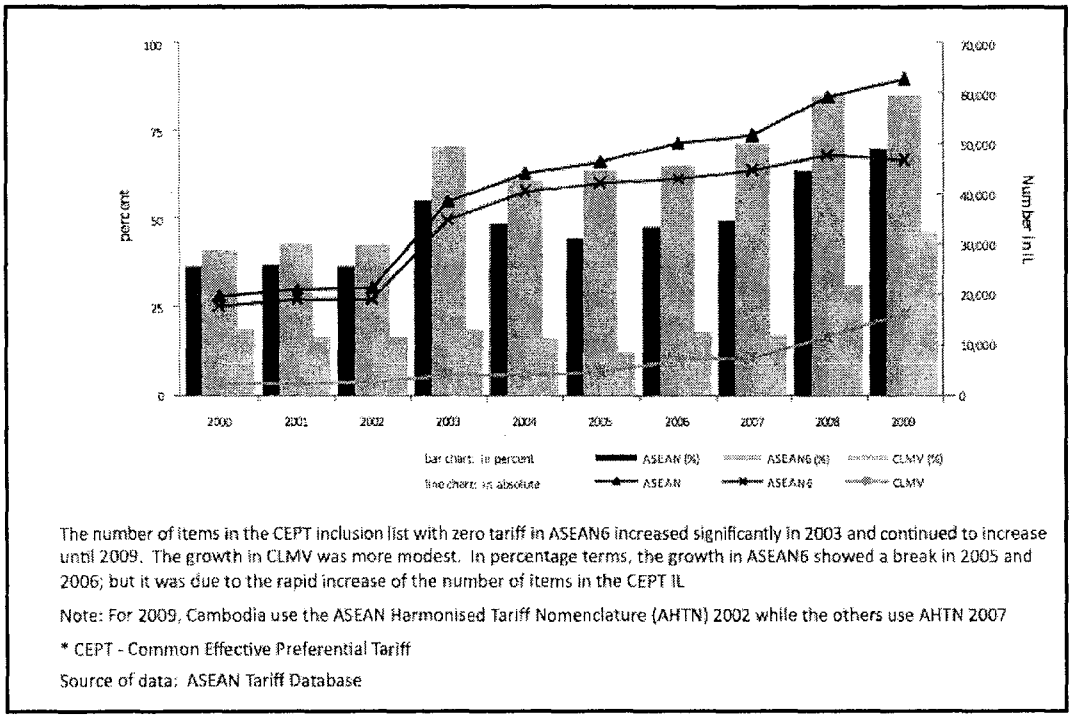
Number of Tariff Lines at 0% for ASEAN in the 2010 CEPT Package

Source ASEAN Secretariat

The tariff reduction programs under the CEPT Scheme have made significant progress. According to the ASEAN Secretariat, more than ninety-nine percent of the products on the CEPT Inclusion List (IL) of ASEAN-6 have been brought down to the 0-5 percent tariff range.[72] For ASEAN's new Members namely, Cambodia, Lao PDR, Myanmar and Vietnam, almost sixty-six percent of their products on the IL have tariffs within the 0-5 percent tariff range. Figure 2.5 bellow shows the number of items on the CEPT IL with zero tariff in ASEAN-6 have increased significantly from 2003 to 2009.

[72] ASEAN Secretariat, ASEAN Free Trade Area (AFTA Council), available at http://www.aseansec.org/19585.htm (last visited February 22, 2010).

Figure 2.5 Percent of Items in the CEPT Inclusion List (IL) with 0 Tariff*



The number of items in the CEPT inclusion list with zero tariff in ASEAN6 increased significantly in 2003 and continued to increase until 2009. The growth in CLMV was more modest. In percentage terms, the growth in ASEAN6 showed a break in 2005 and 2006; but it was due to the rapid increase of the number of items in the CEPT IL

Note: For 2009, Cambodia use the ASEAN Harmonised Tariff Nomenclature (AHTN) 2002 while the others use AHTN 2007

* CEPT - Common Effective Preferential Tariff

Source of data: ASEAN Tariff Database

Source: ASEAN Economic Community Chartbook 2009: ASEAN Secretariat

As shown in the above figures, ASEAN should not worry much about eliminating tariff barriers in intra-ASEAN trade since the tariff reduction program under the CEPT Scheme has shown tremendous progress. On the other hand, eliminating non-tariff barriers has not shown very impressive results. ASEAN should now focus on eliminating non-tariff barriers in intra-ASEAN trade. To make a big step toward establishing the ASEAN Economic Community in 2015, ASEAN needs to act aggressively to eliminate NTBs in intra ASEAN trade. This study proposes that ASEAN should sweep all NTBs out from each single Member to find measures that barrier trade of other ASEAN Member States. It is a time for ASEAN Members to show "ASEAN Spirit" by identifying all the non-tariff barriers that have been hidden in their trade practice. This action will enhance transparency of NTBs in all Members. The next step is to draw a deadline to eliminate all non-tariff barriers. Additionally, ASEAN Members must

commit that they will keep in place the NTBs and will not create more non-tariff measures.

Moreover, ASEAN Members must promise to reduce the NTBs until there are no more non-tariff barriers in intra ASEAN trade. To comply with these actions, ASEAN is required to create a clear action plan to eliminate the NTBs. Furthermore, it needs an effective surveillance mechanism and institution to monitor the implementation of action plans to eliminate NTBs within the timeframe set forth to remove the NTBs from intra-ASEAN trade.

This study recommends that ASEAN uses it own institution, ASEAN AFTA Unit to monitor the action plans suggested above and receive all matters about NTBs from National AFTA Unit to submit issues to SEOM or AFTA Council for further considerations. ASEAN also should use the National AFTA Unit in each Member States as a communication channel with the ASEAN AFTA Unit and private sectors regarding all NTBs matters, including the NTBs reduction program, as well as report all complaints from private sectors that experience NTBs from trading with other Members, to the ASEAN AFTA Unit. It is true that both the ASEAN AFTA Unit and the National AFTA Units have been working on these tasks for years. However, those efforts are clearly insufficient to help with eliminating the NTBs process. ASEAN needs to devote new tasks to those institutions with more effective rules and guidelines. Once tariffs on a product are eliminated, they are gone forever except in special circumstances under Safeguard measures or General Exceptions that will be discussed in the next section. However, non-tariff barriers that were eliminated can resurface in different forms and become barriers to intra-ASEAN trade. Therefore, non-tariff barriers are now the strongest enemies of ASEAN that it must eliminate to allow deeper and greater economic integration among ASEAN Member States.

Chapter III ASEAN Rules of Origin and Certification

The main objective of this chapter is to provide a detailed description and analysis of ASEAN Rule of Origin. This chapter proceeds from explaining the general characteristics of the ASEAN Rules of Origin in international trade in order to give their background, and to better understand the Rules of Origin. The first section of this chapter discusses the fundamentals of the Rules of Origin, and sets out different methods of determining the originating country of a product. However, this section does not intend to explore all the Rules of Origin calculation methods that have been used in international trade, nor does it go deeply into the details of each method. The main focus of Section II is to discuss the preferential Rules of Origin, which are mainly concerned with every Free Trade Area. Nevertheless, a brief description of the groundwork of non-preferential Rules of Origin as well as the attempt to harmonize Non-Preferential Rules of Origin will be studied in this section so as to better understand the Rules of Origin as a whole.

The second part of this chapter turns to the ASEAN Rules of Origin. In this part, the method of determining the ASEAN product will be described in depth. The ASEAN Rules of Origin are very important tools in assisting ASEAN Member States ensure that only a product originating in ASEAN Member States are eligible for the area tariff treatment of the ASEAN Free Trade Area. For a country to claim the preferential treatment from importing member country, the evidence of the ASEAN origin of a product, "the Certificate of Origin,"[1] must be presented to the importing Member Country. Therefore, the operation procedures on the issuance and verification of the Certificate of Origin will also be studied.

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[1] Known as Form D.

I. General Features of Rules of Origin

Generally, in International trading, each country may apply basic trade policies such as different tariff rates, and duties or trade restrictions toward the same kind of product exported from different countries; however these policies may depend upon the origin of the imported products. "If the same tariff or other trade measures of a country were equally applicable to imports from all countries without differentiation or discrimination (though this might be purely hypothetical in the light of the actual situation), there would be no need to establish any Rules of Origin."[2]

In current circumstances of international trade, most countries are bond by established preferential arrangements on both bilateral and multilateral levels; i.e., such as the General Agreement on Tariffs and Trades[3], and the World Trade Organization[4] system, which is based on the most-favored-nation[5] principle as well as regional trade agreements[6]; for examples, free trade area[7] and Custom Union[8] extant in most parts of the world. The

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[2] Hironori Asakura, *The Harmonized System and Rules of Origins*, 27 J.W.T. 4, 5 (Aug.1993).

Professor Hironori Asakura is widely acknowledged as a world authority on customs tariffs and systems of nomenclature. Additionally, Prof. Asakura is an invaluable reference for Customs officials and national training schools, academia and all those involved in international trade in the years ahead. Source: World Customs Organization.

[3] Hereinafter **GATT**.

[4] Hereinafter **WTO.**

[5] Hereinafter **MFN**.

[6] Hereinafter **RTAs**.

[7] Hereinafter **FTA**.

[8] Hereinafter **CU**.

proliferation of special arrangements across the globe has increased the complexity of the international trading system. Therefore, the identifying origin of a product has become a very important element in the practice of international trade. According to the WTO Regional Trade Agreements Information System (RTA-IS)[9], the 184 regional trade agreements (RTAs), both bilateral and multilateral, that have been notified to the WTO have been in force as of April 2009.[10] In addition, WTO has received early announcements of RTAs totaling thirty as of April 2009.[11]

> If we take into account RTAs which are in force but have not been notified, those signed but not yet in force, those currently being negotiated, and those in the proposal stage, we arrive at a figure of close to 400 RTAs which are scheduled to be implemented by 2010. Of these RTAs, free trade agreements (FTAs) and partial scope agreements account for over 90%, while customs unions account for less than 10 %.[12]

Richard Baldwin and Patrick Low comment on the proliferation of regional trade arrangements that:

> "The last two decades have seen an explosion of regional trade agreements, some of them involving several countries, many of them bilateral.

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[9] http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx This database contains formation on only those agreements that have either been notified, or for which an early announcement has been made to the WTO. (visited April 17, 2009).

[10] http://rtais.wto.org/UI/PublicAllRTAList.aspx (last visited April 17, 2009).

[11] Five Regional Trade Agreements (RTAs) were signed and twenty-five are under negotiation. http://rtais.wto.org/UI/PublicEARTAList.aspx (last visited April 17, 2009).

[12] http://www.wto.org/english/tratop_e/region_e/region_e.htm (visited April 18, 2009).

Some have been local, within regions, others have stretched across regions. Some have involved deep integration, going beyond the WTO, while others have been quite light and superficial. All in all, some 350 of these agreements exist".[13]

These above observations confirm that the proliferation of regional trade arrangements especially in form of free trade area agreements has increased significantly around the world. "This proliferation of regional agreements has created a spaghetti bowl of criss-crossing arrangements, with little attention to coherence among agreements or to the implications of so many regimes for trade costs, efficiency, and the conditions of competition in global markets".[14] Tariffs, duties, and trade restrictions vary in the types of special arrangements attendant to each. Hence, goods may be subject to different discriminatory measures depending on their origin. Subsequently, the increasing of multi-national production that involves more than one country makes identifying the origin of a product more difficult. As a general rule, products produced, or obtained solely in a single country will be identified as originating in that country; these include for example, non-processed agriculture products grown and harvested in country A, or minerals extracted from its soil. Such products will be identified as products originating within country A.

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[13] Richard Baldwin and Patrick Low ed., *Multilateralizing Regionalism: Challenges for the Global Trading System*, 1 Cambridge University Press, February 2009.
Richard Baldwin is Professor of International Economics at the Graduate Institute of International and Development Studies, Geneva.
Patrick Low is Chief Economist (Director of Economic Research and Statistics) at the World Trade Organization.

[14] Baldwin & Low, *supra* note 13, at 1.

A.. Fundamental of Rules of Origin

In the practice of international trade, however, products may be composed of materials from many countries around the world. In addition, the production processes may involve more than one country; this is called a multi-stage production process, or global manufactures. "Establishing origin is often difficult: goods may be processed, assembled, packaged or finished in a variety of different countries; or shipped to the importing country via another country where they may or may not enter the commerce of that country." [15]

The widespread implementation of multi-international productions in the world trading system has increased the difficulty in determining the origin of a product. As the result of the new trading system, the origin of a product needs to be identified to ensure that the correct tariffs will be applied, and that trading partners will receive treatment in accordance with the trade agreements between, or among them. A product may be manufactured in more than one country, but what if it is composed of materials from other parts of the world? One product can, however, have only one originating country. This principle may be best illustrated by way of the following examples.

A digital camera is imported from Thailand to Australia under preferential of the Thailand-Australia Free Trade Area Agreement. The camera is made up of imported lenses from Japan, and another forty percent of the components come from China. Such camera is finished and packed in Thailand, after which it is exported to Australia. Since the Thailand-Australia Free Trade Agreement grants a low tariff (2%) toward imported goods from another member, the Thai exporter of this camera could claim this benefit if this camera is identified as a product that originates from Thailand. But Australia will apply a thirty percent tariff to

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[15] MICHAEL J. TREBILCOCK AND ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 122 (ROUTLEDGE 2 ED. 1995).

this camera if it is identified as a product of Japan or China, nations that are not members to the free trade agreement between Australia and Thailand. Does the camera in question qualify as originating in Thailand and is therefore entitled to receive special tariff treatment from Australia? How best to determine whether this camera originates in Thailand? We shall return to this question a little later. In another example, Thailand exports a soccer ball to Australia. The ball is made from Indian rubber, but the manufacturing process occurs in Nepal, and the packing and labeling occurs in Thailand before it is finally exported to Australia. Which country is the originating country of the ball? Thailand, India or Nepal?

From the above examples, how does Australia as the importing country identify the origin of the camera and the soccer ball? Problems arise when the product is composed of material from a country other than the exporting country, or if there is more than one country involved in producing (manufacturing) a product. The best answer to these questions would be to apply a method to determine the origin of goods. We call this method, *Rules of Origin.* The Rules of Origin have been used as the criteria in determining the originating country or nationality of a product. "Rules of origin are often associated with preferential trade regimes, as the fulfillment of origin criteria is a precondition for the application of a preferential tariff. Nonpreferential Rules of Origin apply to trade flows that do not benefit from tariff or other trade preferences".[16] Joseph A. LaNasa III[17] describes the rules of origin as "an uncontroversial, neutral device essential to implementing discriminatory trade policies,

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[16] STEFANO INAMA, RULES OF ORIGIN IN INTERNATIONAL TRADE 1 (CAMBRIDGE UNIVERSITY PRESS 2009). Inama is a Program Manager, Senior Trade and Customs Expert, UNCTAD, Division on International Trade in Goods and Services, and Commodities, Geneva, Switzerland.

[17] Joseph A. LaNasa III graduated magna cum laude from Harvard Law School and summa cum laude from Georgetown University's School of Foreign Service. He is Co-Portfolio Manager and Vice President in Distress Bank Debt at Goldman Sachs & Company.

compiling economics statistics, and marking a good".[18] Identifying originating country of a product is very important to the importing country in order to know what import duties should be applied to such a product. Especially, when the importing country has trade preferences or trade restrictions to the imported product from certain countries.

Rules of origin are divided in two types: non-preferential Rules of Origin[19] and preferential Rules of Origin.[20] Both types of rules of origin are used in different purposes and different trade policy instruments in international trade. Preferential ROOs are associated with preferential trade arrangements, such free trade area agreements or Generalized Systems of Preferences.[21] John J. Barceló III[22] classifies that in general the PROOs whether a good has the national origin of a preference country, in which case it gets preferential market access or not. On the other hand, NPROOs are linked to policy instruments of a more general nature that do not involve preferential access for goods—for example, a customs regime requiring all imports to bear a mark of origin.[23]

"Except for statistical and consumer information programs, NPROs generally decide whether a good will face restricted entry (as opposed to preferential entry) because it comes

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[18] Joseph A. LaNasa III, *An Evaluation of the Uses and Importance of Rules of Origin, and the Effectiveness of the Uruguay Round's Agreement on Rules of Origin in Harmonizing and Regulating Them*, The Jean Monnet Center for International and Regional Economic Law & Justice: 1(1995), available at http://centers.law.nyu.edu/jeanmonnet/papers/96/9601ind.html.

[19] Non-Preferential Rules of Origin [hereinafter **NPROs**].

[20] Preferential Rules of Origin [hereinafter **PROOs**].

[21] Hereinafter **GSP.**

[22] John J. Barceló III is a William Nelson Cromwell Professor of Law, Reich Director, Berger International Legal Studies Program, Cornell University School of Law.

[23] John J. Barceló III, *Harmonizing Preferential Rules of Origin in the WTO System*, Cornell Law School Legal Studies Research Paper Series, Paper 72, 3 (2006).

from a country against which restrictions apply."[24] In addition, non-preferential Rules of Origin are needed when countries agree to restrict imports from or exports to certain countries such as a voluntary restraint agreement governing steel or car exports from Japan to the United States.[25] Whereas the Preferential Rules of Origin are used in implementing preferential trade policy instruments in the context of preferential trade arrangements such as free trade area and custom unions as well as regional arrangements. They are also used in the context of reciprocal arrangements known as the Generalized Systems of Preferences. The PROOs determine whether goods are eligible for preferential treatment under Preferential Trade Agreements[26] or Generalized System of Preferences. The following subsections will discuss details of Non-Preferential Rules of Origins and Preferential Rules of Origins.

1. Non-Preferential Rules of Origin

Non-preferential Rules of Origin are known as domestic regulations used to differentiate foreign products from domestic products. As Jacques Bourgeois[27] observes the following:

> In theory if every country were to apply Most-Favoured-Nation

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[24] K.N. Harilal & P.L. Beena, *The WTO Agreement on Rules of Origin Implications for South Asia*, Working paper (Centre for Development Studies (Trivandrum India) no. 353, 4, at http://www.cds.edu/download_files/353.pdf (visited January 9, 2010).

Dr. KN Harilal and Dr. PL Beena work at Centre for Development Studies (CDS), Thiruvananthapuram, India.

[25] See: RAJ BHALA AND KEVIN KENNEDY, 'WORLD TRADE LAW: THE GATT-WTO SYSTEM, REGIONAL ARRANGEMENTS, AND U.S. LAW', LEXIS LAW PUB. 278 (1998).

[26] Hereinafter **PTAs**.

[27] Jacques H.J. Bourgeois is a Professor of Law at the College of Europe, Belgium since 1973. He has been lecturing, teaching and publishing on subjects of EC Economic Law, with emphasis on Competition Law and Trade Law, and on WTO Law. He serves as a Chairman of a WTO dispute settlement panel

Source: College of Europe, available at http://www.coleurop.be/w/Jacques.Bourgeois (last visited March 22, 2010).

> treatment to imported products, the origin of these products would arguably not matter; country nevertheless do use origin rules, called non-preferential, to distinguish foreign products from domestic products when they do not want to grant national treatment to foreign products.[28]

There was no harmony on both the non-preferential and preferential Rules of Origin under the international trade practice. As a result, countries used the Rules of Origin, as they liked. They were non-transparent, complex and unpredictable, and this caused unfair trades. Moreover, they were used as the protective measures for domestic industry as political policies. Raj Bhala and Kevin Kennedy[29] comment about non-harmonized rules of origin that

> Non-preferential Rules of Origin are not harmonized on a multilateral basis; as a result, problem such as lack of transparency regarding of the absence of the rules, fair, consistent and predictable application of the rules, and abuse of the rules for protectionist purpose, exists in many countries–perhaps in part because of the international disharmony.[30]

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[28] JACQUES H.J. BOURGEOIS, RULES OF ORIGIN: AN INTRODUCTION, IN EDWIN A. VERMULST, PAUL WAER AND JACQUES BOURGEOIS eds., RULES OF ORIGIN IN INTERNATIONAL TRADE: A COMPARATIVE STUDY 1 (UNIVERSITY OF MICHIGAN PRESS, ANN ARBOR, 1994).

[29] **R aj Bhala**, the Rice Distinguished Professor at the University of Kansas (KU), is widely recognized internationally as a foremost expert in international trade law. He teaches courses in International Trade Law and Advanced International Trade Law at the School of Law at KU.

Kevin Kennedy is Professor of Law at Michigan State University College of Law. In addition to his teaching and scholarship Professor Kennedy serves as a NAFTA Chapter 19 binational dispute settlement panelist.

[30] Bhala & Kennedy, *supra* note 25, at 279.

Many attempts were made to harmonize non-preferential Rules of Origin. The first attempt to uniform the Rules of Origin was debated during the GATT meeting in October 1953. The International Chamber of Commerce submitted a resolution to harmonize Rules of Origin to the GATT Contracting Parties Meeting. A drafting group, appointed by the GATT Contracting Parties, proposed two determinations of the country of origin of a product.[31] First, a good resulting exclusively from the materials and labor of a single country would be the product of the country where the good was harvested, manufactured or otherwise brought into being. Second, a good resulting from the materials and labor of two or more countries would be the product of the country in which the goods underwent the last "substantial transformation".[32] Regrettably, there was no adoption of the proposals of the drafting group. However, the proposals from the GATT Meetings led to the adoption of the "International Convention on the Simplification and Harmonization of Customs Procedures." This convention is also known as the Kyoto Convention 1973[33] by the Common Customs Council (CCC) which is the "World Customs Organization (WCO)" in present.

Annex D. 1 of the Kyoto Convention 1973 sets out two criteria to determine the origin of a product namely, "wholly produced" criterion and "substantial transformation" criterion. In the context of this convention, the "wholly produced" criterion applies mainly to "natural" products and to goods made entirely from one country, which is considered the originating country. Under this criterion, any goods containing any parts or materials imported, or of undetermined origin, are generally excluded from its field of application.

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[31] Visit World Customs Organization at http://www.wcoomd.org for more information about the historical movements of harmonization of rules of origin.

[32] *Id.*

[33] International Convention on the Simplification and Harmonization of Customs Procedures, Annex D.1, 95 May 1973, S. Treaty Doc. No 23, 97th Cong., 2d Sess. [hereinafter **Kyoto Convention 1973**].

Pursuant to the Kyoto Convention 1973 Annex D.1, the criterion of "substantial transformation" will be used to determine the origin of a product when the production of that product involves more than one country. The originating country is the country where the "substantial transformation" occurs.

In addition, substantial transformation can be by changing the tariff heading in a specified nomenclature, and/or by a list of manufacturing or processing operations which confer, or do not confer, upon the goods the origin of the country in which those operations were carried out, and/or by the ad valorem percentage rule, where either the percentage value of the materials utilized or the percentage of the value added reaches a specified level. [34] There are many observations regarding the Rules of Origin under the Kyoto Convention 1973. Bhala and Kennedy note about rules of origin in Kyoto Convention that, "in general, however, Kyoto Convention delegates substantial discretion to domestic customs authorities. Hence, there is room for material discrepancies among Rules of Origin in the different countries."[35] Inama comments "guideline under Kyoto Convention 1973 was not sufficiently detailed and left member-states freedom to choose different and alternative methods of determining origin."[36]

Bernard Hoekman[37] concludes the following:

> the vagueness of the Kyoto Convention and the lack of GATT discipline have

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[34] *Id.*, at Annex D.1

[35] Bhala & Kennedy, *supra* note 25 at 280.

[36] The low level of harmonization achieved, combined with the fact that few countries ratified this annex, meant that the annex became little more than general guidance used in determining origin at national level. Inama, *supra* note 16 at 4.

[37] Dr. Bernard Hoekman is the Sector Director of the Trade Department (PRMTR) in the Poverty Reduction and Economic Management Vice-Presidency (PRMVP), World Bank.

> allowed countries a great deal of discretion. The consensus appears to be that there is no ideal system of origin, as arguments can be found in the literature in favor and against each rule that is used in practice. Whatever rule is used, transparency and predictability will be maximized if it is applied uniformly and consistently. In practice, however, few countries apply a uniform rule of origin. Indeed, the plethora of existing rules suggests that many countries are not convinced that a uniform rule is preferable.[38]

On the other hand, Asakura argues that although this Annex is not presented in a form ready for application (except perhaps for the rules applicable to the goods produced wholly in a given country), it certainly provides valuable guidelines for countries wishing to draw up their own Rules of Origin.[39] In 1990, the Protocol of Amendment to International Convention on Simplification and Harmonization of Customs Procedures revised the Kyoto Convention.[40] The original Annex D.1 of Kyoto Convention 1973 was also modified. The Annex K of the revised Kyoto Convention contains two chapters of Rules of Origin. "These chapters concerning Rules of Origin were modified probably because the harmonization work in the World Trade Organization (WTO). Effectively, the original Chapter 1 covers what is now negotiated inside the WTO in terms of definition of substantial transformation."[41] Where two or more countries have taken part in the production of the goods, Annex K of the Revised Kyoto convention states that the origin of the goods should be determined according to the

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[38] Hoekman, B. (1993), Rules of Origin for Goods and Services, 81-99,J.W.T, Vol.27, No.4.

[39] Asakura, *supra* note 2 at 5.

[40] The Protocol of Amendment to International Convention on Simplification and Harmonization of Customs Procedures 1999, S. Treaty Doc. 108-6, Entered into force on 3 Feb, 2006, available at http://www.wcoomd.org/kybodycontent.htm (last visited April 19, 2009) [hereinafter Revised Kyoto Convention].

[41] Inama, *supra* note 16 at 8.

substantial transformation criterion. The Chapter 1 (3) of Annex K[42] recommends two recommended practices to determine origin of goods as follow.

