
ASEAN Law in the New Regional Economic Order: an Introductory Roadmap to the ASEAN Economic Community

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1.1 Introduction

The impasse of the WTO Doha Round has spurred the proliferation of trade and investment agreements, particularly in the Asia-Pacific region. The fast-growing ASEAN has been attracting the attention of governments and enterprises, increasing its importance to global value chains and the world economy. This book explores the theoretical concept of ASEAN law within the broadly defined discipline of international economic law. More specifically, it sheds light on the roadmap to the AEC Blueprint 2025 by evaluating the impact of regional agreements on the business and commercial aspects of laws.

The evolution of ASEAN is significant for global trade. First, with a strategic location and population of 640 million, ASEAN is a rising trade power. The ten-country bloc is Asia's third-largest economy, and is expected to ascend from the world's sixth to the fourth largest economy by 2030.¹ Owing to its geopolitical salience, ASEAN has become a priority trade partner for China, India, the EU and the United States. Second, the legalization of the AEC and ASEAN's external FTAs with major Asia-Pacific economies provides a valuable case study of South-South regionalism between developing nations.

Finally, ASEAN's FTA strategy plays a critical role in the development of mega-regional trade agreements. The United States' withdrawal from the TPP did not deter the remaining signatories from reviving the pact.

¹ ASEAN Economic Community Chartbook 2017 (2017), at 2; Victor Wong, *Compelling Case for Investing in Asean Region*, *The Straits Times*, Feb. 4, 2018, www.straitstimes.com/business/invest/compelling-case-for-investing-in-asean-region (last visited Jun. 29, 2018).

The eleven-party CPTPP was signed in March 2018.² It includes Brunei, Malaysia, Singapore and Vietnam. Another major initiative, the RCEP, is “an ASEAN-led process.”³ The sixteen-country RCEP will encompass the ten ASEAN Member States and incorporate the mechanisms of existing ASEAN agreements.⁴

ASEAN did not begin as an economic endeavor. In fact, the inception of ASEAN in 1967 was primarily driven by political considerations. Pursuant to the Bangkok Declaration, Indonesia, Malaysia, the Philippines, Singapore and Thailand established ASEAN as a loose security alliance against communist expansion.⁵ The postcolonial mindset energized the “ASEAN Way,” which rests upon noninterference and consensus-based principles.⁶ The accession of Brunei in 1987 and the subsequent addition of four least-developed members, Cambodia, Laos, Myanmar and Vietnam (known as the CLMV countries), made today’s ASEAN a ten-country bloc.⁷ The development gap between earlier members and CLMV countries is often perceived to have created a two-tiered ASEAN, and gives rise to notable special and differential treatment provisions under ASEAN agreements.

ASEAN members signed the first economic agreement enabling preferential trading arrangements in 1977, but the objective was the promotion of economic cooperation rather than economic integration.⁸ Preoccupied with cross-border commodity trade, the initiative was designed to ensure a commercially viable market for large-scale industrial products that selected Member States produced. This initiative failed to increase intra-ASEAN trade because Member States insisted upon lengthy exclusion lists and high tariff rates. Faced with global regionalism and the rise of China and India, ASEAN countries switched their focus to trade liberalization and formed the ASEAN Free Trade Area in 1992.⁹

² Comprehensive and Progressive Agreement for Trans-Pacific Partnership Ministerial Statement, Mar. 8, 2018.

³ ASEAN Framework for Regional Comprehensive Economic Partnership (2011).

⁴ Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership (2012).

⁵ Rodolfo C. Severino, *Southeast Asia in Search of an ASEAN Community: Insights from the Former ASEAN Secretary-General* 1–11 (2006).

⁶ ASEAN at 50: Achievements and Challenges in Regional Integration (2017), at 3–7.

⁷ Walter Woon, *The ASEAN Charter: A Commentary* 10–12 (2016).

⁸ Severino, *supra* note 5, at 214–25.

⁹ *Id.*, at 222–5; Tham Siew Yean & Sanchita Basu Das, *Introduction: The ASEAN Economic Community and Conflicting Domestic Interests*, in *Moving the AEC Beyond 2015: Managing Domestic Consensus for Community-Building* 1, 3–4 (Tham Siew Yean & Sanchita Basu Das eds., 2016).

This initiative was not wholly successful, as insignificant margins of preferences and complicated administrative procedures necessary to meet the rules of origin led to the scheme's low utilization rate by businesses.¹⁰

In tandem with the development of the bloc was the beginning and evolution of the concept of unified ASEAN law, which consolidates separate ASEAN legal systems. A milestone of ASEAN is its transformation from an "association" to a "community," which represents a higher degree of legal integration.¹¹ Guided by the ASEAN Vision 2020, ASEAN leaders endorsed the plan for an ASEAN Community under the Bali Concord II in 2003.¹² The goal of the new institution is to establish three mutually reinforcing pillars, including the AEC, the ASEAN Security Community and the ASEAN Socio-Cultural Community.¹³ The ASEAN Summit subsequently brought forward the deadline for the Community from 2020 to 2015.

