

THE FOUNDATION OF THE ASEAN ECONOMIC COMMUNITY:
An Institutional and Legal Profile

Stefano Inama & Edmund Sim

EXECUTIVE SUMMARY

This book provides a critical overview of the legal and institutional foundations of the ASEAN Economic Community (AEC), an ambitious plan to create a single economic entity in Southeast Asia. If successful, the AEC would create a tremendous production base and market that would rival nation-states such as China and India.

The difficulty for the AEC is that, unlike nation-states, ASEAN does not have sufficiently developed legal and institutional foundations. This deficiency goes back to the founding of ASEAN as first and foremost a political grouping during the Cold War, with economic considerations being of secondary importance. Although competition since the end of the Cold War has spurred economic cooperation in Southeast Asia, the continuing emphasis on political and diplomatic matters has limited such cooperation.

ASEAN has maintained an informal decision-making process based on consensus among its member states and ASEAN member states have not delegated any power to supranational entities for economic matters.

The introduction of the ASEAN Charter in 2007, intended to implement greater emphasis on rules in ASEAN's operations, has helped in a somewhat limited fashion. Furthermore, with regard to economic matters, the ASEAN Charter also prioritizes the creation of a single market and a single production base, even though the latter is more achievable politically and would more quickly generate benefits for the general population.

In this book the AEC, ATIGA and other relevant ASEAN legal instruments are analytically examined to conclude that the AEC legal texts does not provide the tools, nor the juridical arsenal to establish the single production base and "*a fortiori*", the single market.

ASEAN has undertaken the complex task of creating a single economic entity but without a single regulator. The ASEAN Secretariat has very limited powers, with almost all decisions still being made by the ASEAN member states themselves. Nor have the ASEAN member states used dispute resolution to enforce the terms of the AEC agreements and commitments. In many cases ASEAN member states prefer to use non-ASEAN legal norms and forums to resolve their disputes.

As a result, implementation of the AEC by 2015 has been an inconsistent, stop-start process. The shortcomings of the current system are illustrated in our book through comparison with the EU, which has strong regional institutions to whom member states have delegated powers to achieve economic integration, and NAFTA, which relies more on a normative approach and dispute resolution to enforce its trade and investment norms.

The authors' analysis of trade in goods and services, investment, dispute resolution and other aspects of the AEC indicates that with ASEAN's having neither strong regional institutions

nor strong dispute resolution or set of norms, full and effective implementation of the AEC is unlikely to result.

With the ASEAN Charter due for review, the authors suggest various options for the improved operation of ASEAN:

- Remain at the status quo, which means that investors will continue to seek alternative markets or demand a higher return premium for investing in the AEC.
- Improve the administration of the ASEAN institutions.
- Develop indigenous ASEAN law and principles that can be applied in the AEC.
- Develop a hierarchy of legal norms for the AEC.
- Improve dispute resolution.
- Provide a right of action for the private sector.
- Enhance feedback and consultation with the private sector.
- Strengthen the ASEAN institutions' powers of oversight, inquiry, proposal, initiating action, and sanction.
- Increase financial support for the ASEAN institutions.
- Create new ASEAN institutions.

In the authors' view, attracting investors to a single production base in ASEAN requires at the very least improved monitoring, administration and implementation of AEC measures. This, in the authors' view, is best served by improving predictability and clarity in the operations of the ASEAN institutions.

The authors understand that ASEAN leaders need to balance both the external factors (competition for foreign direct investment) and internal factors (economic development for the general population) pushing for the AEC with the mainly domestic factors (vested interests, fears of losing sovereignty) motivating against the AEC. Yet in the authors' opinion, the factors in favor of continued regional integration through the AEC are stronger, and necessitate adopting some, if not all, of the policy options discussed in this book. Only by moving beyond the status quo can both the single production base and the single market be achieved in ASEAN, to the benefit of all the citizens of ASEAN.