1. In applying the substantial transformation criterion, use should be made of the International Convention on the Harmonized Commodity Description and Coding System.
2. Where the substantial transformation criterion is expressed in terms of *ad valorem* rule, the values to be taken into consideration should be: the dutiable value at importation or, in the case of materials of undetermined origin, the first ascertainable price paid for them in the territory of the country in which manufacture took place for the materials imported; and either the ex-works price or the price at exportation, according to the provisions of national legislation in case of the goods produced .

It should be noted that Annex K of the Revised Kyoto Convention does not contain a method using specific manufacturing or processing operations in its recommended practices because it was included in Annex D of the Kyoto Convention 1973. Chapter 2 of Revised Kyoto Convention contains standards and recommended practices regarding documentary evidence of origin and certificate of origin.[43]

Major attempts to harmonize the Rules of Origin under the multilateral level in the GATT Meeting were undertaken in the Uruguay Round of Multinational Trade Negotiations 1993. The result of this negotiation was that GATT Member Parties recognized the

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[42] Revised Kyoto Convention, *supra* note 40.

[43] See Annex K: Chapter 2 of the Revised Kyoto Convention, *supra* note 40.

Agreement of Rules of Origin[44] to harmonized and clarify Rules of Origin. Nonetheless, this Agreement governs only Non-Preferential Rules of Origin with a guideline for Preferential Rules of Origin in Annex II "the Common Declaration with Regard to Preferential Rules of Origin" which will be examined in the next section. The Agreement on Rules of Origin aims to harmonize Non-Preferential Rules of Origin, to ensure that Rules of Origin do not create unnecessary obstacles to trade and they are prepared and applied in an impartial, transparent, predictable, consistent and neutral manner. The definition of Non-Preferential Rules of Origin is stated in Article 1 of the Agreement on Rules of Origin as those laws, regulations and administrative determinations of general application applied by any Member to determine the country of origin of goods provided such Rules of Origin are not related to contractual or autonomous trade regimes leading to the granting of tariff preferences going beyond the application of the Most Favoured Nation: MFN provision of the GATT 1994." [45]

To achieve the purposes of the Agreement of Rules of Origin, a Committee on Rules of Origin (herein after CRO) is established for the purpose of consultation on matters relating to this Agreement as well as to review the implementation and operation of the WTO-ARO. In addition, a Technical Committee on Rules of Origin (hereinafter TCRO) is established to carry out the harmonization work, as well as to deal with any matter concerning technical problems related to Rules of Origin and to undertake technical work necessary to implement the work plan. The Technical Committee is under auspices of the World Customs Organization.

The WTO-ARO sets up the Work Programme to harmonize NPROs with what is

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[44] Agreement on Rules of Origin, 15 Dec. 1993, in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Marrakesh, 15 Apr. 1994, 33 I.L.M. 1153 (1994), hereinafter WTO-ARO.

[45] *Id.*, WTO-ARO art.1(1).

called "the Harmonization Working Programme (hereinafter HWP)." In accordance with article 9:2 of the WTO-ARO, the HWP should have been completed within three years of initiation, i.e. by 20 July 1998. However, the time schedule was extended due to the complexity of many issues raised during the working process. In July 1998, the General Council approved a decision whereby Members have committed themselves to make their best endeavor to complete the HWP by November 1999.[46] However, the time-frame to complete this project had been extended again for a number of times due to the complexity of issues involved.[47]

"When the Harmonization Working Programme is completed, the GATT Ministerial Conference will provide the result in an annex as an integral part of WTO-ARO, and will also establish a timeframe for its entry into force".[48] Aiming to accomplish the Harmonization Work Programme, the TCRO has developed uniformed definitions of goods that are to be considered as being wholly obtained in one country, and will develop uniform definitions of minimal operations or processes that do not by themselves confer origin upon a good.

The most important and most complicated task in harmonizing NPROs is to define when the last substantial transformation of a good, which has undergone production processes in more than one country, occurs because of changing the tariff classification method at the subheading or heading level of nomenclatures. This would include any minimum changes within the nomenclature. However, when using a tariff classification does

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[46] In May 1999, at the conclusion of its 17th formal session, the TCRO approved the final results of its harmonization work for submission to its WTO counterpart, the CRO. The TCRO thus concluded the technical review for the Harmonized Rules of Origin under the rearranged time schedule agreed by the Members of the WTO, available at http://www.wto.org/english/tratop_e/roi_e/roi_info_e.htm (last visited January 5th, 2010).

[47] See Inama, *supra* note 16 at 26-27.

[48] WTO-ARO, *supra* note 44 at art. 9:4.

not allow for the expression of substantial transformation, ad valorem percentages (value added) and/or manufacturing or processing operations will be used as supplementary criteria. "The TRCO is entrusted with the job of suggesting minimum change within the nomenclature that meets the criterion of substantial transformation on a product-by-product basis."[49] After the TCRO completes the assigned task in a phased manner, while taking into account the chapters and sections of the Harmonization System (HS) nomenclature, it will submit the results to the CRO on a quarterly basis. After submitting the results, the CRO would consider the interpretation of the result before endorsing them. The Ministerial Conference is in charge of adopting the result of HWP in an annex as an integral part of the WTO-ARO.[50]

2. Preferential Rules of Origin

Preferential Rules of Origin (like non-Preferential Rules of Origin) are the criteria used to determine the originating country of a product; however, they are used for a different purpose. The Preferential Rules of Origin are the set of criteria that help to confer origin of goods. Once a good is identified as being from a participating country of the Preferential Trade Arrangement, then benefit under special arrangements such as free trade, custom union or Generalized System of Preferences (GSP) will be applied to that good. Preferential Rules of Origin play a very significant role in Free Trade Areas as instruments to retain the preferential treatment of a Free Trade Area exclusive for goods of Member States. Unfortunately, there is no uniformity of Preferential Rules of Origin. There were no specific rules governing the determination of the country of origin of goods in international commerce under GATT system. Therefore, each contracting party had wide open freedom to determine its own origin rules, and could even maintain several different Rules of Origin depending on

[49] Harilal & Beena, *supra* note 24 at 23.

[50] WTO-ARO, *supra* note 44 at art. 9:4.

the purpose of the particular regulations."[51]

Furthermore, the Agreement on Rules of Origin covers only Non-Preferential Rules of Origin not Preferential Rules of Origin. However, the paragraph 2 of Annex II to the WTO-ARO defines that Preferential Rules of Origin are those laws, regulations and administrative determinations of general application applied by any Member to determine whether goods qualify for preferential treatment under contractual or autonomous trade regimes leading to the granting of tariff preferences going beyond the application of MFN of the GATT 1994." Moreover, the WTO-ARO's general principles and requirements for NPRO in regard to transparency, positive standards, administrative assessments, judicial review, non-retroactivity of changes and confidentiality will also apply also to Preferential Rules of Origin.

Bhala and Kennedy argue that the Preferential Rules of Origin are needed to facilitate discrimination against countries not entitled to the benefits of a lawful preferential scheme. If there is no difference in imported goods from any country and no import duties at Most-Favoured-Nation rates, there is no need for rules of origin.[52] In practice, each country applies different tariff rates, as well as import regulations on goods from different exporting countries. As provided in Article XXIV of the GATT 1994, the most important purposes for creating free trade areas, or custom unions, are to eliminate trade barriers between the constituent territories on products originating in said territories. The volume of free trade among them must be restricted only to products originating within their territories. The purpose of creating Preferential Trading Agreements: PTA will be worthless if countries not

[51] For more information about WTO's Rules of Origin, visit http://www.wto.org.

[52] See Bhala & Kennedy, *supra* note 25 at 347.

signatory to the PTA could enjoy the same benefit as the Preferential Trading Agreements Member States. Preferential Rules of Origin are often referred as a gate-keeper to ensure that all benefits of PTAs will be given exclusively to members. "Preferential ROO, meanwhile, define the conditions under which an exporting country can receive preferential treatment from to determine whether a good qualifies for preferential treatment when exported from one member state to another."[53]

Various literatures, both legal and economic, affirm that Preferential Rules of Origin are necessary for every PTA member, especially for free trade area, as criteria to confer origin of goods status, which will make members eligible for area tariff treatment. The above mentioned literature further recognizes the methods as necessary to prevent trade deflection or the problem of transshipment. Paul Brenton[54] concludes that the justification for preferential Rules of Origin is to prevent trade deflection, or simple transshipment, whereby products from non-participating countries are redirected through a free trade partner to avoid the payment of custom duties. Hence the role of preferential Rules of Origin is to ensure that only goods originating in participating countries enjoy preferences. Therefore, they are integral parts of PTA's such as bilateral and regional free trade agreements and the non-reciprocal preferences that industrial countries offer to developing countries.[55] Asakura also explains why the rules of origin are needed that

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[53] Antoni Estevadeordal, Jeremy Harris and Kati Suominen, *Multilaterlizing Preferential Rules of Origin around the World*, 58 Prepared for WTO/HEI/NCCR Trade/CEPR Conference "Multilateralizing Regionalism" 10-12 September 2007, Geneva, Switzerland.

[54] Dr. Paul Brenton is a Senior Research Fellow, World Bank and Head of the Trade Policy Unit at the Centre for European Policy Studies in Brussels.

[55] Paul Brenton, *Notes on Rules of Origin with Implications for Regional Integration in Southeast Asia*, 1 (paper prepared for Pacific Economic Cooperation Council, April 22-23, 2003).

"the appearance of custom unions, free trade areas, and preferential areas in recent years has increased the need of establishing one or the other rules for determination of the country of origin for international traded commodities when applying differentiated customs tariffs or other trade measures. Thus, various different Rules of Origin are in operation all over the world." [56]

In addition, Garay and De Lombaerde[57] point out the objective of rules of origin that

"ROs intended to avoid the proliferation of the phenomenon known as trade deflection: the important, under preferential conditions, from third countries through the member country with the lowest external tariff, from this perspective, the level of stringency of the RO should be associated with the difference between the national tariffs of the Member States applied to imports from third countries. The same incentive is created by GSP regimes for firms located in non-beneficiary countries. Requiring a minimum level of substantial transformation aims to prevent such practices by limiting the applicability of trade preferences to those goods that satisfy ROs." [58]

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[56] Asakura, *supra* note 2 at 5.

[57] Dr. Luis Jorge Garay is an Associate Research Fellow at the Comparative Regional Integration Studies Programme of the United Nations University (UNU-CRIS) in Bruges since 2005, and an international consultant.

Dr. Philippe De Lombaerde is Associate Director at the Comparative Regional Integration Studies Programme of the United Nations University (UNU-CRIS) in Bruges since 2008.

[58] Luis Jorge Garay and Philippe De Lombaerde, *Preferential Rules of Origin: Models and levels of Rulemaking*, 2 UNU-CRIS Occasional Paper 0-2005/6.

In a custom union, all Member States have a common external tariff against the import products from countries outside the custom union. There is no different tariff rate for import products from non-custom union members. The import products from non-Member States outside the custom union will be accorded the same tariff rates when they enter into the territory of any member country. That is to say, goods from Member States will be circulated freely in the custom union. Since the transshipment is not likely to be a problem in custom union then there would be no need of PROs in such area. Nevertheless, PROs are often used in custom union. "In practice, however, CUs[59] might apply a system of preferential ROs, mainly because many CUs are not perfect (e.g. not covering the whole tariff universe, having border controls in place, etc.) In addition, CUs may obviously want to use ROs to distinguish between different extra-regional origins."[60]

Unlike a custom union, Member States of a free trade area do not have a common external tariff; however, each has its own external tariffs for third parties. Therefore, tariff rates against non-members are different, i.e., higher than for third party non-members. The creation of a free trade area is to eliminate trade barriers, both tariffs and non-tariff, among members. Preferential treatment is on a reciprocal basis and such benefits are exclusive for the products originating in the Member States.

Without the Rules of Origin, imported products from non-free trade area countries would enter through the country with the lowest tariff and be re-exported to the other FTA members. Problem of transshipment arises when non-FTA members ship their products

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[59] Custom Unions.

[60] Garay & De Lombaerde, *supra* note 56 at 2.

through a low tariff rate country to avoid cost, and then re-export them to the high-tariff countries in a free trade area without any value added, or do only simple assembly or packing operations, and then claim preferential treatment from an importing member country.

As mentioned above, the benefits and the preferential treatment in a free trade area should be reserved only for the products originating in Member States. In the absence of the Rules of Origin, Member States of free trade area have to face the problem of transshipment. As a result, the creation of a free trade area would be useless if products from countries outside a free trade area could enjoy the same benefits as those from Member States.

> A least-cost product in a non-preferred country could gain preferential access merely by transshipping through a preference country. Economists refer to such transshipment as "trade deflection." But here again the purposes of the preference regime would be defeated. Benefits intended for preference countries would be reaped instead by non-preference countries via trade deflection.[61]

To prevent the problem of trade deflection by transshipment, the Rules of Origin are essential tools to help members of FTA determine the eligibility of products to receive the preferential treatments from the other Member States. Lambrinidis contends the following:

> The obvious counterpart of the maintenance of independent tariff structure against imports from the rest of the world by Member States by Member States of a free trade area is that the volume of trade freed among them must be limited only to products originating in their territories; for, if

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[61] Barcelo' III, *supra* note 23 at 15.

> products imported from the outside world were to enjoy equal freedom of movement within the area, then the independent tariffs of member states would make no sense, as they would be undermined in respect of each product by lower tariff in the Area. Under such circumstances, the result would be the *de facto* emergence of a common effective external tariff wall covering the whole area and composed of the lowest Area tariff for each product. Non-Area goods would then flood onto the whole of the Free Trade Area through the customs gates of whichever Member State happened to levy the lowest tariff on each one of them. [62]

This quoted statement affirms that rules of origin are tool that prevent trade deflection from transshipment. They also keep exclusive benefit of free trade area or custom union for member only. Moreover, rules of origin are also designed to promote trade liberalization. There would be no question of a need to have rules of origin in international trading system to serve as a differentiating mechanism to distinguish between various products in accordance with their place of production.[63] In summary, Rules of Origin play an additional and distinctive role in FTAs. The ROOs are essential to maintaining FTAs with different external tariffs towards non –free trade area members. The next subsection discusses types of Preferential Rules of Origin that have been used to determine origin of goods in international trading system around the world.

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[62] JOHN S. LAMBRINIDIS, THE STRUCTURE, FUNCTION, AND LAW OF A FREE TRADE AREA: THE EUROPEAN FREE TRADE ASSOCIATION 90 (THE LONDON INSTITUE OD WORLD AFFAIRS 1965).

[63] See: J.H.H Weiler & Sungjoon Cho, *International and Regional Trade law: The law of the World Trade Organization*, 12 (Unpublished teaching materials for Academic year 2006 NYU School of Law).

B.. Typology of Rules of Origin

The Kyoto convention and the Agreement on Rules of Origin recognize two basic criteria in determining the originating country of goods; they are as follows: the criterion of goods "wholly produced" in a given country, where only one country enters into consideration in attributing origin, and the criterion of "substantial transformation", where the production process of goods involve two or more countries. The "wholly produced" criterion applies mainly to "natural" products and to goods made entirely within one country that is party to a PTA or a Preferential Trade Agreements. The commodities and related products must have been entirely grown, harvested or extracted from the soil within the territory of that member, or manufactured there from any of those products. The Revised Kyoto Convention[64] provides a guideline to determine whether a product is produced or obtained in a single country. The guideline for goods produced wholly in a given country is as follows: The following only is taken to be produced wholly in a given country:

a. mineral products extracted from its soil, from its territorial waters or from its sea-bed;
b. vegetable products harvested or gathered in that country;
c. live animals born and raised in that country;
d. products obtained from live animals in that country;
e. products obtained from hunting or fishing conducted in that country;
f. products obtained by maritime fishing and other products taken from the e sea by a vessel of that country;

[64] Revised Kyoto Convention, *supra* note 37 at Annex K.1 (2)

g. products obtained aboard a factory ship of that country solely from products of the kind covered by paragraph (f) above;

h. products extracted from marine soil or subsoil outside that country's territorial waters, provided that the country has sole rights to work that soil or subsoil;

i. scrap and waste from manufacturing and processing operations, and used articles, collected in that country and fit only for the recovery of raw materials;

j. goods produced in that country solely from the products referred to in paragraphs (a) to (ij) above.

Where two or more countries have taken part in the production of goods, Annex K.1 (3) of the Revised Kyoto Convention recommends that the origin of the goods should be determined according to the *Substantial Transformation Criterion.* Annex K defines that this as meaning the criterion under which origin is determined by regarding the country of origin as the country in which the last substantial manufacturing or processing, deemed sufficient to give the commodity its essential character, has been carried out.

The last substantial transformation rule of origin criterion is a general concept that has been used to identify the origin of a product when the *wholly produced* or *obtained* cannot apply. A product will be determined to have origin in a country where the last substantial transformation has taken place.

A number of different methods of application have been used to measure degree of significant transformation of manufacturing a product. There are three main methods for determining origin of goods that are widely used in many Preferential Trade Agreements, which are "*Change in Tariff Classification* criterion (known as change of tariff heading: CTH), *Ad Valorem Percentage* criterion (known as Value Added criterion), and

Technical Requirement criterion (known as Product Specific criterion). However, those criteria can be used stand-alone or combinations with each other. The followings are criteria that common used to determine origin of goods in international trading system around the world.

1. Change in Tariff Classification Criterion

The change in tariff classification[65] test is also known as change of tariff headings (CTH) or tariff-shift. This criterion based on the change of tariff classification under the Harmonized Commodity Description and Coding System (Harmonized System or "HS"). The Revised Kyoto Convention also recommends using the Harmonized System in applying the substantial transformation criterion.[66] The Harmonized System was developed by the Custom Co-operation Council in co-operation with sixty countries and more than twenty international and national organizations as a multi-purpose international nomenclature.[67]

The Harmonized Commodity Description If so and Coding Systems generally referred to, as "Harmonized System" or simply "HS" is a multipurpose international product nomenclature developed by the World Customs Organization (WCO). It comprises about 5,000 commodity groups; each identified by a six-digit code, arranged in a legal and logical structure and is supported by well-defined rules to achieve uniform classification. The system is used by more than 200 countries and economies as a basis for their Customs tariffs and for the collection of international trade statistics. Over 98 % of the merchandise in international

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[65] Hereinafter CTC.

[66] Revised Kyoto Convention, *supra* note 40 at Annex K 1(4).

[67] Asakura, *supra* note 2 at 8.

trade is classified in terms of the HS.[68]

Origin will be conferred if the final product is classified in a tariff category that differs in a specified way from the classification of the imported input.[69] The usual method of application is to have a general rule whereby a product, which comes under the heading of a systematic goods nomenclature different from the headings applicable to the constituent materials, is considered to have undergone sufficient manufacturing or processing.[70]

Many academic scholars agree that there are many advantages of the CTC as a method to determine the origin of a product. "The change-in-tariff-classification method of determining origin is conceptually simple and easy to apply and leads to consistent, predictable results once the product is classified."[71]

Inama concludes that "this method permits the precise and objective formulation of the conditions determining origin. If required to produce evidence, the manufacturer will normally have no difficulty in furnishing data establishing that the goods do in fact meet the

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[68] World Customs Organization (WCO)
The HS contributes to the harmonization of Customs and trade procedures, and the non-documentary trade data interchange in connection with such procedures, thus reducing the costs related to international trade.
It is also extensively used by governments, international organizations and the private sector for many other purposes such as internal taxes, trade policies, monitoring of controlled goods, Rules of Origin, freight tariffs, transport statistics, price monitoring, quota controls, compilation of national accounts, and economic research and analysis. The HS is thus a universal economic language and code for goods, and an indispensable tool for international trade.
Available at at http://www.wcoomd.org/home_wco_topics_hsoverviewboxes_hsoverview_hsharmonizedsystem.htm (Last visit March 22, 2010).

[69] DAVID PALMETER, RULES OF ORIGIN IN REGIONAL TRADE AGREEMENTS, IN PAUL DEMARET, JEAN- FRANCOIS BELLIS, & GONZALO GARCIA JIMENEZ, REGIONALISM AND MULTILATERALISM AFTER THE URUGUAY ROUND 343 (EUROPEAN INTERUNIVERSITY PRESS, BRUSSELS, 1997).

[70] Inama, *supra* note 16 at 6.

[71] Joseph A. LaNasa, *Rules of Origin and the Uruguay Round's Effectiveness in Harmonizing and Regulating Them*, AM. J. INT'L L.(90) 631.

conditions laid down."[72] On the other hand, there are many disadvantages of this method. Vermulst[73] asserts that the HS system is primarily designed to be a dual-purpose commodity classification and statistics system and might not always be an appropriate basis for conferring originating status.[74] The preparation of lists of exceptions is often difficult; moreover such lists must normally be constantly updated to keep them abreast of technical developments and economic conditions.[75] This method has been used widely a long with other methods that will be discussed below.

2. *Ad Valorem* Percentage Test

The *Ad Valorem* test is known as the *Value-Added* test. The value-added defines the degree of transformation required to confer origin on the good in terms of minimum percentage that must come from the originating country or of maximum amount of value that can come from the used of imported parts and material.[76] This requirement is common used in two forms; first, the import content rule that sets a maximum percentage allowance on the use of imported parts and materials; second, the local content rule that requires a minimum

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[72] Inama, *supra* note 16 at 6.

[73] **Dr. Edwin Vermulst** has practiced international trade law and policy in Washington, D.C. and Brussels since 1985. He obtained LL.M and SJD degrees from the University of Michigan Law School. He has co-authored six books, including landmark comparative analyses of the anti-dumping systems of Australia, Canada, the EC and the United States, and of rules of origin. Dr.Vermulst is a member of the faculty of the World Trade Institute in Bern and teachers at the Amsterdam Law School. He is Editor-in-Chief of the Journal of World Trade and Co-editor-in-Chief of Law and Economics in International Trade.

[74] EDWIN A. VERMULST, "RULES OF ORIGIN AS COMMERCIAL POLICY INSTRUMENTS?-REVISITED" in Edwin Vermulst, Paul Waer, & Jacques Bourgeois, eds., *Rules of Origin in International Trade – A Comparative Study* 449 (1994).

[75] Inama, *supra* note 16 at 6.

[76] Edwin A. Vermulst, *Rules of Origin as Commercial Policy Instruments-Revisited*, 26 J.W.T. 6, 61-62 (Dec.1992).

percentage of local parts or materials that must be added to a product in the last country in which the product undergone a processing.[77]

The North American Free Trade Area (NAFTA) requires a percentage of local content that must be from members. Requirement on percentage of local content from members is also used in European Union. AFTA uses minimum percentage requirement that 40 percent of the value must be added in one of ASEAN Member States to confer originating of product as ASEAN product and also sets out maximum amount of imported parts and materials must not over than sixty percent of the value of the product.

The percentage criterion directly or indirectly specifies that a certain percentage of value-added in the last production process is necessary to confer originating status; if such a percentage can not be reached, the last production process does not give origin and origin is given to another country in the case of nonpreferential rules or to no country at all where preferential agreements are concerned.[78]

The Value-Added test seems to be a simple and satisfactory method to determine the origin of a product. However, calculation of value-added is very complicated since it requires an analysis of production cost, which involves accounting records of manufacturing process and auditing procedures. Furthermore, there are many different methods of qualifying costs

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[77] The value added criterion focuses on the degree of transformation in terms of the minimum economic value that must be added to a product's final price for it to acquire origin from a particular country. The criterion can be applied in the converse by placing a limit on the maximum economic value that can be added outside a country before a product loses its initial origins and acquires new origins.

See Jong Bum Kim and Joogi Kim, *RTA for Development: Utilizing Territoriality Principle Exemptions under Preferential Rules of Origin*, 156, J.W.T 43, Issue 1 (Feb 2009).

Jong Bum Kim is an associate professor at KDI School of Public Policy and Management, Korea.

Joogi Kim is a Professor at College of Law, Yonsei University, Korea.

[78] Vermulst, *supra* note 74 at 437.

of production.[79] Palmeter[80] concludes that calculation of value added frequently depends upon resolution of complex or controversial accounting issues that adds both cost and uncertainly.[81] Nevertheless, many scholars consider the value-added as the best criterion to define the degree of sufficient transformation. "This criterion has the advantage over the CTC criterion of being based on a specific, numerical, economic value added inside or outside a country."[82] "The need for a uniform scale of measurable units that transmit the extent of protection accorded by ROO leads us to the conclusion that the most desirable method for determining origin is the domestic content test."[83]

3. Technical Test Criterion

The Technical Test Criterion is also referred to as a technical processing criterion or specified process. The technical test prescribes certain production or sourcing processes that may (positive test) or may not (negative test) confer originating status.[84] This method to determine origin of a product has been used in many RTAs, especially in the United States for both in non-preferential and preferential areas, the NAFTA and by the European Community as well as Japan, Norway and Switzerland. The Technical Test rule is often used

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[79] See Vermulst, *supra* note 74 at 438 for more detailed information how to calculate production costs.

[80] **David Palmeter** is a partner in the Washington DC office of Sidley, Austin, Brown & Wood. He has worked as practiced international trade law for more than 30 years, and has been involved in GATT and WTO dispute settlement for most of that time. He was involved in WTO dispute settlement from the beginning of the organization, advising Members in the very first case brought under the WTO as well as the first case to go through the full panel and appellate processes. He has lectured on WTO and trade policy matters at many famous universities in America and through out Europe.

[81] David Palmeter, *supra* note 69 at 346.

[82] Kim & Kim, *supra* note 77 at 156.

[83] Moshe Hirsch, *International trade Law, Political Economy and Rules of Origin*, J.W.T 36(2), 185, 2002.

[84] Vermulst, *supra* note 74 at 450.

in free trade agreements as a supplement to other criterion. Additionally, it has been used to determine origin of textile and chemical products. The advantages of the Technical Test are that once the processing of a product is defined, it provides a clear and unambiguous test, as well as provides for certainty if rules can be complied with.[85]However, this test seems to be an unsatisfactory method of determining the origin of goods due to the complexion of specific production of each product.