As a critical constitutional moment, the adoption of the ASEAN Charter codified the bloc's established practice and conferred legal personality on ASEAN "as an inter-governmental" organization.¹⁴ The ASEAN Charter thus alters the nature of the legal foundation for the institutional structure of ASEAN. In 2007, ASEAN states approved the AEC Blueprint 2015, which details the strategies for creating "a single market and production base."¹⁵ Another historical step took place in December 2015 with the official launch of the much-anticipated AEC. To structure the roadmap for the post-2015 vision, ASEAN leaders adopted the new AEC Blueprint 2025, which targets the creation of "a deeply integrated and highly cohesive ASEAN economy."¹⁶

ASEAN law incorporates both internal and external dimensions that mutually accelerate economic integration. The internal dimension denotes multiple intra-ASEAN agreements, which underpin the AEC. The external dimension includes ASEAN+1 FTAs that ASEAN as

¹⁰ See generally Bryan Mercurio, *Trade Liberalisation in Asia: Why Intra-Asian Free Trade Agreements Are Not Utilised By the Business Community*, 6 (1)Asian J. WTO & Int'l Health L. & Pol. 109, 110–36 (2011).

¹¹ Tang Siew Mun, *Is ASEAN Due for a Makeover*, 39 (2)Contemporary Southeast Asia 239, 243 (2017).

¹² Cha-am Hua Hin Declaration on the Roadmap for the ASEAN Community (2009–2015) (2009).

¹³ *Id.*

¹⁴ Charter of the Association of Southeast Asian Nations (2007) (ASEAN Charter), art. 3.

¹⁵ ASEAN Economic Community Blueprint (2007), paras. 4–9.

¹⁶ ASEAN Economic Community Blueprint 2025 (2015), paras. 3–7.

a group signed with its dialogue partners. From 2002 to 2017, ASEAN concluded FTAs with China, India, Japan, Korea, Hong Kong, Australia and New Zealand.¹⁷ RCEP members also affirmed the pledge of the negotiating partners to integrate the legal mechanism consistently with coexisting ASEAN+1 FTAs.¹⁸ These agreements have strengthened ASEAN centrality, a notion that the ASEAN Charter mandated to ensure the bloc's indispensable status in the region.¹⁹

After fifty years of ASEAN's progress, it has become urgent and necessary to have a comprehensive analysis of ASEAN law in national, regional and global contexts. Built on the latest AEC Blueprint 2025, this collection provides the most up-to-date examination of pressing legal issues that governments and investors face with respect to access to the ASEAN market. Each contributor closely considers these parameters and the operation of ASEAN law, reflecting its challenges to conventional theories of regional integration. This book therefore provides a rare opportunity to assess cutting-edge areas of ASEAN law not only from the conventional trade law angle, but also from commercial law and intellectual property perspectives.

In addition, this collection centers on the impact of the latest bilateral FTAs and mega-regionals on national legislation vis-à-vis commercial operations. Comparative case studies in selected countries and the implementation of recent bilateral agreements, including the China-Australia FTA and EU FTAs with Vietnam and Singapore, enrich the understanding of ASEAN law. The features highlighted in the chapters allow us to present fresh and holistic perspectives of Asia-Pacific regionalism and bridge the gap between theory and practice.

1.2 The Contextual Framework of the New Regional Economic Order

As the title of the book indicates, we situate ASEAN law in the context of the NREO and assess associated global trends and shifting paradigms.

¹⁷ ASEAN concluded the most recent ASEAN+1 FTA and investment agreement with Hong Kong in November 2017. For the history and framework of ASEAN's other external trade agreements, see David Chin Soon Siong, *ASEAN's Journey towards Free Trade, in Economic Diplomacy: Essays and Reflections* by Singapore's Negotiators 209, 217–42 (Chin Leng Lim & Margaret Liang eds., 2011).

¹⁸ Joint Leaders' Statement on the Negotiations for the Regional Comprehensive Economic Partnership (2017), para. 5.

¹⁹ ASEAN Charter, art. 2(2)(m); Woon, *supra* note 7, at 71–2; Amitav Acharya, *The Myth of ASEAN Centrality?*, 39 (2) Contemporary Southeast Asia 273, 274–8 (2017).