The advantage of the technical test is that of the three tests, it is best equipped to deal with the specifics of the situation at hand. However, it is also most easily abused by domestic interests as the U.S. Department of Commerce and EC determinations that the origin of integrated circuits depends on the place of diffusion show. Furthermore, it is extremely complicated to devise all kinds of technical test for an enormous array of products. Third, it appears difficult to verify the information on specific production processes performed in third countries.[86] The technical test can easily be tailored to meet a specific situation in a clear, and precise manner. For that reason LaNasa considers the specified test serves as a useful supplement test of origin. However, it would be extremely difficult, if not impossible, to define a process test for each of the enormous array of products on the international market and to update these rules as new products and technological advances in production are made. Therefore, LaNasa does not think that technical test criteria can be used as a satisfactory primary test of origin.[87]

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[85] *See* Brenton, *supra* note 53 at 17.

[86] Comment Wim Keizer (22 May 1992) in Vermulst, *supra* note 74 at 450.

[87] See LaNasa, *supra* note 71 at 632.

Conclusion of Section One

Each testing method has its advantages and disadvantages. Nonetheless, they can be applied in combination. They may also be applied alternatively to specific policy objectives the framework of preferential trade arrangements.[88] Several Regional Trade Agreements use a single method covering all products; for instance, the ASEAN Free Trade Area. In certain agreements, the Rules of Origin for a particular product will specify that two or more of the methods must be satisfied; for example, a change of tariff heading and a certain proportion of domestic value-added.[89] Moreover, some RTAs set alternative methods for particular products that can be applied to consider that the origin of a product is a manufacturer's choice. Bourgeois also agrees that the three methods may be applied in combination; for example when applying the Technical Test, an importing country may well consider that although the process or operation in the exporting country results in a technique product, the process or operation involves an increase in value or cost that is too small to justify conferring origin.[90]

However, it is clear that different Rules of Origin can lead to different determinations of origin. Therefore, producers who are eligible for preferential access to different markets under different schemes with the different Rules of Origin may find their product qualifies under some schemes, but not others.[91] In addition to the requirement that a product must originate within one of the Member States of preferential trade arrangements, most PTAs also require direct consignment or direct transport from the exporting member country. Under

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[88] Bourgeois, *supra* note 27 at 1.

[89] Brenton, *supra* note 53 at 3.

[90] Bourgeois, *supra* note 16 at 2.

[91] Brenton, *supra* note 39 at 4.

direct consignment or direct transport, goods must be transported directly from an exporting member country directly to the importing country.

If goods are in transit through another country, they must not enter the domestic market in that country of transit, nor undergo operations other than unloading and reloading. In such a case, documentary evidence may be requested to show that the goods remained under the supervision of the customs authorities in the country of transit.[92] Another important feature of most PTAs is that they require that the imported goods must be accompanied by a Certificate of origin. Certificates of Origin are usually authorized by government agencies.

LaNasa observes that "the rise of multinational corporations and production of goods in multiple stages using parts produced in different places around the world provided an opportunity to use Rules of Origin as an effective means of protection."[93] Although Non-Preferential Rules of Origin have not yet been harmonized, the attempt to build an international standard of NPROs has been improved from the time of the Kyoto Convention until the Agreement on rules of Origin under the GATT and WTO regimes. The Harmonized Work Programme of WTO is close to accomplishing the mission of harmonizing Non-Preferential Rules of Origin. This shows commendable progress and the possibility of creating uniform Non-Preferential Rules of Origin for international commerce. This study proposes that the WTO should not only harmonize Non-Preferential Rules of Origin but also harmonize the Preferential Rules of Origin as well. The WTO could at least makes an effort to gather all PROOs that have been used in Member Countries which could be done at the same time with harmonizing NPROOs. Thus, the WTO could monitor the use of rules of origin in their trade practices. Perhaps, the WTO could provide guidelines of preferred

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[92] Brenton, *supra* note 39 at 11.

[93] LaNasa, *supra* note 10 at 1.

NPROOs and PROOs that compatible with the WTO Agreement of Rules of Origin. We must not forget that the strict and complicated rules of origin can barrier to trade and obstruct trade liberalization. In the next section, the ASEAN Rules of Origin will be studied in deep detail including criteria to determine ASEAN's product, direct consignment or direction transport rule and ASEAN's certificate of origin.

II. ASEAN Rules of Origin

For the purpose of the ASEAN Free Trade Area, products originating in any ASEAN Member State that are imported or exported to any territory of another Member State are subject to lower tariffs. Such tariffs are governed by a yearly tariff reduction schedule that ASEAN Member States agree upon under the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area (CEPT Scheme). All benefits under ASEAN Free Trade Area regime are limited only to products originating in the territories of ASEAN Member States. For example, a car entirely produced in Thailand is exported to the Philippines. This car will receive preferential treatment from the Philippines under the CEPT Scheme because it is wholly produced in Thailand. What about a car produced in Malaysia in which fifty-percent of the parts come from Japan? Is the originating country of this car Malaysia or Japan? Does this car qualify for preferential treatment, from other Member States, under the CEPT? Problems arise when components of products originate in different countries. How do ASEAN Member States identify which products qualify as ASEAN products and therefore are eligible for preferential treatment under ASEAN Free Trade Area? This Section describes and analyzes the AFTA Rules of Origin that are used to determine whether a product is of ASEAN origin; second, the rule of consignment in preferential treatment; and finally, how a Certificate of Origin is

conferred upon a product.

A.. ASEAN Free Trade Area Origin Criteria

The Agreement on the Common Effective Preferential Tariffs (CEPT) Scheme for the ASEAN Free Trade Area chooses the *Ad Valorem* percentage test, known as the Local Content test or Value-Added test, to identify an ASEAN product. To determine the eligibility of products to receive benefits as ASEAN products in AFTA, the CEPT Scheme article 2(4) states that a product will be deemed to be originating from ASEAN Member States, if at least forty-percent of its content originates within any Member State. As mentioned above, the CEPT Scheme made it clear that the AFTA Rules of Origin are based on value added criterion. However, the CEPT failed to give instructions on how to calculate forty-percent local content. Further, it did not provide detailed principles and guidelines for determining an ASEAN product.

At the ASEAN Economic Ministers Meeting in 1996, ASEAN Members endorsed Rules of Origin for the Common Effective Preferential Tariff Scheme[94] to be used as a set of detailed rules to determine the origin of products eligible for the CEPT Scheme. Additionally, ASEAN members also endorsed the Operational Certification Procedures for the Rules of Origin of the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area[95] that deals with the ASEAN Certificate of Origin.

The AFTA Rules of Origin place products into two categories: (1) Wholly Produced or Obtained Product, and (2) Not Wholly Produced or Obtained product. ASEAN Members set out a list of products that will be considered as *Wholly Produced* or *Obtained* in ASEAN,

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[94] Hereinafter CEPT Rules of Origin.

[95] Hereinafter **Operational Certification Procedures**.

and the members also established conditions for Not Wholly Produced goods, using value add criterion that requires at least forty-percent of a product to originate within a Member State where the working or processing of the good has taken place. In addition, the CEPT Rules of Origin also provide specified direct consignments and treatment of packaging. The CEPT Rule of Origin now clearly defines the method of calculating local content and provides principles as well as guidelines for determining the cost of ASEAN origin. In particular, the method of calculating local/ASEAN content is now set out in Annex A. The principles used to determine the cost for ASEAN origin and the guidelines for costing methodologies were set out in Annex B of the Rules of Origin for the CEPT Scheme.

The CEPT Rules of Origin and its Operational Certification Procedures have been revised and implemented since 1 January 2004. "These changes reflect ASEAN's firm resolve to be receptive to the needs of the industries in the region and adapt, as necessary, to promote economic integration".[96] Since then, ASEAN Members Countries have continued to review the CEPT Rules of Origin and its Operational Certification Procedures through the ASEAN Task Force on the Rules of Origin. Along with using the CEPT Rule of Origin and its addition rules for specific products, ASEAN Members had been improving and strengthening the CEPT Rules of Origin to promote greater utilization of the CEPT Scheme as well as to clarify, simplify and update the rules. ASEAN members revised the cumulation rules in the CEPT Rules of Origin to allow partial qualifying ASEAN national content. "Under the new rule, if the material does not meet the forty-percent local/ASEAN content,

[96] http://www.mfa.go.th/web/2211.php?id=1875 (last visited July 11th 2009).

the qualifying ASEAN national content shall be in direct proportion to the actual domestic content provided that it is equal or more than the twenty percent threshold."[97]

> The ASEAN Task Force on CEPT-AFTA Rules of Origin were working on improving and strengthening the CEPT Rules of Origin and its Operational Procedures, which include the following measures, among others: (a) standardizing the calculation of local/ASEAN content, where possible; (b) consider the adoption of substantial transformation rule as an alternative rule in determining product origin for specific sectors that cannot comply with the forty-percent local/ASEAN content requirement; (c) adopting specific Rules of Origin for specific sectors such as automotive and semi-finished aluminum products, where possible; (d) identifying measures to prevent circumvention of the CEPT Rules of Origin and strengthen Rule 22 of the Operational Procedure; and (e) addressing problems encountered in the issuance and processing of Certificates of Origin (Form Ds).[98]

In August 2008, both the Rules of Origin for the CEPT Scheme and the Operational Certification Procedures for the Rules of Origin of the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area were comprehensive revised and endorsed at the

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[97] *Id.*, The adoption of partial cumulation is expected to: (i) encourage substantial investments and promote outsourcing into ASEAN; (ii) make compliance with the forty-percent rule easier; (iii) facilitate the movement of goods within the region and promote market access of ASEAN goods to the global market; and (iv) make ASEAN more competitive vis-a-vis Dialogue Partners with whom bilateral free trade agreements are currently being negotiated. The ASEAN Economic Ministers (AEM) endorsed the implementing guidelines for partial cumulation in April 2005 in Ha Long, Viet Nam.

[98] http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN011677.pdf (last visited July 17th 2009).

ASEAN Economic Ministers' Meeting. The revised AFTA Rules of Origin are called "Rules of Origin for the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area".[99] The implementation of the comprehensive revised CEPT-AFTA Rules of Origin includes revisions to the text of CEPT ROO and its components such as the Operational Certification Procedures, Product Specific Rules (PSRs) and Certificate of Origin (Form) D. Moreover, the new CEPT-AFTA Rules of Origin revised the general rule of the CEPT Rules of Origin from the single criterion of a "Regional Value Content of forty-percent percent" to the alternative co-equal rules of "Regional Value Content of 40 percent or Change in Tariff Headings."[100]

The new CEPT-AFTA Rules of Origin Agreement states that goods imported under the CEPT Scheme into the territory of a Member State from another Member State is eligible for preferential tariff treatment if said goods conform to the origin requirements under any one of the following conditions: (1) a good that is wholly obtained or produced in the exporting Member State; (2) a good that is non wholly obtained or produced in the exporting Member State will be deemed to be originating within the Member State where working or processing of the good has taken place:

(a) if at least 40 percent of its content (hereinafter referred to as "ASEAN Value Content" or the "Regional Value Content (RVC)") originates from that Member State or

(b) it has undergone a change in tariff classification at four-digit level

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[99] Rules of Origin for the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, available at http://www.aseansec.org/17293.pdf [hereinafter **CEPT-AFTA ROO**].

[100] Joint Media Statement of the Fortieth ASEAN Economic Ministers' (AEM) Meeting Singapore, 25-26 August 2008 , available at http://www.aseansec.org/21886.htm. (last visit March 22, 2010).

(change in tariff heading) of the Harmonised System;

(c) If it is specified in Appendix C and satisfies the criteria set out therein[101]

In light of the above rules, if a product were unable to meet the ASEAN Value Content forty-percent, the relevant Product Specific Rules would apply. The main instrument of the revised ASEAN Rules of Origin is the Rules of Origin for the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area. This instrument consists of fourteen main articles, and appendices A, B and C.

Appendix A contains principle guidelines for calculating regional value of content in the CEPT-AFTA Rules of Origin that are used to determine the cost for ASEAN regional value content as well as provide the guideline for costing methodologies. Appendix B provides guidelines for partial cumulation under ASEAN cumulative Rules of Origin, and Appendix C of the CEPT-AFTA Rules of Origin provides Product Specific Rules that specify that the materials have undergone a change in tariff classification or specific manufacturing or processing operation, or that they satisfy an *ad-valorem* criterion, or a combination of any these criteria.[102]

The "Product Specific Rules of Origin" contains a long list of product-specific rules covering most, but not all products in Harmonized System. Appendix D is the Operational Certification Procedure for the Rules of Origin for the CEPT Scheme. Appendix D contains operational procedures on the issuance and verification of the Certification of Origin (Form D) as well as other related administration matters.

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[101] ASEAN members set out product-specific rules for certain products in Appendix C and those rules must be satisfied in order to claim as an ASEAN product.

[102] CEPT-AFTA ROO, *supra* note 99 at art.1(f).

In addition, the revised ASEAN Rules of Origin is composed of three attachments. Attachment 1 provides for substantial transformation criterion for textiles and textile products. Attachment 2 is Explanatory Note to Rules of Origin for the Agreement on the common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area. Additionally, detailed notes for the CEPT-AFTA ROO in Attachment 2 also provide explanations Regional Value Content (RVC), Calculation Formula, Substantial Transformation Criterion, Specific Rules Applicable for Textile and Textile Products and Specific Rules Applicable for Wood-based Products. The Attachment 3 of CEPT-AFTA ROO is a format of Certificate of Origin (Form D).

1. The "Wholly Produced or Obtained" Criterion

Goods wholly obtained or produced within the territory of any exporting ASEAN Member State qualify for preferential treatments from another importing ASEAN country. Article 3 of the CEPT-AFTA ROO defines what is considered as a product wholly produced or obtained in the exporting Member Country:

(a) Plant and plant products grown and harvested, picked or gathered there;

(b) Live animals born and raised there;

(c) Goods obtained from animals referred to in sub-paragraph (b) above;

(d) Goods obtained from hunting, trapping, fishing, aquaculture, gathering or capturing conducted there;

(e) Minerals and other naturally occurring substances, not included in subparagraphs (a) to (d), extracted or taken from its soil, waters, seabed or beneath its seabed;

(f) Products of sea-fishing taken by vessels registered with a Member State and

entitled to fly its flag and other products[103] taken from the waters, seabed or beneath the seabed outside the territorial waters[104] of that Member State, provided that Member State has the rights to exploit such waters, seabed and beneath the seabed in accordance with international law[105];

(g) Products of sea-fishing and other marine products taken from the high seas by vessels registered with a Member State and entitled to fly the flag of that Member State;

(h) Products processed and/or made on board factory ships registered with a Member State and entitled to fly the flag of that Member State, exclusively from products referred to in sub-paragraph (g) above;

(i) Articles collected there which can no longer perform their original purpose nor are capable of being restored or repaired and are fit only for disposal or recovery of parts of raw materials, or for recycling purposes;

(j) Waste and scrap derived from:

(i) production there; or

(ii) used goods collected there, provided that such goods are fit only for the recovery of raw materials; and

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[103] "other products" refers to minerals and other naturally occurring substances extracted from the waters, seabed or beneath the seabed outside the territorial waters.

[104] For products of sea-fishing obtained from outside the territorial waters (e.g. Exclusive Economic Zone), originating status would be conferred to that Member State with whom the vessels used to obtain such products are registered with and whose flag is flown in the said vessel, and provided that Member State has the rights to exploit it under international law.

[105] In accordance with international law, registration of vessels could only be made in one Member State.

(k) Goods obtained or produced in a Member State from products referred to in subparagraphs (a) to (j).

The Wholly Obtained or Produced criterion is quite straightforward because if any product is wholly obtained or produced in the territory of any ASEAN Member State, then such a product qualifies as an ASEAN product. "Wholly obtained' criteria would apply to goods that are clearly produced domestically. These are more easily identified and have clear HS (Harmonized System) nomenclature and coding. They are mainly in the first 20 HS chapters covering mining, live animals, fruits, with some processing."[106] The "Products Obtained" as referred in the List of qualified products are typically agricultural products, natural products (including mineral products) that have been entirely harvested in, obtained in or extracted from the exporting Member Country.

For example, fish harvested on the High Seas by a Thai fishing vessel are considered a wholly obtained product of Thailand. Another example is that Palm oil extracted from a tree in Indonesia is eligible for preferential tariff treatments under the CEPT Scheme. In addition, Siam rubies extracted from the soil of Thailand are considered products of Thailand. Such fish and Siam Rubies qualify for the benefits of the CEPT Scheme. The list of Wholly Obtained or Produced had been improved from the old version CEPT Rules of Origin.

Some academic scholars "there is a logical extension of the goods wholly obtained test. It indicates that a god is originating if it is produced entirely in the territory of a member

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[106] Erlinda M. Medalla and Jenny Balboa, *ASEAN Rules of Origin: Lesson and Recommendation for the Best Practice*, 4 Philippine Institute for Development Studied: ERIA Discussion Paper Series (June 2009).

Dr. Erlinda Medalla is a Senior Research Fellow, Philippine Institute for Development Studies (PIDS), Philippines.

Jenny Balboa is a Supervising Research Specialist at the Philippine Institute for Development Studies.

of a custom union or free trade area exclusively from materials originating within that union or area."[107] "Wholly produced products" include goods that have been produced entirely in the territory of the exporting Member Country, regardless of size or value.[108] For example, Jasmine brown rice is harvested and manufactured entirely in Thailand; therefore, Thailand is the originating country of that rice. A palm oil, as long as it is entirely harvested and manufactured in the Philippines enjoys the benefit of preferential treatment of AFTA.

The list of qualified products was expanded in the CEPT-AFTA ROO. The list now contains more specific details of how the Wholly Produced or Obtained criterion is applicable in determining the origin of a product. Moreover, the Revised CEPT-AFTA ROO added more products that qualify under this criterion; i.e., such as providing more details for products of sea-fishing taken by vessels registered with a Member State; and it adds waste and scrap derived from production or used goods collected in exporting member state. Furthermore, the CEPT-AFTA ROO provides a list of products that will be considered as wholly produced or obtained in an exporting Member State.

Manufactured goods are, however, a lot more complicated than agriculture products. A computer is composed of hardware produced in Thailand; the monitor is produced in Vietnam but the computer is finally packed in Lao PDR. This international manufacturing processing poses a problem: which country is the origin country of this computer? Thailand, Vietnam or Lao PDR? If some parts of such computer come from non-ASEAN Member States, will the product as a whole still qualify as originating in ASEAN? What about a product in which some parts come from non-ASEAN States and other parts are produced in

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[107] Bhala & Kenedy, *supra* note 25 at 354.

[108] Article 1 of the CEPT AFTA ROO defines "production" as methods of obtaining goods including growing, mining, harvesting, raising, breeding, extracting, gathering, collecting, capturing, fishing, trapping, hunting, manufacturing, producing, processing or assembling a good.

ASEAN States? Which is the country of origin? Finding the origin of a product that is produced from a variety of sources requires sophisticated rules for determining preferential treatment. Problems arise when ASEAN and non-ASEAN parts in the process of manufacturing are involved in manufacturing a product. The next section will study rules governing how ASEAN Member States determine the origin of non-wholly obtained or produced products in Member States under the CEPT-AFTA ROO.

2. Value Added Criterion

According to Rule 4 of the CEPT-AFTA Rules of Origin, products non wholly produced or obtained in any territory of a Member State can still be deemed as originating from within the Member State where working or processing of the good has taken place if at least forty percent of its content (Value Content or Regional Value Content (RVC)) originates within that Member State.[109] The ASEAN Value Content can be calculated either by the direct method or indirect method. The CEPT-AFTA ROO Article 4 sets a formula for calculating ASEAN Value Content, which will be described as follow.

a). Direct Method Formula

The CEPT-AFTA ROO draws this flowing formula for calculating percentage of ASEAN Value Content of a product.

$$RVC = \frac{\text{ASEAN Material Cost} + \text{Direct Labour Cost} + \text{Direct Overhead Cost} + \text{Other Cost} + \text{Profit}}{\text{FOB Price}} \times 100\ \%$$

If the calculation shows that at least forty-percent of the regional value content originates

[109] CEPT-AFTA ROO, *supra* note 99 at rules 4.

within the Member State where working or processing of the good has taken place, such a product is deemed to originate in that Member State. For example, a silk shirt composed of raw materials (forty-percent) from Thailand and manufactured in Thailand; therefore, this shirt is considered a product that originates in Thailand. The Direct method formula under the CEPT-AFTA ROO requires an analysis of production cost. Therefore, the CEPT-AFTA ROO defines the following costs to be used to calculate qualifying costs of production. The CEPT-AFTA ROO Article 4 (3) (b) provides that labor cost includes wages, remuneration and other employee benefits associated with the manufacturing process.[110]

Calculation of overhead cost includes, but is not limited to real property items associated with the production process (insurance, factory rent and leasing, depreciation on buildings, repair and maintenance, taxes, interests on mortgage); leasing of and interest payments for plant and equipment; factory security; insurance (plant, equipment and materials used in the manufacture of the goods); utilities (energy, electricity, water and other utilities directly attributable to the production of the good); research, development, design and engineering; dies, moulds, tooling and the depreciation, maintenance and repair of plant and equipment; royalties or licenses (in connection with patented machines or processes used in the manufacture of the good or the right to manufacture the good); inspection and testing of materials and the goods; storage and handling in the factory; disposal of recyclable wastes ; and cost elements in computing the value of raw materials, i.e. port and clearance charges and import duties paid for dutiable component.

The FOB price means the free-on-broad value of the good, inclusive of the cost of transport to the port or site of final shipment abroad. Under the CEPT-AFTA ROO, the FOB

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[110] CEPT-AFTA ROO, *supra* note 99 at art. 4 (3) (b).

price is determined by adding warehousing, port handling, brokerage fees, service charges, etc.[111] Other cost refers to the costs incurred in placing the goods on the ship for export including but not limited to, domestic transport costs, storage and warehousing, port handing, brokerage fees, services charges, etc.[112]

b). Indirect Method Formula

$$RVC = \frac{\text{FOB Price} - \text{Non-Originating Materials, Parts or Produce}}{\text{FOB Price}} \times 100\ \%$$

The indirect method for calculating ASEAN Value Content or Regional Value Content entails deducting the cost of non-ASEAN materials from the free-on-broad (FOB) price. The formula of indirect method is as follows: "Under a value added test, a good becomes the product of the most recent exporting country only if a special percentage of value is added to the good in that country".[113] For the purpose of calculating the regional value content provided in Article 4 (1), the value of the non-originating materials, parts or produce can be established either by using the Cost of Insurance and Freight (CIF) at the time of importation of the products, or when importation can be proven; or by the earliest ascertained price paid for the products of undetermined origin in the territory of the Member

[111] CEPT-AFTA ROO, *supra* note 99 art. 4 (3) (d).

[112] CEPT-AFTA ROO, *supra* note 99 art. 4 (3) (e).

[113] Bhala & Kennedy, *supra* note 25 at 360.

State where the working or processing takes place.[114] The Cost of Insurance and Freight is the value (price) at the border of the importing country or delivered into factory price. In this manner, the value of non-originating materials, parts or products of known origins can be calculated at the time of importation. If, however, their origins are unknown, the earliest ascertained price paid is used.

According to the AFTA Value Added criterion, a percentage of the value of the product required to confer ASEAN origin can be determined by either calculating the maximum amount of value of imported Non-ASEAN materials that do not exceed sixty percent of the FOB price or by calculating ASEAN Value of Content or Regional value of Content that must be at least forty-percent of the product's content. For example, consider an automobile made of component parts from various countries: an American body (twenty-five percent), a Japanese engine (twenty-five percent), and Thai components (fifty-percent). Such automobile is manufactured in Thailand, the exporting Member Country. From this example, such automobile composed of imported parts from non-ASEAN. Therefore, it is not qualified as a "Wholly produced" product of Thailand. However, it still fulfills the "ASEAN Value Content" criterion because it meets the forty-percent local content requirement (Thailand, which is an ASEAN member, contributes fifty-percent of its content). Therefore, this automobile is an originating product of Thailand. As a result, such automobile qualifies for area tariff treatment under the CEPT Scheme.

Here's another example: a Malaysian manufacturer produces a speedboat from mainly Japanese parts (sixty-five percent) with some Malaysian parts (thirty-five percent). From this example, even though the speedboat is produced in Malaysia, it does not meet the forty-percent ASEAN content requirement because such a speedboat contains more than

[114] The CEPT-AFTA ROO, *supra* note 99 art. 4 (3) (a)

sixty-five percent of Non-ASEAN (from Japan) originating parts and materials. Thus, the speedboat does not qualify as a product of Malaysia.

In light of the above, the CEPT-AFTA ROOs Article 4.4 rules that member States should determine and adhere to only one method of calculating the regional value content. However, Article 4.4 gives flexibility to Member States to change their calculation method. Such change must be notified to the AFTA Council at least six months prior to the adoption of new method. Furthermore, any verification to the ASEAN Value Content calculation by the importing Member State should be done on the basis of the method used by the exporting Member State. Article 4 (6) of the CEPT-AFTA ROOs states that locally procured materials produced by established licensed manufacturers, in compliance with domestic regulations, will be deemed to have fulfilled the CEPT origin requirement. Moreover, locally procured materials from other sources will be subjected to the CEPT origin test for the purpose of origin determination. In determining the cost for ASEAN origin, Member States should closely adhere to the guidelines for costing methodologies set out in Appendix A.[115]

3. Change of Tariff Classification

The Change of Tariff Classification is a new improvement of the CEPT-AFTA ROO. The CTC criterion is an alternative to the ASEAN Value Content or the Regional Value Content. Under this criterion, a product will be deemed as originating in ASEAN if it has undergone a change in tariff classification at a four-digit level (change in tariff heading) of the Harmonized System.

The reforms in ASEAN Rules of Origin are indeed moving toward the direction of

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[115] Appendix A: Principle and Guidelines for Calculating Regional value of Content in the CEPT-AFTA Rules of Origin

less restriction and simplification. The change of tariff classification was introduced to the CEPT-AFTA ROO as an alternative criterion of the ASEAN Value Content criterion. As stated in Article 4 (a) of the CEPT-AFTA ROO that good will be deemed to be originating in the Member State where working or processing of the good has taken place if it has undergone a change in tariff classification at four-digit level (change in tariff heading: CTH) of the Harmonized System.

From a product coverage for CTC limited to: iron & steel products in HS chapter 72, textiles and textiles products, wheat flour, aluminum and wood-based products, there more products now covered by CTC, namely: (i) agro-based products; (ii) automotives; (iii) e-ASEAN; (iv) electronics; (v) fisheries; (vi) healthcare; (vii) rubber-based products; (viii) textiles and apparels; and (ix) wood-based products.[116]

4. Accumulation Criterion

According to Brenton, "Cumulation is an instrument allowing producers to import materials from a specific country or regional group of countries without undermining the origin of the product".[117] Article 5 (1) of the CEPT-AFTA ROO allows full cumulation[118] for

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[116] Erlinda M. Medalla and Josef T. Yap, *Policy Issues for the ASEAN Economic Community: the Rules of Origin*, 86 in Deeping Economic Integration in East-Asian-the ASEAN Economic Community and Beyond-, Hadi Soesasto ed., ERIA Research Project Report 2007 No.1-2.

Dr. Josef T. Yap is the President, Philippine Institute for Development Studies (PIDS), Philippines.

[117] Brenton, *supra* note 53 at 4.

[118] Full cumulation allows for more fragmentation of production processes among the members of the regional group and so stimulates economic linkages and trade within the region. Under full cumulation it may be easier for more developed higher labour cost countries to outsource labour intensive low-tech production stage to less developed lower partners whilst maintaining the preferential status of the good produced in low-cost locations.

Full cumulation provides for deeper integration and allows for more advanced countries to outsource labour intensive production stages to low-wage partners. Full cumulation with simple Rules of Origin will make it easier for regionally based firms to exploit economics of scale that are available. Such cumulation would also allow low-income countries the greatest flexibility in sourcing inputs.
See: Brenton, *supra* note 53 at 4 and 15.

a good originating in a Member State, which is used in another Member State as materials for a finished good eligible for preferential tariff treatment.

Consequently, it will be considered as originating in the latter Member State where working or processing of the finished good has taken place. The CEPT-AFTA ROO also allows partial cumulation as an alternative of the value added criterion. Under partial cumulation rule, the forty-percent of ASEAN content does not have to come solely from one ASEAN Member. Article 5 (2) provides that if the Regional Value Content of the material is less than forty percent, the qualifying ASEAN Value Content to be cumulated using the RVC criterion will be in direct proportion to the actual domestic content provided that it is equal to or more than twenty percent. The Implementing Guidelines of Partial Cumulation are set out in Appendix B.

For the purpose of implementing Article 5(2) of the CEPT-AFTA ROO, Appendix B of the CEPT-AFTA ROO states that a good will be deemed to be eligible for partial cumulation, if at least twenty percent of the Regional Value Content (RVC) of the good is originating in the Member State where working or processing of the good has taken place. Furthermore, Appendix B (b) sets out that the RVC of the good specified in sub-paragraph (a) will be calculated in accordance with the formula provided in paragraph 2 of Article 4 of the CEPT-AFTA ROO using either direct or indirect method. Another condition is that exported good under this arrangement must be accompanied by a valid Certificate of Origin (Form D) duly and prominently marked "Partial Cumulation."

In light of the above, several Member States can contribute to the forty-percent local content requirement so long as the last country in which the product was manufactured

contributes twenty percent of the materials.[119] This holds true for manufactured products as well as raw materials. This means that those manufactured parts that can be used for calculating the forty-percent local content cumulation have to fulfill the origin requirements so that there is a "Partial Cumulation" of ASEAN Member States contribution.

As explained earlier, "Cumulation consists of calculating the value of materials acquiring originating status to determine whether the cumulated meets an *ad valorem* requirement for preferential treatment."[120] The ASEAN cumulation is partial in that the cumulation coverage is strictly limited to ASEAN-origin material. Non-ASEAN origin materials, even if incorporating a small ASEAN content, are excluded from cumulation. The ASEAN partial cumulation is similar to the Pan-European partial cumulation, as opposed to the NAFTA full cumulation.

For example, a motorcycle consists of an American engine (forty-five percent), Chinese parts (fifteen percent) and materials from Malaysia (ten percent, Thailand (ten percent) and Cambodia (twenty percent). The processing of the finished motorcycle takes place in Cambodia. Such a motorcycle is eligible for the preferential treatment under the CEPT because the aggregate ASEAN content of this motorcycle meets the forty-percent local content requires by the Partial Cumulation criterion (twenty percent of the materials and parts originated in Thailand and Malaysia and twenty percent are domestic materials of Cambodia, which is the last manufacturing country). Under the applicable tests, this motorcycle

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[119] Implementing Guidelines for Partial Cumulation under ASEAN Cumulative Rules of Origin

Endorsed by the AEM Retreat, Ha Long, 26 April 2005.

[120] Norio Komuro, *FTA Rules of Origin and Asian Integration: Origin Rules and Certification, in WTO and East Asia*: New Perspectives Reprinted 2007 (2004).

Professor Norio Komuro is the Legal Advisor to the Japan Machinery Exporters' Association, and is Chairman of the Special Committee for the International Harmonisation of Rules of Origin in MITI, is the Professor of Law at Kobe University, and has written a number of books and articles on the GATT and the WTO

originates in Cambodia. The same motorcycle would not qualify for the preferential treatment from the other importing Member States if the last manufacturing country were Thailand, which contributed only ten percent of the materials.

Another example is that tuna canned in oil is comprised of both tuna imported from India (fifty percent) and tuna caught from the Gulf of Thailand (twenty percent), salt from Indonesia (ten percent) and oil from Malaysia (twenty percent). The canning of the tuna was completed in Malaysia. From this example, this canned tuna qualifies as a product of Malaysia because Malaysia is the last manufacturing country that contributed twenty percent of the total content. But what if, for instance, Malaysia only contributed ten percent of the total content? The canned tuna would not be considered to have originated in Malaysia or as an ASEAN product at all for that matter. However, in many cases it is not easy to calculate the forty-percent local content. Medalla and Balboa comment about the about cumulation origin criteria:

> [Th]e more applicable the cumulation principle, the more liberal (and less restrictive) the ROO would be. This is especially true if the VA rule is used in tandem with the roll-up or absorption principle. In ASEAN for example, the AFTA ROO allows so-called partial cumulation (which is essentially full cumulation) of intermediate inputs from other ASEAN members which had passed the VA criterion. In addition, cumulation is for the full value of the intermediate input (hence the term full cumulation), and not just the local value added.[121]

This study also agrees with the above observation. The rules of origin should not be too restrict or very difficulty to comply. By using comulation crition even only partial

[121] Medalla and Balboa, *supra* note 106 at 8.

cumulation alone can relax the strictness of value add criterion that will benefit members of free trade area. Both partial and full cumulations will create great advantage for intra-trade of every free trade area including ASEAN Free Trade Area.

5. Substantial Transformation Criterion

The "Substantial Transformation" rules account for whether certain processes that a product undergo constitute enough "substantial" change to justify that product as being identified as a product of the last exporting Member Country. These rules are listed in Attachment 2 "Explanatory Notes to Rules of Origin for the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area."

The Term "substantial transformation" is employed to protect the benefit of preferential treatment from Non-ASEAN Member States that may take advantage of the preferential treatment under the CEPT. To avoid taxation, ASEAN Member States would set up bases in ASEAN Member States and only make some small changes to their products such as repacking, cleaning, and labeling, and then pass their products out of the ASEAN Region. "Third-country manufacturers cannot "free-ride" on the preferences without making an investment in a country that participates in the FTA or beneficiary developing country to the extent required under the applicable FTA or GSP Rules of Origin. The rules are thus policy-oriented in that they benefit only participating countries or developing countries and encourage investment in those countries."[122] Moreover, some specific products, such as textile and textile products, need to have a particular criterion to ensure there is a significant contribution in processing or manufacturing.

Attachment 2 of the CEPT-AFTA ROO provides that a country of origin is that in which

[122] See Komuro, *supra* note 101 at 447.

the last substantial transformation or process was performed resulting in a new product. Thus, materials that underwent a substantial transformation in a country will be a product of that country. Additionally, a product in the production of which two or more countries are involved will be regarded as originating in the country in which the last substantial transformation or process was performed, resulting in a new product. Furthermore, a product will be considered to have undergone a substantial transformation or process if it has been transformed by means of substantial manufacturing or processing into a new and different article of commerce.

Under the Substantial Transformation Criterion of Attachment 2 of the CEPT-AFTA ROOs, a new and different article of commerce will usually result from manufacturing or processing operations if there is a change in Commercial designation or identity; Fundamental character; or Commercial use. Moreover, as follows below, Attachment 2 sets out four criteria for considering whether a product has been subjected to substantial manufacturing operations.

(i) a physical change in the material or article as a result of the manufacturing or processing operation;

(ii) the time involved in the manufacturing or processing operations in the country in which they are performed;

(iii)the complexity of the manufacturing or processing operations in the country in which they are performed;

(iv)the level or degree of skill and/or technology required in the manufacturing or processing operations.

However, a new question arises when one product undergoes several substantial transformations in different ASEAN Countries. How do we establish which country is the country of origin if there were several transformations? For example, cotton fabric

imported from Lao PDRs is stitched and cut into parts in Thailand and assembled into completed pajamas in Cambodia. Which country is the country of origin for the pajamas? From this example, Cambodia is the country of origin because last substantial transformation into new products, pajamas, was performed in Cambodia.

In yet another example, the Philippines import pineapples from Lao PDRs to produce Pineapple fibers for production of the national shirt made from pineapple fibers "Barong". The manufacturing of the fibers takes place in the Philippines then the fabric is shipped to Thailand for assembling into the pineapple shirts after which they go though the processes of cleaning, banding and packaging in Lao PDRs, then finally they are exported to Singapore. Which country is the country of origin of the Barong shirt? The substantial transformation was carried out in Thailand because it was there that Barong was transformed into a new article of commerce, the pineapple shirt, therefore Thailand is a country of origin. The productions of pajamas and pineapple fibers illustrate the complexity of determining the country of origin, given that the product went through several "substantial transformations" in different ASEAN countries. The CEPT Rules of Origin provide a simple answer: the country of origin is where the last substantial transformation or process was performed so long as the materials which underwent a substantial transformation resulted in a new product. In other words, the materials have undergone processes that transform the product itself into a "new and different article of commerce" either by a change in commercial designation, fundamental character or commercial use.

6. Specific Rules for Textile and Textile Products and Wood-based Products

ASEAN provides separate criteria specific to those products that have complex

production; textiles and textile products and wood-based products.[123] The nature of textiles and textile products is that they can be composed of materials from ASEAN Member States and non-ASEAN countries alike, making it is complicated to identify the originating country. For example, a cotton shirt composed of the cotton fiber from Brunei and the buttons came from China and a zipper that came from India. Such a shirt was assembled into a finished product in Lao PDR. This example shows the complexity of establishing the originating status of the shirt. This example also poses a question, which is where did the last substantial transformation take place? China, India or Lao PDR?

The Nineteenth Meeting of the AFTA Council, ASEAN Member States endorsed the Substantial Transformation Rules for Wheat Flour[124] Wood-Based products, Aluminum products, Iron and Steel.[125] Wheat Flour, for instance, is considered a product of a particular ASEAN country when it has undergone the industrial process of milling from wheat grain prior to importation into another ASEAN country. The CEPT Rules of Origin of "Substantial Transformation criterion" applied to textiles and wheat but are not exclusive to those materials. AFTA Council went on to include more specific rules pertaining to processes for these products as well as other products that fulfill "Substantial Transformation" criterion.

ASEAN Member States have agreed to expand the use of the Substantial Transformation rules to some more products namely, wood-based products, aluminum products, and iron and steel, and tend to endorse these rules as an alternative to the Rules of Origin, which would further enhance the inter-ASEAN trade, particularly in the concerned

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[123] "The CEPT Rules of Origin for Textile and Textile Products."

[124] "The CEPT Rules of Origin for Wheat Flour."

[125] Joint Media Statement of the Nineteenth Meeting of the ASEAN Free Trade Area Council, Vientiane September 27th 2005

sectors.

a). Specific Rules for Textile and Textile Products

The processes of producing textiles and textile products are much more complicated than for other products. Therefore ASEAN Member States decided to create an ASEAN Single List to identify each of the textiles and textile products upon which such working or processing would confer originating status. The ASEAN Single List catalogued material that may or may not have originated in an ASEAN member country but may be nonetheless considered of ASEAN origin if the products undergo such processes as needle punching, spin bonding, chemical bonding, weaving or knitting, crocheting or wadding or tufting or dyeing or printing and finishing; or impregnation, coating, covering or lamination.

For example, in Myanmar, silk yarn that is imported from China are woven into silk fabric and transformed into silk women suits. These silk women suits originate in Myanmar because they have been transformed from Chinese silk into women suits. In another example, Australian synthetic fiber of nylon is imported to Cambodia, where it is cut, stitched, coated and assembled into finished tents. Such tents originate in Cambodia because they have undergone the substantial manufacturing process in Cambodia. What if the tents were entirely made in Australia but only the labeling process occurred in Cambodia? Are they still qualified as originating products of Cambodia? The CEPT Rules of Origin stated that an article or material is not considered as a product originating in ASEAN if the products are not changed by means of "substantial manufacturing" or processing into a "new and different article of commerce." The process of attaching labels does not contribute enough change to the tents so as to establish a new and different article of commerce. Therefore, Myanmar is not an originating country of the tents.

Under the new improvement of the ASEAN Rules of Origin, specific rules for

textile and textile products are now in Attachment 2 of the CETP-AFTA-ROO. Under this Attachment 2, textile material or article is deemed to be originating in a Member State, when it has undergone, prior to the importation to another Member State, any of the following:

i. Petrochemicals which have undergone the process of polymerization or polycondensation or any chemicals or physical processes to form a polymer;
ii. Polymer which has undergone the process of melt spinning or extrusion to form a synthetic fiber;
iii. Spinning fiber into yarn;
iv. Weaving, knitting or otherwise forming fabric;
v. Cutting fabric into parts and the assembly of those parts into a completed article;
vi. Dyeing of fabric, if it is accompanied by any finishing operation which has the effect of rendering the dyed good directly;
vii. Printing of fabric, if it is accompanied by any finishing operation which has the effect of rendering the printed good directly usable;
viii. Impregnation or coating when such treatment leads to the manufacture of a new product falling within certain headings of customs tariffs;
ix. Embroidery which represents at least five percent of the total area of the embroidered good.[126]

The list of textile and textile products covered under these rules are set out in Attachment 1

[126] Attachment 2 of the CETP-AFTA-ROO.

"Substantial Transformation Criterion for Textile and Textiles products." Attachment 2(C) rules that an article or material will not be considered as originating in the territory of a Member State by virtue of merely having undergone any of the following:

i. Simple combining operations, labeling, pressing, cleaning or dry cleaning or packaging operations, or any combination thereof;
ii. Cutting to length or width and hemming, stitching or overlocking fabrics which are readily identifiable as being intended for a particular commercial use;
iii. Trimming and/or joining together by sewing, looping, linking, attaching of accessory articles such as straps, bands, beads, cords, rings and eyelets;
iv. One or more finishing operations on yarns, fabrics or other textile articles, such as bleaching, waterproofing, decating, shrinking, mercerizing, or similar operations; or
v. Dyeing or printing of fabrics or yarns.

Nonetheless, under Article 3 (c) of Attachment 2, the following items made of non-originating textile materials will be considered as originating good if it has undergone the processes identified in sub-paragraph (b) but not merely performing the processes identified in sub-paragraph (c): i. Handkerchiefs; ii. Shawls, scarves, veils, and the like; iii. Travelling rugs and blankets; iv. Bed linen, pillow cases, table linen, toilet linen and kitchen linen; v. Sacks and bags, of a kind used for packing of goods; vi. Tarpaulins, awnings and sunblinds; vi. Floor cloths, and dish cloths and other similar articles simply made up. This provision made it clear what textile products will be considered as originating product of ASEAN Member even though they composed of non-member materials. However, those products must have undergone the processes identified in sub-paragraph (b).

b). Specific Rules for Wood-based Products

Pursuant to Article 4 (a) of Attachment 2 of the CEPT-AFTA-ROO, Wood-based products covered under these rules are products classified under: i. Harmonised System Chapter 44; ii. Harmonised System Headings 94.01 - 94.03 and 94.06.

However, Article 4 (b) of Attachment 2 states that an article or material will not be considered as originating in a Member State by virtue of having undergone any of the following: Trimming, cutting-to-size, sanding, attaching accessory article such as decorative upholstery material; or Over-laying and/or coated either by chemical material or natural material. Basically ASEAN Rules of Origin do not except small changes in manufacturing products as they confer originating product. It is noted that, only two products, namely textiles and textile products, and wood-based products are specifically addressed in specific rules under Attachment 1 and 2.

B.. Direct Consignment Requirement

Under the ASEAN Rules of Origin, the preferential tariff treatment will be applied to a good satisfying the requirements of the CEPT-AFTA ROO and which is consigned directly between the territories of the exporting Member State and importing Member State. Products under the CEPT Scheme must conform to one of five criterion of origin as described above namely; "Wholly Produced or Obtained," "ASEAN Value Content or Regional Value Content," Change in Tariff Classification," "Accumulative (and Partial Cumulative)" and "Substantial Transformation for what product." The second condition is that such products must be consigned directly from the territory of a Member Country to the territory of an importing Member Country. When products under the CEPT Scheme meet these two conditions, they qualify for AFTA preferential treatment. Direct consignment requirements can be described in details as follows.

That the product originated in one of the ASEAN Member States, however, is not the sole criterion for preferential treatment. It also must be the case that when it is exported, it must be directly consigned from the exporting Member Country to the Importing Member Country. Direct consignment refers to products that are transported through the territory of an ASEAN country without passing through the territory of any non-ASEAN country.[127] For example, Indonesian rattan furniture transported directly to the Philippines without passing through any non-ASEAN country. The rattan furniture is determined as directly consigned from one Member State to another Member State. As the supposedly rattan furniture was entirely produced in ASEAN Member State and was directed consigned to the Philippines, such rattan furniture qualifies as ASEAN product. Therefore, it will benefit from the CEPT Scheme. But if televisions, are shipped from the Philippines to Vietnam and pass through China, which is not a member of ASEAN (even though such televisions are entirely produced in the Philippines), these televisions do not qualify for preferential treatment from Vietnam because they do not comply with the direct consignment rule.

However, the CEPT–AFTA ROO provides an exception of direct consignment rule. The goods transported through the territory of "one or more intermediate" Non-ASEAN countries "with or without transshipment or temporary storage" will be considered directly consigned if

(i) a transit entry is justified for geographical reasons or by consideration related exclusively to transport requirements;

(ii) the goods have not entered into trade or consumption in there; and

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[127] The CEPT AFTA ROO, Article 7 (2) states that the following shall also be considered as consigned directly from the exporting Member State to the importing Member State:
(a) If the goods are transported by passing through the territory of any other Member State;
(b) If the goods are transported without passing through the territory of any non-ASEAN Member State.

(iii) the goods have not undergone any operation other than unloading and reloading or any operation required to keep them in good condition.

For example, computer products originating in Vietnam are transported to the Philippines, but during the transportation the ship develops engine damage. The ship stopped at a Hong Kong (Non-ASEAN Member) port to be repaired. During this stop, the computer products are uploaded from the ship to a storage space in Hong Kong in order to keep them in good condition and prevent them from any damage, which may occur during the repair of the ship. Even though the computer products are not transported directly from Vietnam to the Philippines, they remained in Hong Kong, which is a non-ASEAN Member country for some time. The computer products are still considered directly consigned because such transshipping falls in the exception of direct consignment.

In yet another example, the same computer products are uploaded to a Hong Kong port and they are kept in storage space but they are repacked in order to make the products look better. In this case, the transportation of these computer products are not considered a direct consignment because the computer products have undergone (other than unloading and reloading) the process of repacking in Hong Kong. This example brings up an important distinction between transportation and packing. In the example, the computer products are not eligible to enjoy the preferential treatment under the CEPT because they are repackaged in Hong Kong. However, the packing materials themselves have no bearing on the determination of the product origin so if Chinese packaging were sent to Vietnam and were repackaged there (unless the Member Country has it own regulations regarding the treatment of products separately from their packing), and then the computer would be of ASEAN origin.

C.. Certification and Verification of ASEAN Product

To benefit from the CEPT preferential treatments, imported products must be accompanied by a Certificate of Origin[128] issued by a Government Authority designated by of the exporting Member State.[129] The Certificate of Origin is proof or evidence of ASEAN origin. ASEAN Member States established "the Operation Certification Procedures for the Rules of Origin of the ASEAN Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area" to provide the operation procedures on the issuance and verification of the Certificate of Origin. This certification is quite different from NAFTA's procedure. As Norio states, "the ASEAN origin certification and verification consists of public Form D certification and the exporting country's verification. This differs from NAFTA's private self-certification and intrusive verification by the importing country's authorities. In this regard, AFTA followed the EC regime based of a public EUR 1 certification and the exporting country's verification."[130]

The New revised CEPT-AFTA ROO sets out operation certification procedures in its Appendix D "the Operational Certification Procedures for the Rules of Origin of the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area."[131] Appendix D provides operational procedures on the issuance and verification of the Certificate of Origin (hereinafter Form D) and other related administrative matters. For the

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[128] Hereinafter Form D.

[129] In the case of having more than one Member Country involve with exporting the products then an authorized Government Agency of the final exporting Member Country is in charge of authorizing a Certificate of Origin.

[130] Komuro, *supra* note 120 at 491.

[131] Hereinafter Operational Certification Procedures.

purpose of claiming preferential tariff treatment, the importer must submit to the customs authority of the importing Member State at the time of import, a declaration, a Certificate of Origin (Form D) including supporting documents (i.e. invoices and, when required, the through Bill of Lading issued in the territory of the exporting Member State) and other documents as required in accordance with the domestic laws and regulations of the importing Member State.[132] The operational procedures on the issuance and verification of the Certification of Origin (Form D) and the other related administrative matters are observed as follows.

1. Issuing Authorities

Pursuant to Article 2 (1) of Appendix D, each Member State must provide a list of the names, addresses, specimen signatures and specimen of official seals of its issuing authorities, in hard copy and soft copy format, to the ASEAN Secretariat for dissemination to other Member States. Any change in the said list must be promptly provided in the same manner.

Accordingly, The specimen signatures and official seals of the issuing authorities, compiled by the ASEAN Secretariat, must be updated annually. Any Certificate of Origin (Form D) issued by an official not included in the list referred to in paragraph 1 will not be honored by the receiving Member State.[133] For the purpose of determining originating status, the issuing authorities have the right to request supporting documentary evidence or to carry out check(s) considered appropriate in accordance with respective domestic laws and regulations of a Member State.[134]

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[132] CEPT-AFTA-ROO, Appendix D art.12.

[133] CEPT-AFTA-ROO, Appendix D art.2 (2).

[134] CEPT-AFTA-ROO, Appendix D art.2 (3).

2. Certification Application Procedures

According to Article 4 (1) of Appendix D, in accordance with the Member State's domestic laws and regulations, the producer and/or exporter of the good, or its authorized representative, can apply to the issuing authority, requesting pre-exportation examination of the origin of the good. Additionally, the result of the examination, subject to review periodically or whenever appropriate, will be accepted as the supporting evidence in determining the origin of the said good to be exported thereafter. However, the pre-exportation examination may not apply to the good whose origin, which by its nature, can be easily determined. For locally-procured materials, self-declaration by the final manufacturer exporting under the CEPT Scheme is used as a basis when applying for the issuance of the Certificate of Origin (Form D).[135]

At the time of carrying out the formalities for exporting the products under preferential treatment, the exporter or his authorized representative can submit a written application for the Certificate of Origin (Form D) together with appropriate supporting documents proving that the products to be exported qualify for the issuance of a Certificate of Origin (Form D).[136]

3. Pre-Exportation Examination

Pursuant to Article 3 of Appendix D of the CEPT-AFTA-ROO, the issuing authority will, to the best of its competence and ability, carry out proper examination in accordance with the domestic laws and regulations of the Member State upon each application for a Certification of Origin (Form D) to ensure that:

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[135] CEPT-AFTA-ROO, Appendix D art.4 (2).

[136] CEPT-AFTA-ROO, Appendix D art.5.

(a) the application and the Certificate of Origin (Form D) are duly completed and signed by the authorized signatory;

(b) the origin of the product is in conformity with the CEPT-AFTA ROO;

(c) the other statements of the Certificate of Origin (Form D) correspond to supporting documentary evidence submitted;

(d) description, quantity and weight of goods, marks and number of packages, number and kinds of packages, as specified, conform to the products to be exported;

(e) multiple items declared on the same Certificate of Origin (Form D) shall be allowed provided that each item qualifies separately in its own right.

4. Issuance of Certificate of Origin

The issuing authorities of the exporting Member State issue the Certificate of Origin (Form D) at the time of exportation or soon thereafter whenever the products to be exported can be considered originating in that Member State within the meaning of the CEPT-AFTA ROO. The CEPT-AFTA ROO allows a back-to-back-Certificate of Origin. Appendix D Article 10.2 rules that the issuing authority of the intermediate Member State may issue a back-to-back[137] Certificate of Origin if an application is made by the exporter, provided that a valid original Certificate of Origin (Form D) is presented. In the case where no original Certificate of Origin (Form D) is presented, its certified true copy must be presented.[138]

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[137] The "back-to-back Certificate of Origin" means a Certificate of Origin issued by an intermediate exporting Member State based on the Certificate of Origin issued by the first exporting Member State. CEPT-AFTA-ROO, Appendix D art.1 (a).

[138] CEPT-AFTA-ROO, Appendix D art.10 (2) (a).

Furthermore, the back-to-back Certificate of Origins issued should contain some of the same information as the original Certificate of Origin (Form D) such as FOB price of the intermediate Member State should also be reflected in the back-to-back Certificate of Origin etc.[139]

5. Presentation of Certificate of Origin

Under Article 13 of Appendix D of the CEPT-AFTA ROO, the time limit for presentation of the Certificate of Origin (form D) is as follows. Certificate of Origin (Form D) must be submitted to the customs authorities of the importing Member State within one year from the date of endorsement by the relevant Government authorities of the exporting Member State.[140] Where the Certificate of Origin (Form D) is submitted to the customs authorities of the importing Member State after the expiration of the time-limit for its submission, such Certificate of Origin (Form D) is still to be accepted when failure to observe the time-limit results from *force majeure* or other valid causes beyond the control of the exporter.[141] In all cases, the customs authorities in the importing Member State may accept such Certificate of Origin (Form D) provided that the products have been imported before the expiration of the time limit of the said Certificate of Origin (Form D).[142]

6. Exception of Certificate of Origin Requirement

In the case of consignments of products originating in the exporting Member State and not

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[139] CEPT-AFTA-ROO, Appendix D art.10.2 (b).

[140] CEPT-AFTA-ROO, Appendix D art.12 (a).

[141] CEPT-AFTA-ROO, Appendix D art.12 (b).

[142] CEPT-AFTA-ROO, Appendix D art.12 (c).

exceeding US$ 200.00 FOB, the production of Certificate of Origin (Form D) is waived.[143] Moreover, the use of a simplified declaration by the exporter that the products in question have originated in the exporting Member State will be accepted. A product sent through the post not exceeding US $ 200.00 FOB is also similarly treated.

7. Record and Keeping Requirement

For the purposes of the verification process, the producer and/or exporter applying for the issuance of a Certificate of Origin (Form D) should, subject to the domestic laws and regulations of the exporting Member State, keep its supporting records

for application for not less than three (3) years from the date of issuance of the Certificate of Origin (Form D).[144] The issuing authorities should retain the application for Certificates of Origin (Form D) and all documents related to such application for not less than three (3) years from the date of issuance. In addition, any information communicated between the Member States concerned must be treated as confidential and must be used for the validation of Certificates of Origin (Form D) purposes only.[145]

8. Dispute Settlement

In the case of a dispute concerning origin determination, classification of products or other matters, the government authorities concerned in the importing and exporting Member States are obligated under Article 22 of Appendix D to consult each other with the purpose of resolving the dispute. The result should be reported to the other Member States for information.

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[143] CEPT-AFTA-ROO, Appendix D art.14.

[144] CEPT-AFTA-ROO, Appendix D art.16.

[145] CEPT-AFTA-ROO, Appendix D art.16 (4).

If no settlement can be reached bilaterally, the Senior Economic Officials Meeting will decide the issue concerned. The ASEAN Protocol on Enhanced Dispute Settlement Mechanism will be applied in relation to any dispute arising from, or any difference between Member States concerning the interpretation or application of the CEPT Rules of Origin and its Operational Procedures.

III. Conclusion: Chapter III

ASEAN Member States have been developing ASEAN Rules of Origin to be use as a screening tool for a product that claims the benefit of the area tariff treatment under the CEPT Scheme. At the beginning, the CEPT Scheme sets out that a product is deemed to be originating from ASEAN Member States, if at least forty-percent of its content originates from any Member State.[146] However, the CEPT Scheme didn't specify details or guidelines as to how to determine the origin of a product, or products. Soon after, ASEAN Member States developed a set of detailed Rules of Origin under Rules of Origin for the CEPT Scheme. Under the development of AFTA Rules of Origin, the forty-percent value-added criteria was still the only criterion that had been used across all products. The AFTA provides for, in effect, full accumulation, since the domestic content can be an aggregate of value-added in any ASEAN member state.[147] The requirement of a forty percent ASEAN local content is not too high to comply with and it is not too burdensome on the flow of trade between and among nations.

Many of the Japanese-affiliated firms interviewed in Japan External Trade Organization (JETRO)[148] survey asserted that the rules of requiring "ASEAN content of forty-percent or more" on the whole present a low hurdle that can be met with no problem. According to JETRO questionnaire survey of Japanese-affiliated firms operating in six major

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[146] CEPT Article 2.4 which stated that a product shall be deemed to be originating from ASEAN Member States, if at least forty-percent of its content originates from any Member State.

[147] Brenton, *supra* note 53 at 13.

[148] The Japan External Trade Organization (JETRO) is a government-related organization that works to promote mutual trade and investment between Japan and the rest of the world. http://www.jetro.org

ASEAN countries, more than half of the companies in Thailand (54.8%), Malaysia (54.8%) and Indonesia (50.6%) satisfied the local procurement rate of forty-percent. It appears that in any case, companies are able to obtain Form D because personnel costs, direct costs, domestic transport costs, and profits, can be included in calculating the actual local procurement rate.[149] Many academic scholars such as Paul Brenton, suggested that ASEAN should provide change in tariff classification as an alternative to the value added criterion that has been used as a stand-alone criterion to determine an ASEAN product.

In August 2008, the revised Rules of Origin for the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area or CEPT-AFTA was adopted. Along with improving specific details in the Rules of Origin, the most significant improvement in the new revision of Rules of Origin is introducing Change in Tariff Classification as alternative rule of ASEAN Value Content. Moreover, the Product Specific Rule is being used in the new CEPT-AFTA ROO. With all tremendous improvements in the CEPT-AFTA-ROO, ASEAN Countries still continue improving its Rules of Origin. Article 14 of the CEPT-AFTA ROO provides that these Articles may be reviewed, and modified as and when necessary upon request of a Member State and may be open to such reviews and modifications as may be agreed upon by the AFTA Council.

This study finds that Rules of Origin in ASEAN are effective tools in preventing trade deflection from simple transshipments. The CEPT-AFTA ROO ensures that only goods from ASEAN Member States will be eligible for preferential tariff treatments within ASEAN Free Trade Area. The new Revised Rules of Origin makes determination of ASEAN products less difficult. However, they are not too restrictive—unless they create trade restrictions.

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[149] *ASEAN's FTA's and Rules of Origin*, 9 Oversea Research Department, Japan External Trade Organization (November 2004) at http://www.jetro.go.jp/thailand/e_survey/pdf/fta_rulesoforigin.pdf (visited January 2010).

Furthermore, they provide alternative criteria, and exporters can choose the one most suitable for them. It should be noted that the CEPT-AFTA ROO also introduces *De Minis rules*[150] as one criterion that confers ASEAN origin.[151]

[150] Such rules allow a certain percentage of non-originating materials to be used without affecting the origin of the final product. It should be noted that this rules applied to the change of tariff heading and the specific manufacturing rules but does not affect the value added rules. See Brenton, *supra* note 53 at 5.

[151] Article 8 (1) of the CEPT-FTA ROO states that a good that does not undergo a change in tariff classification shall be considered as originating if the value of all non-originating materials used in its production that do not undergo the required change in tariff classification does not exceed ten (10) percent of the FOB value of the good and the good meets all other applicable criteria set forth in this CEPT-AFTA Agreement for qualifying as an originating good.

Chapter IV

The ASEAN Dispute Settlement Mechanism

I. Historic Background of Settlement of Trade Dispute in ASEAN: From Political Realm to Legal Realm

Since its establishment in 1967, ASEAN has been developing economic cooperation among Member States. The first major economic integration agreement, however, the ASEAN Free Trade Area (AFTA), was signed twenty-five years after ASEAN was established. Plummer comments that,

> Southeast Asian economic co-operation through the institutional mechanism of the Association of Southeast Asian Nations (ASEAN) has been quite exciting of late. This is particularly noteworthy because the organization took almost a decade from its creation in 1967 to develop even the most superficial forms of economic co-operation, and then another fifteen years before the ASEAN Free Trade Area was launched in 1992.[1]

ASEAN Member States signed the Framework Agreement on the ASEAN Investment Area

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[1] MICHAEL G. PLUMMER, CREATING AN ASEAN ECONOMIC COMMUNITY: LESSONS FROM THE EU AND REFLECTION ON THE ROADMAP, 31 (Denis Hew Ed., Roadmap to an ASEAN Economic Community, Institutional of Southeast Asian Study 2003).

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(AIA)[2] in 1998 to promote free flow of investments in ASEAN countries. The year 2010 was set as a goal for completion. Furthermore, the ASEAN Framework Agreement for Services (AFAS)[3] was launched to create free flow of trade in services in the region.

At the Ninth ASEAN Summit in Bali in October 2003, ASEAN agreed to establish an ASEAN Economic Community (AEC) by the year 2020. The Charter of Association of Southeast Asian Nations, (ASEAN Charter),[4] was implemented to establish a legal and institutional framework for ASEAN. The ASEAN Charter aims to create a single market and production base with free a flow of goods, services and investments, and as well as, facilitated movement of business persons, professionals, talents and labor; and a freer flow of capital. "Unlike a normal common market, the AEC had no plan to establish a common tariff rate applicable to non-Members and restricted the flow of labor to skilled labors. Accordingly, the AEC is conceptualized as an "FTA-plus" arrangement."[5]

The economic agreements namely, AFTA, AIA, and AFAS are core mechanisms to achieve the ultimate goal, which is to create a common market in ASEAN. Nevertheless, conflict of interests, which will lead to disputes among ASEAN Members, may occur during implementation of those arrangements. Therefore, an effective dispute settlement mechanism is very essential to help ASEAN Members solve any differences among themselves, as well

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[2] Framework Agreement on the ASEAN Investment Area (AIA), Oct. 7, 1998, available at http://www.aseansec.org/7994.pdf [hereinafter **AIA**].

[3] ASEAN Framework Agreement on Services (AFAS), Dec. 15, 1995, available at http://www.aseansec.org/6628.htm [hereinafter **AFAS**]

[4] Charter of Association of Southeast Asian Nations, Nov. 20, 2007, entered into force Dec. 15, 2008, available at http://www.aseansec.org/ASEAN-Charter.pdf [hereinafter **ASEAN Charter**].

[5] Hidetaka Yoshimatsu, *Collective Action Problems and Regional Integration in ASEAN*, 28 CONTEMPORARY SOUTHEAST ASIA 115, 124 (2006).

as, maintaining the implementation of those agreements. Unfortunately, an effective trade dispute settlement mechanism has always been lacking in ASEAN economic relations. "The lack of an effective dispute settlement mechanism had slowed the progress of their economics integration arrangements. In reality, however, ASEAN has been successful in preventing 'political' conflict. It has not been successful in preventing disputes over trade."[6] The below statement is about the ASEAN Way: How ASEAN Member States work together.

> In the normal practice of ASEAN, Member States settle any differences between them amicably in the, what they like to call, "ASEAN's Spirit of Solidarity." They prefer the negotiations to the use of dispute settlement mechanism, which is too confrontational, unfriendly and may create a damaging impression that ASEAN lacks the spirit of compromise and that the so-called ASEAN Spirit of Solidarity does not really exist. Decision making processes in ASEAN rely heavily on a minimum of organized rule making and the doctrine of consensus as embodied in the terms *musyawarah* (consultation) and *muafakat* (consensus); not on majority voting. [7]

"The social norm or the informal institution in ASEAN is one where national sovereignty is highly value; non-intervention in domestic affairs is stressed and decisions are reached by

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[6] Koesrianti, *The Development of the ASEAN Trade Dispute Settlement Mechanism: From Diplomacy to Legalism*, 222 (2005) (unpublished Ph.D. thesis, University of New South Wales) (on file with the University of New South Wales Library) [hereinafter **Koesrianti**].

Dr. Koesrianti is an Associate Professor at Faculty of Law, Airlangga University. She holds a PhD degree in Law from University of New South Wales School of Law.

[7] See *id.* at p.32-33.
The simple majority rule under the DSM constitutes an inevitable departure from ASEAN normal practice of consensus or "*mushawara*" in its decision-making process. In view of the fact that the DSM seeks to settle disputes between ASEAN Member States, this innovation appears to be a valid exception to such a general rule.

consensus. Evidently, this provides a weak framework for any agreement to be made."[8] As mentioned above, many economic agreements have been signed among ASEAN Member States that cover many core areas such as trade in goods, trade in services, and investments. However, to address the differences of all Members, ASEAN has to put their agreements in forms of framework agreements and deal with the details later. Soesastro[9] notes that some have correctly (and sarcastically) described AFTA as "Agree First, Talk After".[10] In practice, this quote is not only true for AFTA, but also for other ASEAN economic agreements. Akrasanee and Arunanonchai[11] observe that apart from AFTA, the signed documents are either in the form of agreed plans on the direction of ASEAN interaction or they are initiatives to be implemented far into the future (for example, the AIA will be fully operational only in 2020 for non-ASEAN countries).[12]

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[8] NORONGCHAI AKRASANEE & JUTAMAS ARUNANONDCHAI, INSTITUTIONAL REFORMS TO ACHIEVE ASEAN ECONOMIC INTEGRATION 64 (Denis Hew ed., Roadmap to an ASEAN Economic Community, Institutional of South Asian Study 2003). [hereinafter **Akrasanee** and **Arunonchai**].

[9] **Dr. Hadi Soesastro** is the Executive Director of the Center for Strategic and International Studies (CSIS) in Indonesia.

[10] HADI SOESASTRO, ASEAN ECONOMIC COMMUNITY: CONCEPTS, COSTS, AND BENEFITS 13 (Denis Hew ed., Roadmap to an ASEAN Economic Community, Institutional of South Asian Study 2003).

[11] **Dr. Narongchai Akrasanee**, former Minister of Commerce and Senator of Thailand, and former member of APEC Eminent Persons Group and APEC Business Advisory Council. He is also a Director of Thailand Development Research Institute, Mekong Institute, an Honorary Advisor to the Fiscal Policy Research Institute and Vice Chairman of the Executive Board of Industrial Finance Corporation of Thailand (IFCT). Concurrently he serves as an Advisor to Minister of Finance, the Thailand Representative on the ASEM Task Force, and Chairman of the Follow-up Committee on FTA.

Source: http://www.usc.edu/programs/asia/speakers/akrasanee.html.

Dr. Jutamas Arunanondchai is Senior Researcher, Fiscal Policy Research Institute Foundation, Bangkok, Thailand.

[12] Akrasanee & Arunanonchai, *Supra* note 8, at 64-65.

II. Dispute Settlement Mechanism under the ASEAN Free Trade Area (AFTA)

In 1992, ASEAN Member States formed a free trade area, namely, ASEAN Free Trade Area with the intention to create free flow of trade in goods among ASEAN Member States by eliminating trade barriers. Two main instruments of AFTA are the Framework Agreement on Enhancing ASEAN Economic Cooperation[13] and the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area.[14]

The ASEAN initiative to form a free trade area has clearly brought challenges to the traditional ASEAN way of settling disputes. Implementation of the AFTA is dependent on the political will of ASEAN Members. However, to some extent it is also dependant on the existence of a reliable formal dispute settlement mechanism as well.[15]

The Framework Agreement on Enhancing ASEAN Economic Cooperation, under which AFTA was created, states that "any differences between [or among] the Member States concerning the interpretation or application of this Agreement or any arrangements arising therefrom shall, as far as possible, be settled amicably between the parties. Whenever necessary, an appropriate body shall be designated for the settlement of disputes."[16]

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[13] Framework Agreement on Enhancing ASEAN Economic Cooperation, Jan. 28, 1992 as amended by Protocol to Amend the Framework Agreement on Enhancing ASEAN Economic Cooperation, Dec.15, 1995, available at http://www.aseansec.org/12369.htm (11/01/08) [hereinafter Framework Agreement].

[14] Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, Jan. 28, 1992, available at http://www.aseansec.org/12375.htm 11/01/08 as amended by Protocol Regarding the Implementation of the CEPT Scheme Temporary Exclusion List, Nov. 25, 2000 available at http://www.aseansec.org/12365.htm and Protocol to Amend the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA) for the Elimination of Import Duties, Jan.3, 2003, available at http://www.aseansec.org/14183.htm. [hereinafter **CEPT Scheme**].

[15] Koesrianti, *supra* note 6, at 230.

[16] Framework Agreement, *supra* note 13.

However, it gave no further details for how Members could settle disputes that may rise during the implementation of AFTA. The CEPT Scheme, however, provides more details on solving any differences among themselves as stated in Article 8, as follows:

> (1) Member States shall accord adequate opportunity for consultations regarding any representations made by other Member States with respect to any matter affecting the implementation of this Agreement. The Council referred to in Article 7 of this Agreement, may seek guidance from the ASEAN Economic Ministers (AEM) in respect of any matter for which it has not been possible to find a satisfactory solution during previous consultations.
>
> (2) Member States, which consider that any other Member State has not carried out its obligations under this Agreement, resulting in the nullifications or impairment of any benefit accruing to them, may, with a view to achieving satisfactory adjustment of the matter, make representations or proposal to the other Member States concerned, which shall give due consideration to the representations or proposal made to it.
>
> (3) Any differences between the Member States concerning the interpretation or application of this Agreement shall, as far as possible, be settled amicably between the parties. If such differences cannot be settled amicably, it shall be submitted to the Council referred to in Article 7 of this Agreement, and if necessary, to the AEM.

Both the *Framework Agreement on Enhancing Economic Cooperation* and the CEPT Scheme, encourage Members to settle their differences amicably. According to Article 8 of the

CEPT Scheme, Member States to the dispute must enter into consultation to reach solution by themselves.

The AFTA Council, a ministerial-level council, was established to serve as AFTA's institutional for supervising, coordinating and reviewing the implementation of AFTA agreements. The AFTA Council not only plays an important role as a monitor institution to oversee the implementation of the CEPT Scheme, but it also plays a primary role in dispute settlement in AFTA. As stated in the CEPT Scheme Article 7(1), if parties to the dispute are unable to reach solution by consultation, they can bring disputes up to the AFTA council or the AEM as a last resort.[17] In spite of this, there are no specific detailed procedures explaining how to settle disputes. "However, the Agreement fails to define specifically what the role of the Council will be in arbitrating disputes under the CEPT-AFTA scheme and contains no procedural rules to guide the Council in its mission as arbiter".[18]

The lack of any concrete mechanism for dispute resolution is one of the weakest aspects of the CEPT for AFTA. There are many comments regarding ineffective dispute mechanism in AFTA. Kenevan and Winder observe that "while the flexibility of AFTA in general provides for more resilient agreement, the vagueness of the dispute resolution mechanisms creates [a] potential stumbling block."[19] Kaplan notes that the AFTA dispute settlement process by definition rests entirely upon closed-door political settlements. He also states that the resulting political consultations process, however, does not substitute for a

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[17] CEPT Scheme, *supra* note 14, art. 7(1).

[18] Peter Kenevan and Andrew Winder, *Flexible Free Trade: The* ASEAN *Free Trade Area*, 43 HARV. INT'L L.J.224, 237 (1993).

[19] *Id.* at 237.

genuine dispute settlement system.[20] It should be noted that private sectors are excluded from the settlement of dispute process under the CEPT Scheme.

> Most fundamentally, there is no provision in the AFTA Agreement for the conduct of judicial or quasi-judicial dispute settlement or adjudication as a formal type of dispute resolution. In other words, the parties have to settle their disputes without involving judges and lawyer. Government official, politicians and policy decision makers are given the power to resolve dispute. Hence, this agreement facilitates the use of non-judicial procedures, since all decision made by AEM are made through political and diplomatic channels. It also has no clear mechanism for disputes to be settled. This is a drawback of the Agreement.[21]

The ASEAN Members comprehended that the settlement mechanism in the CEPT Scheme did not serve as an effective tool to solve disputes that occurred during the implementation of AFTA. Furthermore, inadequate dispute settlement mechanism also created difficulty in implementation other economic agreements between Member States. "The informal and cooperative style of decision-making in ASEAN had to be complemented by more rule-based mechanism to ensure transparency and the sustainability of regional economic cooperation".[22]

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[20] Jeffrey A. Kaplan, *ASEAN's Rubicon: A Dispute Settlement Mechanism for AFTA*, 14 UCLA PAC. BASIN L.J.147, 171 (1996).

[21] Koesrianti, *supra* note 6, at 234.

[22] Robert R. Teh Jr. et al. eds., *ASEAN Secretariat, Strengthen the Disciplines of the CEPT Agreement* 11, AFTA READER :V (1998).

ASEAN Member States recognized the need to expand Article 9 of the Framework Agreement to strengthen the mechanism for the settlement of disputes in the area of ASEAN economic cooperation.[23] Therefore, on November 20th, 1996 in Manila, ASEAN Member States signed the first formal dispute settlement mechanism agreement, namely the Protocol on Dispute Settlement Mechanism 1996. This Protocol on DSM 1996 is a main mechanism for the settlement of all disputes arising under the economic agreements listed as covered agreements in its Appendix 1 and future ASEAN economic agreements. The new ASEAN DSM was modeled from the World Trade Organization Dispute Settlement Mechanism.[24] "It had been patterned after that of the WTO as it follows identical principles and procedures with minute differences to be found only the amount of time granted per phase prior to the issuance or reports and ruling". [25] Sucharitkul opines that

> the ASEAN Ministers, recognizing the need to implement Article 9 of the Agreement, called for the strengthening of the mechanism for the settlement of disputes in the area of ASEAN economic cooperation, and established the Dispute Settlement Mechanism in 1996. This arrangement is, in fact, patterned on the Dispute Settlement Understanding of the World Trade Organization. [26]

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[23] As stated in preamble of the Protocol on Dispute Settlement Mechanism, Nov. 20, 1996 available at http://www.aseansec.org/16654.htm [hereinafter Protocol on DSM 1996].

[24] [Hereinafter WTO DSM].

[25] Raphael Madarang, *ASEAN Dispute Settlement: A decade hence*, Trade Intelligence, 2 (May-Jun., 2006) at http://www.tatrade.net/publications/ASEAN_Dispute.pdf.

[26] Sompong Sucharitkul, *Course on Dispute Settlement ASEAN 3-4*, UNITED NATIONS PUBLICATION, (2003).

ASEAN Members state clearly that any differences they have must be settled amicably. Like the WTO DSM, the process of the ASEAN DSM under the Protocol on DSM 1996 begins with consultations between parties to the dispute as states in Article 2 that

> (1) Member States shall accord adequate opportunity for consultations regarding any representations made by other Member States with respect to any matter affecting the implementation, interpretation or application of the Agreement or any covered agreement. Any differences shall, as far as possible, be settled amicably between the Member States.
>
> (2) Member States which consider that any benefit accruing to them directly or indirectly, under the Agreement or any covered agreement is being nullified or impaired, or that the attainment of any objective of the Agreement or any covered agreement is being impeded as a result of failure of another Member State to carry out its obligations under the Agreement or any covered agreement, or the existence of any other situation may, with a view to achieving satisfactory settlement of the matter, make representations or proposals to the other Member State concerned, which shall give due consideration to the representations or proposals made to it.
>
> (3) If a request for consultations is made, the Member State to which the request is made shall reply to the request within ten days after the date of its receipt and shall enter into consultations within a period of no more than thirty days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution.

However, the detailed provisions on consultation were not provided in the Protocol on DSM 1996.The ASEAN DSM under the Protocol on DSM 1996 encourages parties to a166

dispute to settle any differences amicably. Article 3 of the Protocol on DSM 1996 provides that parties to the dispute can use other forms of dispute settlement methods such as good offices, conciliation and mediation at any time. Additionally, if the parties to a dispute agree, procedures for good offices, conciliation or mediation may continue while the dispute proceeds. Furthermore, Article 1 (3) of the Protocol on DSM 1996 also recognizes the rights of Member States to seek recourse to other *fora* for the settlement of disputes involving other Member States. Member States involved in a dispute can resort to other *fora* at any stage before the Senior Economic Officials Meeting ("SEOM") has made a ruling on the Panel report. [27]

Pursuant to Article 4 of the Protocol on DSM 1996, if the consultations fail to settle a dispute within sixty days after the date of receipt of the request for consultations, the matter will be raised to the SEOM. In the case where the SEOM decides to establish a Panel, the SEOM will appoint a Panel no later than thirty days after the date on which the dispute has been raised to it.[28] Article 6 of the Protocol on DSM 1996 addresses function of the Panel that is to make an objective assessment of the dispute before it, including an examination of the facts of the case and the applicability of and conformity with the sections of the Framework Agreement or any covered agreement, and make such other findings as will assist the SEOM in making the rulings provided for under the Agreement or any covered agreement.[29]

Apart from the working procedure of the Panel covered in Appendix 2, the Protocol on DSM 1996 did not have specific or standard rules of procedure for the Panel. On the other

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[27] Protocol on DSM 1996, *supra* note 23, at art.1 (3).

[28] *Id.* art.5 (2).

[29] *Id.* art 6.

hand, it authorizes the Panel to regulate its own procedures in relation to the rights of parties to be heard and its deliberations.[30] The Panel must submit its report to the SEOM within sixty days of its formation. The SEOM must consider the report of the Panel, base on simple majority, in its deliberations and make a ruling on the dispute within thirty days from the submission of the report by the Panel.

The Protocol on DSM 1996, however, did not set up a group of experienced professionals to serve as appellate body but authorizes the ASEAN Economic Ministers (AEM) to serve as appellate body. "The ASEAN DSM has not been able to uphold formerly ratified agreements. This is partly due to the tendency of the ASEAN Economic Ministers (AEM), which has the highest authority on economic matters, to accommodate political interests of Member States".[31] The SEOM's ruling can be appealed through the AEM within thirty days of the ruling. The AEM will make a decision within thirty days of the appeal.[32] The decision of the AEM on the appeal is final and binding on all parties to the dispute.[33] The maximum timeframe is 290 days.

As mentioned earlier, the ASEAN DSM under the Protocol on Dispute Settlement Mechanism 1996 was a first and important step in creating a formal dispute settlement mechanism in ASEAN trade. However, it has not served as an effective tool in settling disputes among Member States. The lack of detailed Panel procedures and a separated appellate body from political organs are the main concerns about the effectiveness of the

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[30] *Id.* art.6 (1).

[31] Akrasanee & Arunanonchai, *supra* note 8, at 67.

[32] Protocol on DSM 1996, *supra* note 23, at art.8 (2).

[33] *Id.*

Protocol on DSM 1996. Members were not assured that disputes among them would be settled without political sanctions. "With the adoption of the Protocol on Dispute Settlement in 1996, ASEAN has begun to move to a more formalized DSM. However, dispute settlement within ASEAN should be taken from the political realm (involving ministers or senior officials) and be brought into the legal realm".[34]Akrasanee and Arunanondchai observe that

> even the most concrete ASEAN economic integration agreements and protocols, such as AFTA and the ASEAN Dispute Settlement Mechanism (DSM), have failed time and time again to resolve trade disputes. Not only does the ASEAN DSM lack of effective penalties but the Common Effective Preferential Tariff (CEPT) Scheme under AFTA also provides several loopholes for countries to withdraw from their tariff concession obligation.[35]

During the implementation of the AFTA, there have been many disputes regarding elimination of tariff barriers, especially, from tariff reduction programs. For example, there was a conflict between Thailand and Malaysia on automobile tariff reduction. Malaysia claimed that reducing the tariff on the automobile industry from five percent to the mandated zero percent by year 2002 under the CEPT Scheme would cause injury to its national car company, known as "Proton." Therefore, Malaysia refused to lower its tariffs on the automobile industry. Since Thailand is a regional production center for the international auto company targeting Asian markets, the nation has sought compensation on the basis that Malaysia's refusal would damage the Thai automobile industry.[36] To placate both sides,

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[34] Soesastro, *supra* note 10, at 27-28.

[35] Akrasanee & Arunanondchai, *supra* note 8, at 65.

[36] Koesrianti, *supra* note 6, at 229.

ASEAN did not allow Malaysia to exclude its automobile industry from the tariff reduction commitment under AFTA; however, ASEAN allowed Malaysia to delay its reduction until 2005. This incident illustrates ASEAN way of settling disputes among its Members. Instead of using legalistic dispute settlement mechanisms, such as the Protocol on DSM 1996, to solve the problem between Thailand and Malaysia, ASEAN used diplomacy and negotiation to settle the differences between the Member States.

Even though the conflict between Thailand and Malaysia was settled without having to use the dispute settlement mechanism under the Protocol on DSM 1996, however, such had caused many attempts to delay the implementation of AFTA Scheme by other Members. Koesrianti emphasizes that there were fears that this incident had set a precedent which would encourage other ASEAN Members to delay tariff reductions on other products; for example, the Philippines announced (in 2001) its intention to delay tariff cuts to it petrochemical industry; later, Indonesia attempted to exclude sugar from its tariff reduction list on the ground that Indonesian farmers were not ready to reduce tariffs.[37] These examples of conflict between ASEAN Members during the implementation of AFTA affirmed that an effective dispute settlement, as well as other economic agreements, is most needed for AFTA. Nonetheless, no case was formally raised to test the effectiveness of ASEAN DSM under the Protocol 1996.

III. ASEAN Dispute Settlement under the Protocol on Enhanced Dispute Settlement Mechanism 2004

Aiming to create the *ASEAN Economic Community* (AEC) by the year 2020, ASEAN realized that it must consider instituting new mechanisms and measures to strengthen the

[37] Koesrianti, *supra* note 6, at 229.

implementation of its existing economic initiatives, including ASEAN Free Trade Area (AFTA). Furthermore, strengthening the institutional mechanisms of ASEAN, including the improvement of the existing ASEAN Dispute Settlement Mechanism, is needed to ensure expeditious and legally binding resolution of any economic dispute.[38] Strengthened legalistic dispute settlement mechanisms will benefit ASEAN Member States both during implementation of economic agreements and when all national economies within ASEAN are fully integrated. An effective dispute settlement mechanism not only serves as an instrument to settle any disputes that may arise during implementation of economic agreements, but it also helps Members to understand their rights and obligations to other Members.

The recommendations of High-Level Task Force on ASEAN Economic Integration[39] were adopted as an annex of the Bali Concord II and have been implemented by ASEAN Member States. The HTLF established new dispute settlement resolution systems that will provide advisory, consultative, and adjudicatory mechanisms as an effective system to ensure proper implementation of all economic agreements and expeditious resolution of any disputes. The Protocol on DSM 1996 had failed to serve as an effective dispute settlement mechanism; therefore, ASEAN Member States agreed to replace it with a new ASEAN dispute settlement mechanism. In November 2004, the ASEAN Protocol on Enhanced Dispute Settlement Mechanism[40] was signed by ASEAN Members to replace the Protocol on DSM 1996. The following section will discuss the new dispute resolution units created under Bali Concord II and, will be followed by illustration of the Protocol on DSM 2004 in depth

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[38] As reflected in Declaration of ASEAN Concord II, Oct. 7, 2003, available at http://www.aseansec.org/15159.htm [hereinafter **Bali Concord II**].

[39] Recommendation of the High-Level Task Force on ASEAN Economic Integration, Oct. 7, 2003, available at http://www.aseansec.org/hltf.htm [hereinafter **HTLF**].

[40] ASEAN Protocol on Enhanced Dispute Settlement Mechanism, signed on November 29, 2004, available at http://www.aseansec.org/16754.htm [hereinafter **Protocol on DSM 2004**].

details.

A.. Dispute Resolution Mechanism under Bali Concord II

This new dispute settlement system is comprised of three new institutions. They are the ASEAN Legal Unit as an advisory stage to provide legal advice on trade disputes, the ASEAN Consultation to Solve Trade and Investment Issues (ACT)[41] as a consultative stage to provide quick resolution to operational problems, and the ASEAN Compliance Monitoring Body (ACMB)[42] or ASEAN Compliance Board (ACB) as an adjudication stage. The ACMB is modeled after the WTO Textile Monitoring Body and makes use of peer pressure. These new units are established to accommodate the differences among Member States as well as private sectors. While the resolution of disputes should generally advance form the advisory stage to the consultative stage, and finally the adjudication stage; however, this is not mandatory. In other words, Member States or parties to the dispute may choose the appropriate stage for the resolution of their dispute.

1. Advisory Mechanism by ASEAN Legal Unit

The ASEAN Legal Unit consists of qualified lawyers specializing in trade laws employed by the ASEAN Secretariat. This unit offers legal interpretation and advice on potential trade dispute issues upon request from Member States. However, the advice is purely advisory and non-binding. The ASEAN Legal Unit plays a useful role in screening out issues that are operational or technical in nature, and which could be resolved through bilateral consultations, rather than being shuttled to the ASEAN Compliance Monitoring Body or the Enhanced ASEAN Dispute Settlement Mechanism. Moreover, it is also

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[41] [Hereinafter **ACT**].

[42] [Hereinafter **ACMB**].

responsible for providing legal advice and secretariat support to the ASEAN Compliance Monitoring Body and the enhanced ASEAN Dispute Settlement Mechanism. By accommodating this type of mechanism, citizens and businesses will be able to avoid long delays in resolving their problems. "These procedures have been put in place due to the need to address disputes resulting from the possible misapplication of trade agreements by public administrations in Member States immediately".[43]

2. Consultative Mechanism by ASEAN Consultation to Solve Trade and Investment Issues (ACT)

The ASEAN Consultation to Solve Trade and Investment Issues (ACT) was adapted from the EU SOLVIT mechanism.[44] It is a network of government agencies (one from each country) that allow the private sector to cut through red tape and achieve speedy resolution of operational problems encountered. The ACT will help create a pro-business environment in ASEAN. Koesrianti suggests that by resolving operational problems in their early stages, existing and new trade initiatives within ASEAN become more attractive to foreign investors, thereby increasing intra-ASEAN trade and investment flow.[45] When private individuals and

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[43]This is because by fixing operational problems at this stage, the confidence of businesses toward ASEAN economic agreements is preserved. See Koesrianti , *supra* note 6 at 253.

[44] Effective Problem Solving in the Internal Market (SOLVIT); an on-line problem solving network in which EU Member States work together to solve without legal proceedings problems caused by the misapplication of Internal Market law by public authorities. There is a SOLVIT centre in every European Union Member State (as well as in Norway, Iceland and Liechtenstein). SOLVIT Centres can help with handling complaints from both citizens and businesses. They are part of the national administration and are committed to providing real solutions to problems within ten weeks. Using SOLVIT is free of charge.

SOLVIT has been working since July 2002. The European Commission coordinates the network, which is operated by the Member States, the European Commission provides the database facilities and, when needed, helps to speed up the resolution of problems. The Commission also passes formal complaints it receives on to SOLVIT if there is a good chance that the problem can be solved without legal action.

Source: http://ec.europa.eu/solvit/site/about/index_en.htm

[45] Koesrianti, *supra* note 6 at 253.

businesses are faced with operational problems related to ASEAN countries either at home or in other ASEAN countries, they can present these problems to the ACT in their country (Host ACT).[46]

For those problems encountered within the home country, the Host ACT will direct the problem to the appropriate government agencies, and ensure that a proposed solution is sent to the individuals or businesses within thirty calendar days. If problems are encountered in other ASEAN countries, the Host ACT will forward the problem to the other countries' ACT (Lead ACT). The Lead ACT will be responsible for directing the problem to the appropriate government agencies in its country, and ensure that a proposed solution is sent to the individuals or businesses via the Host ACT within thirty calendar days.[47] If the proposed solution does not resolve the problem, the private individuals or businesses may request that their government raise this issue to the other dispute settlement mechanisms. The ACT is set up in each Member State. Communication between Host and Lead ACTS is recommended by the HLTF to use electronically means as an online database accessible to all Members.

3. Compliance Mechanism by ASEAN Compliance Monitoring Body (ACMB)

The Compliance mechanism by the ASEAN Compliance Monitoring Body (ACMB) is modeled after the Textile Monitoring Body of the WTO. If there is a case of non-compliance by one or more ASEAN Members in any ASEAN economic integration agreement, including the CEPT for AFTA, those who feel that they have been injured by such non-compliance can bring the issue to the ACMB to resolve a dispute. However, this mechanism is subject to

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[46] See HTLF, *supra* note 39.

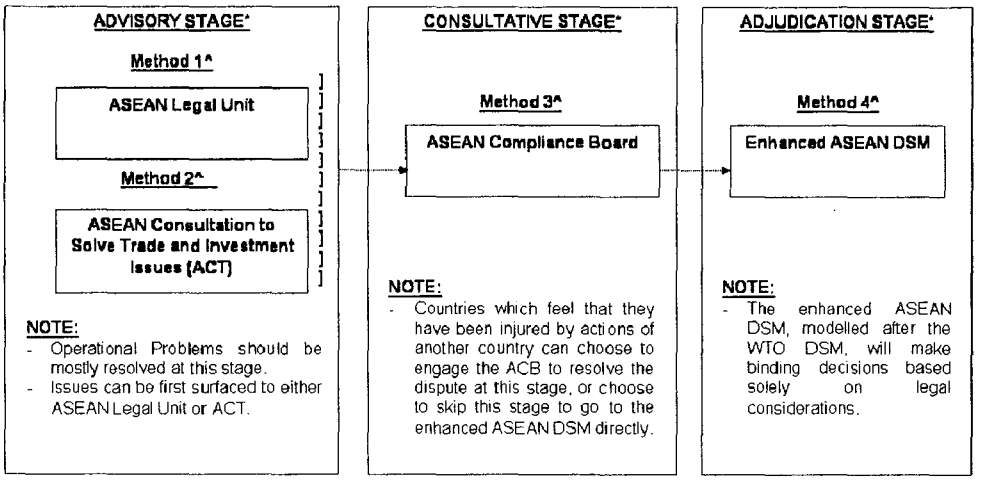
[47] See HLTF, *supra* note 39.

agreement by both parties. Therefore, Member States who do not wish to avail themselves of the ACMB can go directly to the ASEAN DSM Panel. The roles of the ASEAN DSM Panel will be discussed later in the next section of this chapter.

Upon request, the ACMB Members from countries not involved in the dispute will review and issue findings on the case within a stipulated timeframe. "The body would perform a quasi-judicial function by reviewing each trade dispute and issuing a judgment that is not legal binding but that can be used to take steps to settle the dispute."[48] In addition, any opinion pointing to non-compliance should lead to the offending ASEAN Member Country/Countries to seriously considering measures to rectify the non-compliance. Moreover, the ACMB's findings would be tabled as inputs to the DSM. The case should be raised to the DSM. With respect to the benefits for private sectors, these new dispute resolution mechanisms are expected to be efficient tools to solve problems that will reduce the possibility of having serious disputes among Member States.

FLOWCHART OF THE ASEAN DISPUTE RESULUTION MECHANISM

[48] Yoshimatsu, *supra* note 5 at 124.



NOTE:

* While resolution of disputes should generally advance from the advisory stage to the consultative stage, and finally the adjudication stage as shown in the flowchart, this is not mandatory. Countries may choose to make use of the appropriate mechanisms as they wish.

^ Countries do not need to go through the four methods sequentially. After surfacing the issue at either the ASEAN Legal Unit or ACT, they can either go to the ACB or proceed directly to the enhanced ASEAN DSM.

- Upon mutual agreement, involved countries should engage in consultations or avail themselves of the good offices of the ASEAN Secretary General to engage in concurrent conciliation and mediation processes at any stage.

Source: The ASEAN Secretariat (at http://www.aseansec.org/hltf_flowchart.htm)

B.. ASEAN Protocol on Enhanced Dispute Settlement Mechanism 2004

Regarding the improvement of dispute settlement mechanism, the HLTF has proposed that the dispute settlement system must be improved to ensure that binding decisions can be made based solely on legal considerations. Therefore, the HTLF recommended that changes should be made to the procedures of the existing ASEAN DSM, and the Protocol on DSM 1996 to depoliticize the entire process. The enhanced ASEAN DSM would be modeled after the WTO DSM, which has already established a proven track record in resolving trade disputes.

The HLTF recommends that the new dispute settlement mechanism should have Panels of three independent professionals from countries not involved in the disputes (including non-ASEAN countries). Such Panels will have jurisdiction to rule on the

disputes as well as administer the appellate process. To ensure de-politicization of the processes, ASEAN will replace the AEM with an appellate body comprising well-qualified, independent and experienced professionals as the appeal body for the Panels' decisions, and will adopt the existing WTO DSM Panel selection procedures, including the listing of qualified individuals who can serve as Panelists and Members of the appellate body.

Moreover, the HLTF states that strict and detailed procedures and timelines governing each stage of the dispute settlement process will be given in a new ASEAN DSM to ensure speedy progress towards a fair outcome. To ensure full implementation of the dispute settlement mechanism rulings, effective mechanisms including the possibility of imposing sanctions on non-compliant countries will be added. ASEAN Member States have agreed to revise the ASEAN Settlement Mechanism in Bali Concord II, the ASEAN Protocol on Enhanced Dispute Settlement Mechanism was signed on November 2004 to replace the Protocol on DSM 1996.

Because it was modeled after the WTO DSM, the new DSM under the Protocol on DSM 2004 provides three main stages to settle a dispute among parties; they are, (1) consultations between, or among the disputing parties, (2) adjudication by Panels and by the Appellate Body (if applicable); and (3) the implementation of findings and recommendations.

1. Scope of Application and Covered Agreements.

The ASEAN DSM, under the Protocol on DSM 2004, has compulsory jurisdiction over disputes between ASEAN Member States arising under what is called *covered agreements*[49] as well as under future ASEAN economic agreements. The covered agreements, including the Agreement on the Common Effective Preferential Tariff Scheme

[49] See Protocol on DSM 2004, *supra* note 40, Appendix 1: Covered Agreement.

for the ASEAN Free Trade Area and its amendments, are listed in Appendix 1 of the Protocol on DSM 2004. However, several of the covered agreements may provide special, or additional, rules to deal with particularities of the dispute settlement that relate to obligations arising under specific covered agreement. The Protocol on DSM 2004 Article 1 (2) states that the rules and procedures of this Protocol will apply subject to any special or addition rules and procedures on dispute settlement contained in the covered agreements. These special, or additional, rules and procedures prevail over the Protocol on DSM 2004 rules and procedures to the extent that there is a difference between the rules and procedures of this Protocol and the special or addition rules and procedures in the covered agreements.

ASEAN Member States use the Protocol on DSM 2004 as a main dispute settlement mechanism to resolve any trade disputes arising under any of the covered agreements. The rules and procedures of the Protocol on DSM 2004 apply to any matter affecting the implementation, interpretation, application of the agreement, or any covered agreements, as well as future agreements.

2. Administration

The Senior Economic Officials Meeting (SEOM) is responsible for administering the Protocol on DSM 2004, consultation and dispute settlement provisions of the covered agreements except as otherwise provided in a covered agreements. The main responsibilities of the SEOM under the Protocol on DSM 2004 are the establishment of Panels, adoption of Panel and Appellate Body reports, and to maintain surveillance of implementation of findings and recommendations of the Panel as well as the Appellate Body reports adopted by the SEOM. Additionally, the SEOM authorizes the suspension of concessions and other obligations under the covered agreements. The SEOM works like the Dispute Settlement Body (DSB) of the WTO. This means the SEOM is responsible for the referral of a

dispute to adjudication (establishing a Panel); for making the adjudicative binding (adopting the reports); generally, for supervising the implementation of the ruling; and for authorizing "retaliation" when a Member does not comply with the ruling.[50]

3. Requirement for Prior Consultations

The Protocol on DSM 2004 requires Member States to solve their disputes through consultation as well as encourages them, as far as possible, to settle their disputes amicably in order to reach mutually satisfactory solution. However, the provisions of the Protocol on DSM 2004 are without prejudice regarding the rights of Member States to seek recourse to other *fora* for the settlement of disputes involving other Member States. A Member state involved in a dispute can resort to other *fora* at any stage before a party has made a request to the Senior Officials meeting ("SEOM") to establish a Panel.

Prior consultation is not only a non-judicial/diplomatic feature of the ASEAN DSM parties to the dispute have many alternative options to settle the dispute among them before going to judicial *fora.* Parties to a dispute may agree to settle their dispute by good offices, conciliation or meditation. Those procedures may begin and be terminated at any time. Once the procedures are terminated, the complaining party may proceed to raise the matter to the SEOM.[51] Parties to the dispute may agree to continue the procedures for good offices, conciliation or mediation while the Panel process proceeds.[52] In addition, the Secretary-General of ASEAN may, in an *ex officio*, offer good offices, conciliation or mediation with

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[50] *See* A WTO Secretary Publication (by Legal Affairs Division and the Appellate Body), *A Handbook on the WTO Dispute Settlement System*, 17-18, Cambridge University Press 2004.

[51] Protocol on DSM 2004, *supra* note 40 at art.4 (1).

[52] Protocol on DSM 2004, *supra* note 40 at art. 4 (2).

the view to assisting Member States to settle a dispute.[53] Member States to a dispute must notify the SEOM and other relevant ASEAN bodies of any mutually agreed solutions to matters formally raised under the consultation and dispute settlement provisions of covered agreements.

The first stage of the dispute settlement under the new ASEAN DSM is a consultative process whereby the disputing parties are required to first attempt to negotiate a mutually acceptable settlement of their differences by themselves. Article 3 (2) of Protocol on DSM 2004 provides:

> Member States which consider that any benefit accruing to them directly or indirectly under the Agreement or any covered agreement is being nullified or impaired, or that the attainment of any objective of the Agreement or any covered agreement is being impeded as the result of a failure of another Member State to carry out its obligations under the Agreement or any covered agreement, or the existence of any other situation, may, with a view to achieving satisfactory settlement of the matter, make representations or proposals to the other Member State concerned, which give due consideration to the representations or proposals made to it."[54]

The request for consultation has to be made in writing and must give the reason for the request, identifying the measures at issue, and indicating the legal basis for the complaint.

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[53] Protocol on DSM 2004, *supra* note 40 at art 4 (3).

[54] Protocol on DSM 2004, *supra* note 40 at art.3 (2).

Further, the SEOM must be notified of this request.[55] "This notification to the SEOM is an improvement over the 1996 Protocol. Since there is an obligation to notify the SEOM, it is possible to determine the exact date when the consultation begins and ends."[56]

Upon receipt of a request for consultation, the Member receiving that request has two deadlines to comply with: (1) it must reply to the request within ten days after the date of receipt, and (2) it must enter into consultations with the requesting party within a period of thirty days after the date of receipt.[57] Member States are required to accord adequate opportunity for consultation regarding any representations made by other Member States with respect to any matter affecting the implementation, interpretation, or application of the Framework Agreement or any covered agreement.[58] In addition, the consultation must be carried out in good faith with a purpose of reaching a mutually satisfactory solution.[59] However, if a Member receiving a request for consultation fails to comply within the two deadlines, stated above, or if the consultations have failed to settle a dispute within sixty days after receipt of the request for consultations, the complaining party may request the SEOM to establish a Panel to adjudicate the dispute.[60]

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[55] Protocol on DSM 2004, *supra* note 40 at art.3 (3).

[56] Koesrianti, *supra* note 6 at 258.

[57] Protocol on DSM 2004, *supra* note 40 at art.3 (4).

[58] Protocol on DSM 2004, *supra* note 40 at art.3 (1).

[59] Protocol on DSM 2004, *supra* note 40 at art.3 (4).

[60] Protocol on DSM 2004, *supra* note 40 at art.5 (1).

4. Settlement of Dispute by Panel

a). Establishment of Panel

A request for establishment of a Panel must be made in writing and must indicate whether consultations were held, must identify the specific measures at issue, and must provide a brief summary of the legal basis of the complaint sufficient to present problem clearly. If there are special terms of reference other than standard terms of reference, the proposed text must be included in the written request.[61] Unless it decides by consensus not to do so, the SEOM will establish the Panel. Kosrianti comments that

> "like the WTO DSU, the Protocol on DSM 2004 utilizes the negative consensus rule and Panels for disputes are convened upon the request by complainant parties absent a consensus finding by the SEOM not to do so. As complainant parties are unlikely ever to vote against a Panel's establishment, the process is regarded as virtually automatic. Therefore, this procedure is a legalistic system. This incorporation of the negative consensus rule is the new protocol marks a significant improvement from the 1996 Protocol."[62]

Article 5 (2) of the Protocol on DSM 2004 provides that the SEOM will hold a meeting immediately after the receipt of the request for a Panel and accordingly, the request will be placed on the agenda of the SEOM at that meeting. If not, the SEOM meeting is scheduled or planned within forty-five days of receiving the request, the establishment of the Panel or the

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[61] Protocol on DSM 2004, *supra* note 40 at art.5 (3)

[62] Kosrianti, *supra* note 6 at 260.

decision not to establish it will be done or taken by circulation. This process will not exceed forty-five days whether the issue of the establishment of the Panel is settled at the SEOM or by circulation. Setting a specific timeframe for this stage is a very effective provision to ensure the speed of procedure without delay.

b). Compositions of Panel

Pursuant to Appendix II of the Protocol on DSM 2004, a Panel is normally composed of three Panelists unless the parties to the dispute agree, within ten days from the establishment of Panel, to a Panel composed of five Panelists. Regarding the qualifications of the Panelists, the new ASEAN DSM requires that the Panel be composed of well-qualified governmental and/or non-governmental individuals, including the persons who have served on, or have presented a case to a Panel, or have served in the ASEAN Secretariat, or taught or published on international trade law or policy, or have served as a senior trade policy official of a Member States.

In the nomination to the Panel, preference will be given to individuals who are nationals of ASEAN Member States. However, nationals of Member States who are parties to the dispute may not serve on a Panel concerned with that dispute, unless the parties to the dispute agree otherwise. The ASEAN Secretariat maintains an indicative list of individuals from which Panelists may be drawn as appropriate. Member States may periodically suggest names of qualified individuals for inclusion on the indicative list, including relevant information about their knowledge of international trade and of the sectors or subject matter of covered agreements. Those names will be added to the list upon approval by the SEOM. For each individual on the list, the list indicates a specific area of experience or expertise of that individual in the sector or subject matter of the covered agreements. Once the SEOM establishes a Panel, the ASEAN Secretariat will propose nominations for the Panel to the

parties to the dispute. In principle, except for compelling reasons, the parties to the dispute will not oppose ASEAN Secretariat's nomination.

Under Appendix II (I) (7) of the Protocol on DSM 2004, if the parties to the dispute are unable to reach agreement on Panelists within twenty days of the decision of the SEOM to establish a Panel, then either party may appeal to the Secretary-General of ASEAN to determine the composition of the Panel. Within ten days after the receipt of such a request, the Secretary-General of ASEAN, in consultation with the SEOM, will determine the composition of the Panel by appointing the Panelists whom he considers most appropriate. The Secretary-General will consult the parties in the dispute before appointing the Panelists, if so relevant, in accordance with any relevant special or addition rules or procedures of the covered agreed or covered agreements, which are at issue in the dispute.

The ASEAN Secretariat will inform Member States of the composition of the Panel thus formed. Member States should undertake, as general rule, to permit their officials to serve as Panelist. Panelists serve in their individual capacities and not as government representatives, nor as representatives of any organization. Therefore, Member States will not give them instructions nor seek to influence them as individuals with regard to matters before a Panel. These provisions regarding qualification of Panelists are very similar to the WTO Dispute Settlement Understanding (DSU).

c). Terms of Reference and Function of Panels

According to Article 6 of the Protocol on DSM 2004, the parties to the dispute may agree to have a different term of reference for their case prior to the establishment of a Panel; otherwise the following standard terms of reference will be used by Panels as terms of reference:

"To examine in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the SEOM by (name of party) in (document) ... and to make such findings as will assist the SEOM in the adoption of the Panel report or in making its decision not to adopt the report." [63]

Regarding this matter, Panels will address the relevant provisions in any covered agreement or agreements cited by the parties to the dispute. In establishing a Panel, the SEOM may authorize its Chairman to draw up the terms of reference of the Panel in consultation with the parties to the dispute. The terms of reference thus drawn up will be circulated to all Member States. If other than standard terms of reference are agreed upon, any Member state may raise any point relating thereto with the SEOM at the time of establishment of a Panel.[64]

d). Panel Procedures, Deliberations and Findings

The Protocol on DSM 2004 sets out the rules that govern Panel proceedings in Appendix II (I). Apart from these Panel proceedings, the Protocol on DSM 2004 authorizes The Panel to regulate its own procedures in relation to the rights of parties to the dispute to be heard and its deliberations.[65] The Panel will meet in closed session. The parties to the dispute, and interested parties, will be present at the meetings only when invited by the Panel to appear before it.

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[63] Protocol on DSM 2004, *supra* note 40 at art. 6.

[64] Protocol on DSM 2004, *supra* note 40 at art.6 (3).

[65] Protocol on DSM 2004, *supra* note 40 at art.8 (1).

To ensure confidentiality of both parties to the dispute Protocol on DSM 2004 Appendix II (II) (3) states that the deliberations of the Panel. Moreover, all documents submitted to the Panel must be kept confidential. Member States must treat as confidential information submitted by another Member state to the Panel, which the submitting Member has designated as confidential.[66] However, a party to a dispute can disclose statements of its own positions to the public. "Upon request of a Member State, a party to a dispute will provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public when it submits a confidential version of its written submissions to the Panel". [67]

Before the first substantive meeting of the Panel with the parties, the parties to the dispute will transmit to the Panel written submissions in which they present the facts of the case and their arguments.[68] In the first substantive meeting with the parties, the Panel will ask the party that has brought the complaint to present its case. Subsequently, and still at the same meeting, the Panel will ask the party against which the complaint has been brought to present its point of view. [69] All third parties who have a substantial interest and who already have notified their interest in the dispute to the SEOM will have an opportunity to be heard by the Panel and to make written submissions to the Panel.[70]

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[66] Protocol on DSM 2004, *supra* note 40 at Appendix II (II) (3).

[67] Protocol on DSM 2004, *supra* note 40 at Appendix II, II (3).

[68] Protocol on DSM 2004, *supra* note 40 at Appendix II, II. (4).

[69] Protocol on DSM 2004, *supra* note 40 at Appendix II, II (5)

[70] Protocol on DSM 2004, *supra* note 40 at art.11 (2).

During the first substantive meeting, such third parties will be invited, in writing, to present their views and will be allowed to present for the entirety of this session.[71] In this meeting, the third parties will also receive the submissions that the parties to the dispute transmit to the Panel. At any time, the Panel can put questions to the parties and ask them for explanations either in the course of a meeting with the parties or in writing.[72] Both the parties to the dispute, and any third party invited to present its views, will have a written version of their oral statements available to the Panel.[73]

In the interest of full transparency, the Protocol on DSM 2004 states that the presentations, rebuttals and statements will be made in the presence of the parties. Moreover, each party's written submissions, including any comments on the descriptive part of the report and responses to questions put by the Panel, will be made available to the other party or parties. The Protocol on DSM 2004 Article 8 provides that the Panel will accord adequate opportunity to the parties to the dispute to review the report before submitting its findings and recommendations to the SEOM. A Panel has the right to seek information and technical advice from any individual or body which it deems appropriate. A Member state must respond promptly and fully to any request by a Panel for such information as the Panel considers necessary and appropriate.

The Protocol on DSM 2004 sets procedures for multiple complainants in Article 10, which is a new added improvement in this ASEAN DSM. If more than one Member State requests the establishment of a Panel related to the same matter, a single Panel may be

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[71] Protocol on DSM 2004, *supra* note 40 at art.11 (6).

[72] Protocol on DSM 2004, *supra* note 40 at art.11 (8).

[73] Protocol on DSM 2004, *supra* note 40 at art.11(9).

established to examine these complaints, while taking into account the rights of all Member States concerned. In fact a single Panel is established to examine such complaints whenever feasible. The single Panel will organize its examination and present its findings and recommendations to the SEOM. If one of the parties to the dispute so requests, the Panel will submit separate reports on the dispute concerned.

The written submissions by each of the complainants will be made available to the other complainants. In addition, each complainant has the right to be present when any one of the other complainants presents its views to the Panel. If more than one Panel is established to examine the complaints related to the same matter, to the greatest extent possible, the same persons would serve as Panelists on each of the separate Panels and the timetable for the Panel process in such disputes will be harmonized.

The Panel is required to submit its findings and recommendations to the SEOM in the form of a written report within sixty days of its establishment. In exceptional cases, the Panel may take an addition ten days to submit its findings and recommendations to the SEOM.[74] Panel deliberations will be confidential and the reports of Panels will be drafted without the presence of the parties to the dispute in the light of the information provided and the statements made.

e). Treatment of Panel Report

Under the Protocol on DSM 1996, the SEOM made rulings on the Panel findings based on majority vote. In contrast, the new ASEAN DSM under the Protocol on DSM 2004 rules that the adoption of the Panel and Appellate Body reports by the SEOM is subjected to the 'negative consensus' rule. Within thirty days after the date of submission of a Panel report

[74] Protocol on DSM 2004, *supra* note 40 at art. 8 (1).

to the SEOM, the report will be adopted at the SEOM meeting unless a party to the dispute formally notifies the SEOM of its decision to appeal or the SEOM decides by consensus not to adopt the report.

If a party has notified its decision to appeal, the report by the Panel will not be considered for adoption by the SEOM until after the completion of the appeal. The SEOM representatives from Member States who are parties to a dispute can be present during the deliberations of the SEOM.[75] In the event that no meeting of the SEOM is scheduled or planned to enable adoption or non-adoption of the Panel report, the adoption will be done by circulation.[76] However, a non-reply will be considered as acceptance of the decision and/or recommendation in the Panel report.

f). Appeal Proceedings

Article 12 of the Protocol on DSM 2004 confirms that the parties to the dispute may obtain the right to appeal a Panel report. It also states clearly that only parties to the dispute can appeal a Panel report. However, appeal is limited only to issues of law covered in the Panel report and legal interpretations developed by the Panel. Therefore, third parties cannot appeal a Panel report. Nonetheless, third parties that have been third parties at the Panel stage may make written submissions to, and be given an opportunity to be heard by the Appellate Body.[77]

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[75] Protocol on DSM 2004, *supra* note 40 at art. 9 (1).

[76] Protocol on DSM 2004, *supra* note 40 at art. 9 (2).

[77] Protocol on DSM 2004, *supra* note 40 at art. 12 (4).

g). Appellate Review Process

The Protocol on DSM 2004 Article 9 (1) implies that the Panel report must be appealed before it is adopted by the SEOM. This article does not specify a clear deadline or timeframe for the filing of an appeal. Rather, the parties to the dispute must formally notify the SEOM of its decision to appeal before the adoption of the Panel report. This adoption may take place within thirty days of its submission by the Panel. Since the appeal of a panel report must be notified to the SEOM before adoption actually occurs, the effective deadline for filing an appeal will be within thirty days of the report submission by the Panel to the SEOM. According to Article 12(8) of the Protocol on DSM 2004, the Working Procedures of the Appellate Body will be drawn up by the SEOM. Additionally, any amendments thereto, will be drawn up from time to time as necessary by the Appellate Body in consultation with the SEOM and the Secretary-General of ASEAN, and communicated to the Member States for their information.

h). Composition of Appellate Body Divisions

In the Protocol on DSM 1996, the AEM acted as an appellate body in case of an appeal. In the new ASEAN DSM, ASEAN Members have established a new Appellate Body division. This improvement shows that ASEAN has taken earnest action to improve its dispute settlement mechanism. An Appellate Body is established by the ASEAN Economic Ministers. It consists of seven Members of which three of the seven serve on each appeal.[78] Additionally, the seven Members are to serve on cases in rotation as further determined in the in the working procedures of the Appellate Body. The function of the Appellate Body is to

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[78] Protocol on DSM 2004, *supra* note 40 at art.12 (1).

hear appeals from Panel cases.[79] The appointed persons will serve on the Appellate Body for a four-year term, and each person may be reappointed once. A person appointed to replace a person whose term of office has not expired will hold office for the remainder of the predecessor's term.[80]

The Appellate Body consists of persons of recognized authority, irrespective of nationality, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally.[81] Appointed persons are unaffiliated with any government. In addition, they are required to be available at all times on short notice. Moreover, they must stay abreast of dispute settlement activities and other relevant activities of ASEAN. During their term, they must not participate in the consideration of any disputes that would create a direct or indirect conflict of interest.

i). Appellate Review Process

As a general rule, the proceedings of the Appellate Body will not exceed sixty days from the date a party to the dispute formally notifies the Appellate Body of its decision to appeal, to the date the Appellate Body circulates its report.[82] In no case shall the proceedings exceed ninety days. When an appellate procedure takes more than sixty days, the Appellate Body must inform the SEOM in writing of the reasons for the delay together with an estimate of the period within which it will submit its report. In cases of urgency including those which

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[79] Protocol on DSM 2004, *supra* note 40 at art.12 (1).

[80] Protocol on DSM 2004, *supra* note 40 at art.12 (2).

[81] Protocol on DSM 2004, *supra* note 40 at art.12 (3).

[82] Protocol on DSM 2004, *supra* note 40 at art.12 (5).

concern perishable goods, Article 3(5) of the Protocol on DSM 2004 requires that the parties to the dispute, Panels (during Panel stage) and the Appellate Body must make every effort to accelerate proceeding to the greatest extent possible.

The proceedings of the Appellate Body are confidential. Therefore, written submissions must be treated as confidential, but must be made available to the parties to the dispute.[83] However, the Protocol on DSM 2004 does not preclude a party to a dispute from disclosing statement of its own positions to the public. In addition, Member States must treat as, confidential, information submitted by another Member State to the Panel or the Appellate Body which that Member State has designated as confidential.[84] A party to a dispute will also, upon request of a Member State, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public. The reports of the Appellate Body will be drafted without the presence of the parties to the dispute and in the light of the information provided and the statements made. [85] Any opinions expressed in the Appellate Body report by the individuals serving on the Appellate Body are anonymous.[86]

During the appellate proceeding, the Appellate Body addresses each of the issues of law covered in the Panel report and legal interpretations developed by the Panel.[87] The Appellate Body may uphold, modify, or reverse the legal findings and conclusions of the

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[83] Protocol on DSM 2004, *supra* note 40 at art.13 (2).

[84] Protocol on DSM 2004, *supra* note 40 at art.13 (2).

[85] Protocol on DSM 2004, *supra* note 40 at 12 (9).

[86] Protocol on DSM 2004, *supra* note 40 at art.12 (10).

[87] Protocol on DSM 2004, *supra* note 40 at art.12 (11).

Panel.[88] As is the case with Panels, *ex parte* communications with the Appellate Body concerning matters under its consideration are not permitted.[89]

j). Treatment of Appellate Review Report

The SEOM must adopt, and the parties to the dispute must unconditionally accept, the Appellate Body report unless the SEOM decides by consensus not to adopt the Appellate Body report within thirty days following its circulation to the Member States.[90] In the event that no meeting of the SEOM is scheduled or planned to enable adoption or non-adoption of the report, as the case may be, within the thirty-day period, adoption will be done by circulation. A non-reply within the said thirty day period will be considered an acceptance of the Appellate Body report. [91] This adoption procedure is without prejudice to the rights of Member States to express their views on an Appellate Body report. The adoption process must be completed within the thirty-day period irrespective of whether it is settled at the SEOM or by circulation.[92]

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[88] Protocol on DSM 2004, *supra* note 40 at art.12 (12).

[89] Protocol on DSM 2004, *supra* note 40 at art.13 (1).

[90] Protocol on DSM 2004, *supra* note 40 at art. 12 (13).

[91] Protocol on DSM 2004, *supra* note 40 at art. 12 (13).

[92] Protocol on DSM 2004, *supra* note 40 at art. 12 (13).

5. Implementation and Enforcement of Panel and Appellate Body Findings and Recommendations

a). Panel and Appellate Body Recommendations

Where a Panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it recommends that the Member State concerned bring the measure into conformity with that agreement.[93] In addition to its recommendations, a Panel or the Appellate Body may suggest ways in which the Member State concerned could implement the recommendations.[94] However, in their findings and recommendations, a Panel and the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements.[95]

b). Surveillance of Implementation of Findings and Recommendations

Prompt compliance with the findings and recommendations of Panel and Appellate Body reports adopted by the SEOM is essential to ensure effective resolution of disputes. Parties to the dispute are required to comply promptly with the findings and recommendations of Panel reports adopted by the SEOM within sixty days from the SEOM's adoption of Panel reports.[96] In the event of an appeal, parties to the dispute have sixty days from the SEOM's adoption of the findings and recommendations of the Appellate Body.[97]

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[93] Protocol on DSM 2004, *supra* note 40 at art.14 (1).

[94] Protocol on DSM 2004, *supra* note 40 at art.14 (1).

[95] Protocol on DSM 2004, *supra* note 40 at art.14 (2).

[96] Protocol on DSM 2004, *supra* note 40 at art.15 (1).

[97] Protocol on DSM 2004, *supra* note 40 at art.15 (1).

However, the parties to the dispute can agree on a longer time period. When a party to the dispute requests a longer time period for compliance, the other party must take into account the circumstances of the particular case and must accord favorable consideration to the complexity of the actions required to comply with the findings and recommendations of Panel and Appellate Body reports adopted by the SEOM. [98] The request for a longer period of time will not be unreasonably denied.

Moreover, where it is necessary to pass national legislation to comply with the findings and recommendations of Panel and Appellate Body reports, a longer period appropriate for that purpose must be allowed. Additionally, the parties' decision on the extension of time must be made within fourteen days from the SEOM's adoption of the findings and recommendations of the Panel report, or in the event of an appeal, fourteen days from the SEOM's adoption of the findings and recommendations of the Appellate Body's reports.[99] Article 15 (5) of the Protocol DSM 2004 addresses these concerns.

Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the findings and recommendations of Panel and Appellate Body reports adopted by the SEOM such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original Panel. The Panel shall circulate its report within sixty days, after the date of referral of the matter to it.[100]

When the Panel determines that it cannot provide its report within this time frame, it

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[98] Protocol on DSM 2004, *supra* note 40 at art.15 (2).

[99] Protocol on DSM 2004, *supra* note 40 at art.15 (3).

[100] Protocol on DSM 2004, *supra* note 40 at art.15 (5).

must inform the SEOM in writing of the reasons for the delay together with an indication of the period within which it will submit its report.[101] In no case will the proceedings for this purpose and the submission of the report exceed ninety days after the date of reference of the matter to the Panel.

Surveillance by the SEOM

Implementation of all adopted findings and recommendations is kept under surveillance by the SEOM and the issue of implementation may be raised at the SEOM by any Member State at any time following their adoption.[102] Unless the SEOM decides otherwise, the issue of implementation is placed on the agenda of the SEOM meeting and remains on the SEOM's agenda until the issue is resolved.[103] Any party required to comply with the findings and recommendations is obliged to provide the SEOM with a status report in writing of their progress in the implementing the findings and recommendations of Panel and Appellate Body reports adopted by the SEOM.[104]At least ten days prior to each such the SEOM meeting, the party concerned is required to provide a written status report in writing of its progress in the implementation to the SEOM.[105]

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[101] Protocol on DSM 2004, *supra* note 40 at art.15 (5).

[102] Protocol on DSM 2004, *supra* note 40 at art.15 (6).

[103] Protocol on DSM 2004, *supra* note 40 at art.15 (6).

[104] Protocol on DSM 2004, *supra* note 40 at art.15 (4).

[105] Protocol on DSM 2004, *supra* note 40 at art.15 (6).

c). Compensation and the Suspension of Concessions

A concerned Member State must bring the measure found to be inconsistent with a covered agreement into compliance therewith, or otherwise comply with the findings and recommendations of Panel and Appellate Body reports adopted by the SEOM within sixty days or the longer time period as agreed under Article 15. If fails to comply with this provision, such Member must, if so requested, enter into negotiations with any party having invoked the dispute settlement procedures with a view to developing mutually acceptable compensation.[106] The negotiation must be done no later than the expiry of the period of sixty days or the extended time period as agreed.

If no satisfactory compensation has been agreed within twenty days after the expiry of the period of sixty days or the longer time period as agreed upon, any party having invoked the dispute settlement procedures may request authorization from the SEOM to suspend the application to the Member State concerned about concessions or other obligations under the covered agreements.[107] Nonetheless, compensation is not only one remedy option in the Protocol on DSM 2004; suspension of concessions, other obligations and temporary measures are also allowed.[108] However, neither compensation, nor suspension of concessions, or other obligations is preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements.[109]

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[106] Protocol on DSM 2004, *supra* note 40 at art.16 (2).

[107] Protocol on DSM 2004, *supra* note 40 at art.16 (2).

[108] Protocol on DSM 2004, *supra* note 40 at art.16 (1).

[109] Protocol on DSM 2004, *supra* note 40 at art.16 (1).

The parties to the dispute must agree upon the compensation, which is voluntary, and must be consistent with the covered agreements.[110] This provision is also similar to the WTO DSM provision regarding compensation requirement. "The compensation does not mean monetary payment; rather, the respondent is supposed to offer a benefit, for example a tariff reduction, which is equivalent to the benefit which the respondent has nullified or impaired by applying its measure,"[111] However, compensation usually has serious drawbacks for both complainants and the defendants, and is for that reason, comparatively rare. From the complainant's point of view, compensation by the way of lower barriers in other area does nothing to eliminate non-compliance in the area that was the subject to the dispute.

The Protocol on DSM 2004 Article 16 (3) gives the following principles and procedure as guidelines that the complaining party must apply in considering what concessions or other obligations to suspend. As a general principle, the complaining party should first seek to suspend concessions, or other obligations, with respect to the same sector(s) in which the Panel or Appellate Body has found a violation or other nullification or impairment. The level of the suspension of concessions, or other obligations, authorized by the SEOM must be equivalent to the level of the nullification or impairment. This means that the complainant's retaliatory response may not go beyond the level of the harm caused by the respondent. The suspension of concessions or other obligations is temporary. Moreover, it is only applied until such time as the measure found to be inconsistent with a covered agreement has been removed, or the Member State that must implement recommendations and findings provides a solution to the nullification or impairment of benefits, or a mutually

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[110] Protocol on DSM 2004, *supra* note 40 at art.16 (1).

[111] A handbook on the WTO Dispute Settlement System, *supra* note 50, at 80.

satisfactory solution is reached. [112]

If that party considers that it is not practicable or effective to suspend concessions or other obligations with respect to the same sector(s), it may seek to suspend concessions or other obligations in other sector(s) under the same agreement. However, if that party considers that it is not practicable, or effective, to suspend concessions, or other obligations with respect to other sector(s) under the same agreement, and that the circumstances are serious enough, it may seek to suspend concessions or other obligations under another covered agreement.[113]

In applying the above principles and procedure, Article 16 of the Protocol on DSM 2004 states that a party must take into account these issues. First, it should consider the trade in the sector or under the agreement under which the Panel or Appellate Body has found a violation or other nullification or impairment. Then it should consider the importance of such trade and the broader economic elements related to the nullification or impairment as well as the broader economic consequences of the suspension of concessions or other obligations.

Upon request, the SEOM will grant authorization to suspend concessions or other obligations within thirty days of the expiry of the sixty-day period or the expiry of the longer period agreed upon by the parties to the dispute, unless the SEOM decides by consensus to reject the request.[114] If no meeting of the SEOM is scheduled or planned to enable authorization to suspend concessions or other obligations within the thirty day period, the

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[112] Protocol on DSM 2004, *supra* note 40 at art.16 (9).

[113] Protocol on DSM 2004, *supra* note 40 at art.16 (3).

[114] Protocol on DSM 2004, *supra* note 40 at art.16 (6).

authorization is done by circulation.[115] A non-reply within the thirty-day period is considered an acceptance of the authorization. In addition, the authorization process must be completed within the thirty-day period irrespective of whether it is settled at the SEOM or by circulation.[116] The SEOM must not, however, authorize suspension of concessions or other obligations if a covered agreement prohibits such suspension.[117]

In the event that the Member State concerned objects to the level of suspension proposed, or claims that the principles and procedures for suspension have not been followed, the matter may be referred to arbitration. If the original Panelists are available, it is the original Panel that carries out this arbitration; otherwise arbitration appointed by the Secretary-General of ASEAN will carry out such matter.[118] The deadline for completing the arbitration is sixty days after the date of expiry of the sixty day period or the expiry of the longer period agreed upon by the parties to the dispute. The concessions or other obligations are not be suspended during the course of the arbitration.

The acting arbitrator will not examine the nature of the concessions or other obligations to be suspended but, however, will determine whether the level of such suspension is equivalent to the level of nullification or impairment. The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement.

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[115] Protocol on DSM 2004, *supra* note 40 at art.16 (6).

[116] Protocol on DSM 2004, *supra* note 40 at art.16 (6).

[117] Protocol on DSM 2004, *supra* note 40 at art.16 (5).

[118] Protocol on DSM 2004, *supra* note 40 at art.16 (7).

The arbitrator may also determine if the proposed suspension of concessions or other obligations is allowed under the covered agreement. However, in the event that the matter referred to arbitration includes a claim that the principles and procedures set forth in Article 16 (3) (as described above) for suspension have not been followed, the arbitrator will also examine that claim.[119] If the arbitrator determines that those principles and procedures have not been followed, the complaining party must apply them consistent with Article 16 (3). The parties are required to accept the arbitrator's decision as final, and the concerned parties must not seek a second arbitration. The decision of the arbitrator must be relayed promptly to the SEOM. Upon request, the SEOM may grant the authorization to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator, unless the SEOM decides by consensus to reject the request.

In summary, the total time required for the dispute resolution process to be completed, from the consultations stage up to appellate review, amounts to 315 days. The total period for the disposal of disputes under the ASEAN DSM, from the Consultation Stage until the Arbitration stage (if applicable), will not exceed 445 days, unless the parties to the dispute agree to the longer time period. The new maximum timeframe is longer than the time frame in the Protocol on DSM 1996 which gave the total time period to settle any dispute only ninety days. The new maximum time frame of 445 days is a reasonable time period that will give enough time to Members to settle their disputes.

IV. Conclusion: Chapter IV

There have been major improvements in the new ASEAN dispute settlement

[119] Protocol on DSM 2004, *supra* note 40 at art.16 (3).

mechanism under the ASEAN Protocol on Enhanced Dispute Settlement Mechanism 2004. There are more clarifying details at each stage, especially the Panel stage. The detailed working procedures of Panel are included in the new ASEAN DSM in Appendix II. Furthermore, the procedures for consultations as well as deliberations, findings and recommendations of Panel or Appellate Body are also illuminated.

The new developments include the procedure for multiple complainants, terms of references and the role of third parties in the dispute. The significant improvement of the new ASEAN DSM is the creation of an Appellate Body separated from political body (the AEM was appellate body in the previous DSM) including detailed appellate review provisions. This change will guarantee the transparency of the new ASEAN DSM. The surveillance of implementations of finding and recommendations are also expanded to more detailed procedures. With all new improvements, the ASEAN DSM has become the most legalistic and the most effective settlement dispute mechanism that ASEAN has ever had in its history.

In the normal practice of ASEAN, Member States settle any differences between them amicably in what they like to call, "ASEAN's Spirit of Solidarity." They prefer the negotiations to the use of dispute settlement mechanism that is too confrontational, unfriendly and may create a damaging impression that ASEAN lacks the spirit of compromise and that the so-called ASEAN Spirit of Solidarity does not really exist. Even though at the time this paper was written, there has not yet been any case law under the Protocol on Dispute Settlement Mechanism 2004 to prove the effectiveness of the new ASEAN DSM to settle disputes between Member States. However, this ASEAN DSM is, in a way, a bold stride forward for ASEAN and proof of the political will to strengthen the economic co-operation among ASEAN Members, because it does comprise an innovation in allowing disputes between Member States to be settled by a system, which is analogous to the DSU of the

WTO, and very akin to a compulsory arbitration.

A devil's advocate may, however, interpret it otherwise and assert that ASEAN Member States have never made use of this arrangement because the so-called ASEAN integration is so diluted that they are not convinced that it would be beneficial for them to resort to this ASEAN DSM, which is merely a redundant dispute settlement system patterned on the Dispute Settlement Understanding of the WTO, with, of course, some minor deviations and adaptations here and there, which neither the time constraint, nor the limited scope of this paper permits to deal with in detail. Time alone can tell whether or not the latter pessimistic view is well-founded or erroneous.

Chapter IV

Conclusion and Recommendations

The Association of Southeast Asian Nations (ASEAN) was founded in 1967. Its objective was, and remains, the deepening and strengthening of the economic, as well as the political and social co-operation among the five founding Member States. These States are Indonesia, Malaysia, the Philippines, Singapore and Thailand. Brunei Darussalam then joined ASEAN in 1984. Later, ASEAN welcomed the accessions of Vietnam in 1995, Lao PDR and Myanmar in 1997, and the latest member, Cambodia in 1999. At the earlier stages of ASEAN economic cooperation, the economic interactions in the Southeast Asian region underwent very little development. The differences among Members have always played important roles in their economic relations.

Those differences lie within their historical backgrounds, and within their cultures, religions, economies, political systems and language; there was very little common interest among Members. On the other hand, except for Singapore and Brunei, most Members' economies were based on agricultural and commodities products. Consequently, they were competitors more than allies. Several Members produced and exported the same products; i.e., sugar, rice, and palm oil. Moreover, the need for foreign direct investment inflows to stimulate and buttress their respective economies also created a great deal of competition among Members. Not surprisingly, there was no effective economic cooperation in ASEAN until the early 1980s.

In the 1980s, ASEAN created many economic cooperation projects such as the Preferential Trading Arrangement (PTA), the ASEAN Industrial Complementation (AIC) Scheme, the ASEAN Industrial Projects (AIPs), and the ASEAN Industrial Joint Venture

(AIJV) Scheme. Unfortunately, these projects were far from being successful. Akrasanee and Stifel observe that "these attempts at economic cooperation through a combination of market sharing and resource pooling mechanisms, however, were plagued by a common set of problems which limited their effectiveness."[1] Moreover, Akrasanne and Stifel identified four major problems that ASEAN experienced in its pre-AFTA economic cooperation:

> First, as a consequence of the excessive bureaucratic procedures at both the ASEAN and national levels, delays of a year or more for approvals weakened the attraction of the various schemes. Second, there was a general lack of commitment to implement those schemes. ASEAN initiatives were not followed up with thorough promotion efforts, and information was not extensively disseminated to all the parties who stood to benefit from cooperation. Third, there was an absence of private sector involvement in the decision-making process at regional level. Finally, a dearth of political will was the most important factor impeding genuine economic cooperation in ASEAN. Government leaders were more concerned with the costs associated with cooperation than the spillover of benefit and were, therefore, reluctant to pursuer greater cooperation[2]

The above analysis is a comprehensible reflection of ASEAN economic cooperation before the birth of the ASEAN Free Trade Area project. The economic cooperation among ASEAN Members had failed over and over again. Thus, it was very doubtful that ASEAN would be able to

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[1] Akrasanee, Narongchai, and Stifel, David. "*AFTA and Foreign Direct Investment.*" TDRI Quarterly Review, Vol.8 No.3 (1993): 1-2.

[2] *Id.*, at 1-2.

continue economic integration.

However, unsuccessful attempts in their economic cooperation projects did not stop ASEAN Members from pursuing their economic integration. Indeed, they made extra efforts to avoid unpleasant outcomes. In 1992, ASEAN leaders of the five founding Members and Brunei called for establishing the ASEAN Free Trade Area (AFTA). The Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area[3] was signed in 1992 as a main instrument to establish AFTA. The obligations of ASEAN Members under the CEPT Scheme for AFTA were to reduce tariff barriers, quantitative restrictions, and other non-tariff barriers, to 0-5% by the year 2008. The objectives of AFTA are to liberalize trade among Members, create a single production base and create a regional market.

AFTA is expected to promote greater economic efficiency and productivity, as well as competitiveness. A product can enjoy the benefit of AFTA preferences if it is identified as an ASEAN product under the CEPT-AFTA Rules of Origin that were discussed in depth in Chapter III. The CEPT Scheme for AFTA categorized products into four lists namely, the Inclusion List, the Temporary Exclusion List, the Sensitive List, and the General Exception List. Those products were subject to different timelines for the elimination of tariff and non-tariff barriers. It should be noted that any quantitative restrictions of such products must be eliminated once a product is placed in the CEPT Scheme for the AFTA program.

In 1995, ASEAN Members agreed to shorten the target date for the establishment of AFTA to 2003, and then again shorten the date to 2002. The Newer Members namely, Cambodia, Lao PDR, Myanmar, and Vietnam were given grace periods. Therefore, as previously discussed, they were allowed different target dates to complete the implementation if the CEPT Scheme for AFTA. The implementation of AFTA does not use only the CEPT

[3] CEPT Scheme for AFTA.

Scheme for AFTA, but it also uses a series of supporting agreements. Unlike North American Free Trade Agreement that has over than 100 pages of texts and annexes. The CEPT Scheme for AFTA, which is a very abbreviated agreement, contains only ten articles and less than ten pages. Hence, the CEPT Scheme was not the comprehensive instrument used to create AFTA. For that reason, AFTA was given a nickname by many scholars as "Agree First Talk Later".[4] Therefore, in its implementation, AFTA could not be done by the CEPT Scheme for AFTA alone, but by supporting agreements such as the CEPT-AFTA Rules of Origin, the Protocol on TEL, and the Protocol on Sensitive and Highly Sensitive products to clarify the CEPT Scheme. The Rules of Origin for AFTA were created to help ASEAN identify ASEAN products.

Each year, ASEAN Members negotiate tariff reductions and other non-tariff barriers reductions. No one would even imagined that ASEAN Members would make it to the point that more than ninety-nine percent of the products in the CEPT Inclusion List (IL) of ASEAN-6 have been brought down to zero tariffs started from January 1 2010. In addition to the progress of tariff elimination of the ASEAN-6, the newer members, the CLMV, who once were thought to be burdens to the implementation of AFTA, have also made impressive progress on the tariff reduction program. As of 2010, they have reduced import duties on 98.86% of their products to 0-5 percent for intra-ASEAN trade. Vietnam started eliminating import duties on 80 percent of her products on 1 January 2010. Further, the CLMV has committed to eliminate duties on all products by 2015.[5]

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[4] "Agree First Talk AFTA" were referred to AFTA by many scholars such as Associate Prof. Michael Ewing-Chow, National University of Singapore, Dr. Hadi Soesastro, the Executive Director of the Center for Strategic and International Studies (CSIS) in Indonesia and Prof. David Cheong of John Hopkins University.

[5] The 23rd AFTA Council Meeting, Bangkok, Thailand 13 August, 2009.

The introduction of this dissertation shows the characteristics of ASEAN and AFTA. The diversity of Members has, in many ways, made it difficult to integrate their economic agendas. However, ASEAN Members have proven that it may take some time for them, but they are on the verge of establishing a free trade area among the ten Member States. The Value of ASEAN Trade has been increasing from below 200 billion US dollars in 1993 to 458 billion US dollars in 2008. In addition, intra-ASEAN trade has been increasing, but only modestly. Statistics of intra-ASEAN trade were 19.20% in 1993 and increased to 25.1% in 2003; it then increased to 26.8% in 2008.[6] Even though the increasing rate of intra- ASEAN trade was not very significant, at least it showed a positive trend.

In 2010, ASEAN declared victory over the AFTA project, which means AFTA is now almost established. However, the implementation of the CEPT Scheme has not yet been realized. There are many products such as sugar from Indonesia and Rice from the Philippines are still excluded from IL. Moreover, Products on the GE List are omitted from the implementation of the CEPT Scheme Inclusion List. Furthermore, elimination of non-tariff barriers still shows no sign of full elimination of non-tariff barriers (NTBs). This study has found some challenges and obstacles in the implementation of AFTA that need serious attention from ASEAN Members. The followings are major challenges and obstacles for ASEAN Member Countries to the deepening and broadening their economic integration under the AFTA and the AEC. This last chapter will point out the key challenges that obstruct the trade liberalization under the AFTA and cause insignificant impact to AFTA. It will also propose some recommendations from this study that, perhaps, can help ASEAN solve those obstacles.

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[6] Figure 1.4 Intra ASEAN Trade

1. First challenge is the need to improve the international competitiveness of the newer members that are less developed countries compares to ASEAN-6. In joining ASEAN, each new member consented to all existing and relevant ASEAN agreements, including the CEPT Scheme for AFTA. "...it agreed to extend Most-Favored-Nation treatment and to fellow ASEAN members, national treatment to ASEAN products imported into its domestic market, and to ensure transparency in its economic and trade regime".[7] The newer Members: Cambodia, Lao PDR, Myanmar and Vietnam, have proven that their accessions to the CEPT Scheme Agreement were not burdens to the establishment of AFTA. They indeed added huge advantages to ASEAN and AFTA. With the accessions of CLMV, ASEAN has become the largest market of regional integration with 600 million consumers.

Even though the CLMV has done very impressive job so far in implementing the CEPT Scheme but it still needs assistance from the ASEAN-6 in implementing the CEPT Scheme. The CLMV has experienced problems with the implementation of its commitments because the economies of its members are less developed than those of other ASEAN Members. Soesastro also suggests the following:

> [B]y leveraging on their cost advantage in the production value chain, the CLMV countries would clearly stand to benefit from being part of a regional production base. However, appropriate resources should be allocated to ensure the full participation of these countries in the integration process. This would include financial and technical assistance, transfer of technology,

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[7] Termsak Chalermpalanupap, "ASEAN-10: Meeting the Challenges. Asia-Pacific Roundtable, Malaysia (1999) 7, available at http://aseansec.org/3063.htm (last visit March 22, 2010).

education and training facilities.[8]

ASEAN needs to ensure that CLMV will be able to continue to implement the CEPT Scheme and be ready for the deeper and broader economic integration under the AEC. This study recommends that, in every manner, ASEAN must raise the level of developmental assistance to the CLMV especially financial and technical assistance.

2. The second challenge is the bureaucratic inefficiencies. To maintain efficient implementation of AFTA under the CEPT Scheme, ASEAN needs to improve AFTA Institutions on both regional and national levels, especially the AFTA Council, the ASEAN Secretariat[9], and ASEAN AFTA United and National AFTA Unit. There are many institutions involved with AFTA but none works as an effective organ to help deal with AFTA matters. This does not mean they are not good, or their work is inefficient; there are just too many institutions involved with AFTA matters at both the regional and national level; hence, effective communication is often difficult. Moreover, many organs work on the same issue, which causes overlapping such as the Senior Economic Official Meeting (SEOM), the ASEAN Secretariat and the National AFTA Units and Interim Technical Working Group (ITWG) on CEPT have been working on non-tariff barriers issues. The overlapping between organs does not provide any good in helping ASEAN solve problems. On the other hand, the overlapping slows down the development and improvement of AFTA. Therefore, I suggest that ASEAN should reform all AFTA related institutions. The clear mandates and roles of

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[8] Hadi Soesastro,. "*Accelerating ASEAN Economic Integration: Moving Beyond AFTA*". Centre for Strategic and International Studies Working Paper Series, WPE 091 (2005): 10.

[9] Professor Dr. Kriensak Chareonwongsak comments that the structure of the ASEAN Secretariat is too weak due to its limited authority, its committee roles, lack of human resources, budget and political support., available at http://www.kriengsak.com (last visit March 22, 2010).

AFTA Council should be revised.

As Chapter I explains, there are four main AFTA institutions on the regional level that are in charge of AFTA matters; they are the AFTA Council, the SEOM, the ASEAN Secretariat and the ASEAN-AFTA Unit. The SEOM and the ASEAN Secretariat were not created specifically for AFTA. They are institutions that existed in ASEAN before AFTA. The ASEAN Secretariat and the SEOM should act as supporting institutions to AFTA related matters, and not as the main institutions that deal directly with said matters. ASEAN should have only one institution at the regional level to deal with all matters and issues relating to AFTA. The ASEAN-AFTA Unit in the ASEAN secretariat is the perfect organ to be the main institution for AFTA. However, ASEAN needs to create a clear set of rules and guidelines for the ASEAN-AFTA Unit. Moreover, the ASEAN-AFTA Unit needs the power to enforce the implementation of AFTA. It will be a central communication channel with all National AFTA Units as well as private sector that need any information about AFTA. For institution in each Member country, ASEAN should reform the National AFTA Unit to be an AFTA-One-Stop service center and the first institution that the private sector should contact with any AFTA issues. Moreover, the National AFTA Unit should be the key AFTA institution that deals with issues relating to AFTA on the national level.

There are too many government agencies involved with AFTA. Hence, it is very complicated for the private sector to go to every government agency to get information about AFTA, to determine requirements, or see if their products qualify for benefit under AFTA. Thailand, for instance, has her National AFTA Unit at the Ministry of Finance, but the Department of Trade Negotiations of the Ministry of Commerce is in charge of AFTA negotiation and provides information about AFTA and other free trade areas on its website.

This study suggests that the National AFAT Unit should be reformed. It should

take responsibility for all AFTA issues, including non-tariff barriers issues, and promote AFTA awareness to the private sector by providing all information regarding AFTA, and receive any complaints from the private sector that experience problems in intra-ASEAN trade and report those issues to the ASEAN-AFTA Unit, which can search for solutions for those problems. Most importantly, the National AFTA Unit should collaborate with the ASEAN AFTA Unit and other National AFTA Units in other Member Countries. Any Member Country that does not have an official website for AFTA issues should create one to facilitate the private sector and academic scholars in AFTA matters. Additionally, ASEAN should create a website for the ASEAM Free Trade Area that contains everything about AFTA; *e.g.*, agreements, trade barriers reduction programs and nay updates about AFTA.

From the author's experience researching the ASEAN official website[10] regarding AFTA, it is very difficult to follow all developments and updates for trade barriers reductions programs, changes or even new agreements without having to go through all AEM and AFTA Council meeting reports. This creates unnecessary difficulty for the private sector. Moreover, requesting information from the ASEAN Secretariat seems to be another uneasy task and no answer is ever returned. The author requested information about AFTA by sending various emails to the email addresses provided on the official website but have never received a response. This event reflects the fact that ASEAN does not provide good a communication channel for the private sector. ASEAN should realize that the private sector does not mean only large sized companies, multi-nationals corporations or foreign investors, but it also includes individuals from Member Countries including domestic small and

[10] http://www.aseansec.org

medium- sized enterprises.[11]Soesastro explanations that the problematic issues of ATFA include the lack of private sector awareness, lack of clarity in the application of the Rules of Origin and customs procedures, the lack of dispute settlement mechanisms, and little progress in the removal of NTBs.[12]

3. Third challenge is the lack of policy on promoting the awareness of AFTA to private sector that makes the intra-ASEAN trade rate is unimpressive. This factor has played important role on ineffectiveness of AFTA and other economic cooperation. Jose Tonzen addresses clearly that "since the opposition to trade liberalization has come from mostly from the private sector, it is critical to the success of AFTA that the private sector is supportive of policy initiatives. After al the private sector will drive the actual operation of the envisioned economic integration".[13]

If domestic enterprises and investors do not use the AFTA preferences, it would be a big loss that ASEAN cannot afford. "Economic strategies over the past three decades have mainly focused on promoting large export-oriented manufacturing industries and attracting FDIs and MNCs."[14] To increase intra-ASEAN trade and effectiveness of AFTA, ASEAN must provide to private sector business/investor communities as well as public sectors—especially SMEs—a better appreciation and understanding of AFTA and ASEAN Economic

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[11] Hereinafter SMEs.

[12] Soesastro, *supra* note 8 at 2.

[13] Jose L. Tonzen, "Role of AFTA in an ASEAN Economic Community." In *Roadmay to an ASEAN Economic Community*, edited by Denis hew, 127-145. Pasir Panjang: ISEA Publication, 2005.

[14] Soesastro, *supra* note 8 at 10.

MNCs refers to Multinational Corporations. FDIs refer to foreign direct investments.

Community issues.

This study proposes that ASEAN should reverse this strategy so as to promote ASEAN domestic enterprises that play very important roles in increasing intra-ASEAN trade, as well as, creating a single production base and a single market in ASEAN. "If AFTA wants to keep sufficient momentum, support and close cooperation with the private sector in the ASEAN countries is needed".[15] Moreover, ASEAN not only needs to promote, educate the private and public sectors, but must also promote research pertaining to AFTA in order to analyze the effectiveness of AFTA from every angle, if possible.

4. The Forth challenge is the trade barriers in intra-ASEAN trade are not fully eliminated. There are still many products excluded from the trade barriers eliminations under the CEPT Scheme. At its inception, the tariff elimination program under the CEPT Tariff barriers was not very effective. The primary reason being there were too many products excluded from the tariff reduction program of the IL. However, ASEAN has done an impressive job since 2003. ASEAN has now claimed that AFTA is nearly fully established. This statement was not fully correct because there are products still outside the IL, and fall under the GE, the SL and the HSL lists. This study recommends ASEAN to incorporate the excluded products into the IL before the establishment of the AEC. The elimination of Non-tariff barriers is a big test that challenges to the implementation of AFTA. The process of removing the NTBs is very slow and unimpressive. ASEAN needs to take a serious action to still eliminate and harmonize the NTBs. Moreover, the ASEAN Members need to harmonize the licensing procedures, technical standards and customs procedure that remain major obstacles to the trade liberalization process. This action needs to be taken before establishing

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[15] Cuyvers, Ludo and Pupphavesa, Wisarn. "*From ASEAN to AFTA*", Centre for ASEAN Studies, Discussion paper No.6 (1996): 13.

the AEC. ASEAN will need to speed the removal of NTBs process, and this should increase intra ASEAN trade liberalization.

5. The fifth challenge is the rules of origin procedures. To be eligible for all preferences from AFTA, a product must be identified under the AFTA rules of origin as an ASEAN product. ASEAN used the *value add criteria* (40% local content) as a single method to identify a product that is not wholly produced or obtained in a Member States. ASEAN, however, revised the rules of origin and provides alternative methods, namely a change of tariff classification, and accumulative and substantial transformation, in order to select a product to receive preferences under AFTA.[16] Problems arise when rules of origin, especially certification procedures are too complicated. One of the main disadvantages of the ASEAN rules of origin is the lack of clear transparent procedure in obtaining the ASEAN certificate of origin (Form D). Erlinda and Yap comment on the important Introduce quote to keep rules of origin as simple as possible to facilitate trade:

> the ROO is at the heart of any free trade agreement (FTA) and in order to achieve its full benefits, the ROO should not only be an instrument to prevent trade deflection. It should be trade facilitating as well. Striking a balance between trade facilitation and preventing trade deflection is a difficult challenge. ASEAN ROO is already considered as among the simplest in the world and still, in practice, results fall short of expectations.[17]

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[16] Rules of Origin for the Agreement on the Common Effective Preferential Tariff Scheme for ASEAN Free Trade Area (CEPT-AFTA ROO)

[17] Medalla, Erlinda M. and Yap, Josef T. "Policy Issues for the ASEAN Economic Community: the Rules of Origin". Philippine Institute for Development Studies Discussion Paper Series No. 2008-18: 2008, 2.

The CEPT-AFTA ROO has standard criteria that have been used around the world to determine the origin of a product. Arguably, the forty percent that the value added criteria requires of a product from ASEAN is not too high. However, to facilitate intra ASEAN trade the rules of origin, including procedures and the certification must be simple. Haddad observes that even though the value added criterion is simple in principle, however, it is very difficult to comply with. "The AFTA rule of origin of 40 percent value added is simple and transparent, but it is proving difficult to implement in practice. AFTA members, especially CLMV countries, are often unable to cumulate the necessary local/regional content".[18]

Haddad also emphasizes that ASEAN ROO is very difficult to comply with and the administrative cost of compliance to prove origin in Member Countries is different. Moreover, origin administration costs problems such as a lack of information or unclear rules, inefficiencies arising from the manual processing of origin applications, and a lack of support and connections with the private sector.[19]

ASEAN has put forth the idea of using Self-Certification, which will ease the problems with complicated certification procedures, and is now considering details of Self-certification. Self-Certification will reduce the administrative burden of trading for intra ASEAN trade and will allow every business, no matter its size, to take advantage of preferences under AFTA. This stydu proposes that ASEA should simplify and clarify rules of origin. Transparent rules of origin that are easy to comply will make AFTA more attractive for MNCs and SMEs.

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[18] Haddad, M. (2007). "Overview: Rules of Origin in East Asia: How Are They Working in Practice?" in *Trade Issues in East Asia: Preferential Rules of Origin*: p.i, Policy Research Report. East Asia and Pacific Region, Poverty Reduction and Economic Management, World Bank.

[19] *Id.*

6. The sixth challenge is the lack of courage to use ASEAN dispute settlement mechanism. In 1996, ASEAN Members built a dispute settlement mechanism under the Protocol on ASEAN Dispute Settlement Mechanism (The Protocol on DSM).[20] The Protocol on DSM provides an expeditious and transparent way of settling disputes among ASEAN Member States regarding the implementation of ASEAN economic agreements. The ASEAN Protocol on Enhanced Dispute Settlement Mechanism 2004[21] revised the Protocol on DSM 1996 by including a new set of provisions that provide more detail and guidelines by which to settle ASEAN economic disputes. Furthermore, the Revised Protocol on DSM 2004 creates an Appellate Body to replace the role of the AEM to serve as an Appellate Body under the Protocol on DSM 1996. The new ASEAN DSM 2004 was modeled after the dispute settlement system of the World Trade Organization. Another new development in the ASEAN DSM is the creation of three new organs to help ASEAN solve trade disputes before the adjudication stage under the Revised Protocol on DSM.

At the time of this study, no case has been brought under the ASEAN DSM. This is encouraging, in a way, however, this does not mean there have been no problems what so ever. Many disputes occurred during the implementation of the CEPT Scheme for AFTA such as the conflict between Thailand and Malaysia over the tariff reduction on the Malaysian domestic car the "Proton," and the conflict between Thailand and the Philippine on rice products. However, those issues have never been brought up to the ASEAN DSM. It is not ASEAN's nature to settle their problems under adjudication mechanisms. Members have

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[20] Hereinafter, Protocol on DSM 1996.

[21] Hereinafter the Revised Protocol on DSM.

always used diplomatic methods and a little bit of political pressure and compromise to resolve their problems. This is true for political, as well as economic issues among ASEAN Member States. Solving problems with diplomacy way work well with political issues, but not with trade as it slows down development and progress. I would encourage ASEAN Members to solve their disputes relating to economic matters by using the ASEAN DSM as it will increase the effectiveness of the implementations of AFTA and other economic integration agreements. However, it is still doubtful whether ASEAN will ever try to use the ASEAN DSM to resolve any dispute arising from implementing any economic agreements.

7. The last challenge that also plays import role in the unimpressive intra-ASEAN rate is the proliferation of bilateral trade negotiations. This event lessens the importance of AFTA and other ASEAN regional cooperation. ASEAN has been negotiating free trade area agreements with many dialogue partners; e.g., the ASEAN-Australia New Zealand Free Trade Area, the ASEAN-China Free Trade Area, the ASEAN-India Free Trade Area, the ASEAN-Japan Free Trade Area, and the ASEAN-Republic of Korea Free Trade Area. The increasing of the trade liberalization with ASEAN's dialogue partners will benefit ASEAN as a whole. Each ASEAN Member has furthermore concluded many bilateral free trade area agreements on it own with non-ASEAN nations such as Singapore has concluded bilateral free trade areas with twenty-four non-ASEAN trading partners and there are on-going negotiations with five other countries.[22] Thailand has also entered into bilateral free trade area agreements with four non-ASEAN trading partners and now has on-going negotiation with six non-ASEAN trading partners such as China, Japan and the United Sates. It is to be noted

[22] Visit http://www.fta.gov.sg/ for more detail (last visited March 5, 2010).

that China and Japan have already established free trade agreements with ASEAN.[23]

The ADBI Asia Regional Integration Center FTA database observes the number of free trade area activities in East Asia that "in 2009 East Asia emerged at the forefront of Asia's FTA activity, with 37 FTA initiatives in effect and another 72 at various stages of preparation - equivalent to more than half of Asia's total FTA initiatives Noodle bowl effect".[24] The proliferation of bilateral free trade areas of ASEAN Member Countries might affect the role of AFTA in liberalizing trade in the Southeast Asian region. The private sector might find that it is easier to comply with bilateral free trade agreements, which their respective countries have concluded with non-ASEAN partners. ASEAN needs to be aware of this phenomenon and solve this problem and ensures that the rules of origin for ASEAN products are simply drawn up and easy to comply with.

As ASEAN has declared it would establish the ASEAN Economic Community in 2015,[25] is it not time for them to speak as one entity? However, one may concede that speaking in one voice might not be easy for non-members who may not want to liberalize trade with certain other members. The Unity of ASEAN Members is what ASEAN needs most in order to become a powerful voice in international trading system. When ASEAN speaks as one means the voice of 600 million consumers which much more powerful that speak as an individual country.

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[23] Visit http://www.thaifta.com/ for more detail (last visited March 5, 2010).

[24] Source: Asian Development Bank Institute at http://www.adbi.org.

The spread of many different, overlapping FTAs in the region has also triggered concerns about potentially harmful, noodle bowl effects. The issue is whether the Asian noodle bowl can raise trade-related business costs for using FTAs due to complexity and, hence, reduce incentives for utilizing the intended FTA preferences, especially for SMEs which may face higher administrative and business costs as their capacity to deal with them is limited.

[25] With no single currency and no common tariffs.

Therefore, ASEAN Members must improve the implementation of the CEPT Scheme for AFTA and eliminate free trade barriers, reform AFTA institutions, make rules of origin, and simplify certification procedures for SMEs and large corporations, ASEAN needs to in implementing the remainder of the commitments under the CEPT Scheme and to make AFTA a sufficient and effective key in creating the ASEAN Economic Community in 2015.

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Summary of Recommendations:

1. ASEAN should reform all AFTA related institutions. The clear mandates and roles of AFTA Council should be revised.

2. The ASEAN AFTA Unit, National AFTA Unit should be reformed.

3. Any Member Country that does not have an official website for AFTA issues should create one to facilitate the private sector and academic scholars in AFTA matters. Additionally, ASEAN should create a website for the ASEAM Free Trade Area that contains everything about AFTA; *e.g.*, agreements, trade barriers reduction programs and updates about AFTA.

4. ASEAN should provide financial and technical assistance to the newer Member.

5. ASEAN needs to promote awareness of AFTA and AEC to private and public sectors. Private sector should be informed he benefits of regional economic integration under AFTA.

6. The Rules of Origin should be simplified and clarified.

7. ASEAN should facilitate intra-ASEAN trade such as harmonize custom procedures and licensing procedures.

8. Incorporate those products that are excluded from the implementation of the CEPT

Scheme into the trade elimination programs in Inclusion List ad remove all NTBs all products before the establishment of AEC in 2015.

Predictions:

A good action plan and strong commitments from all Members will lead ASEAN to create the most power free trade area in the Southeast Asia region. AFTA will become the most important key to the deepening and strengthening of ASEAN economic integration and the establishment of the ASEAN Economic Community in 2015. This dissertation envisions that ASEAN has a good possibility to move toward the greater economic integration, the ASEAN Economic Community. There are many challenges and obstacles along to way toward the ASEAN Economic Community. ASEAN needs not only goods rules and good management system but also needs common vision and solid commitment to establish AEC in year 2015. Without them, ASEAN Economic Community would be only just a dream that never come true.

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