We propose the NREO as the normative framework to understand the contemporary dynamics of Asia-Pacific FTAs, which shape the evolution of ASEAN law.²⁰ The NREO represents the Global South's prodevelopment aspirations but is different from the movement of the NIEO. In the 1970s, the Group of 77 that included predominantly Asian and African states pushed for the United Nations to adopt the NIEO principles.²¹ This group resorted to the UN Conference on Trade and Development to influence negotiations of the GATT, which Washington and Brussels had dominated.

In essence, the South requested a “just and equitable” economic order that demands absolute trade sovereignty and justified exceptions to cardinal trade norms such as the most-favored-nations principle.²² To a certain extent, the South's agenda was advanced by prompting the GATT's incorporation of prodevelopment schemes, including special and differential treatment provisions and the Enabling Clause, which legalizes preferential market access for the South.²³ However, the NIEO quickly waned because of the divergent interests of the developing nations and, more decisively, the Thatcher-Reagan coalition's refusal to consider further demands.²⁴

Since the Uruguay Round, the Washington Consensus – based on the North's concept of neoliberalism – became the dominant force for the trading system.²⁵ Under the single undertaking approach of the WTO, developing countries lacked bargaining power to confront the North. They were compelled to assume daunting obligations ranging from services to intellectual property under various agreements. Similar

²⁰ This normative framework can be explained by realist and dependency theories. Pasha L. Hsieh, *Reassessing the Trade – Development Nexus in International Economic Law: The Paradigm Shift in Asia-Pacific Regionalism*, 37 (3) *Northwestern J. Int'l L. & Bus.* 321, 337–41 (2017).

²¹ GA Res. S-6/3201, Declaration on the Establishment of a New International Economic Order (May 1, 1974) (NIEO Declaration); The Early Days of the Group of 77, May 2014, <https://unchronicle.un.org/article/early-days-group-77> (last visited Jun. 29, 2018).

²² E.g., NIEO Declaration, *supra* note 21, Arts. 4 & 5; Antony Anghie, *Legal Aspects of the New International Economic Order*, 6 (1) *Humanity* 145, 147–9 (2015).

²³ Sonia Rolland, Development at the World Trade Organization 44–5 (2012); Tracey D. Epps & Michael J. Trebilcock, *Special and Differential Treatment in Agricultural Trade, in Developing Countries in the WTO Legal System* 323, 328–30 (Chantal Thomas & Joel P. Trachtman eds., 2009).

²⁴ James M. Cypher, The Process of Economic Development 238 (2014); Trade and Development Report (2014), at 67–8.

²⁵ John Williamson, *A Short History of the Washington Consensus, in The Washington Consensus Reconsidered: Towards a New Global Governance* 14, 16–17 (Narcís Serra & Joseph E. Stiglitz eds., 2008).

dynamics also prompted WTO-plus components to be included in FTAs between developed and developing nations. Much to the South's frustration, the NIEO movement failed to achieve its goals. Conceptually, the NIEO was preoccupied with North-South clashes in trade norms, whereas the current NREO focuses on new-generation South-South cooperation. In practice, the NREO has forged the collective power of developing countries through FTAs and reconstructed the neocolonial dependency of the South on the North.

The context of global regionalism is essential for understanding ASEAN law in the NREO. Global regionalism can be categorized into three major waves. The first wave occurred from the 1960s to the 1970s.²⁶ As ASEAN's initial preferential trade initiative illustrates, the prevailing import substituting policy that sought to increase the economies of scale by allocating regional industrial outputs largely collapsed in the developing world. The second wave took place in the 1980s and 1990s, when the United States and Europe galvanized the impetus for expediting regionalism.²⁷ Notable examples include NAFTA and the transformation from the European Single Market to the EU. The North-led bilateral agreements also resulted in the "domino effect" that invigorated South-based regionalism, such as the ASEAN Free Trade Area.²⁸

The NREO emerged in what we call the "Third Regionalism," which refers to the third wave of global regionalism. The Third Regionalism has coincided with the Doha Round since the 2000s and gave rise to the AEC. The Third Regionalism encompasses distinctive characteristics. The five-fold growth of trade pacts in the past three decades, leading to 287 FTAs in 2018, evidences the unrepresented speed of regionalism.²⁹ South-South FTAs (agreements between developing countries) now represent 75 percent of FTAs worldwide, whereas the number of North-South FTAs (agreements between developed and developing nations) dropped from

²⁶ Jagdish Bhagwati, *Regionalism versus Multilateralism*, 15 *World Eco.* 535, 538–39 (1992); World Trade Report 2011 (2011), at 52; Sungjoon Cho, *Breaking the Barrier between Regionalism and Multilateralism: A New Perspective on Trade Regionalism*, 42 *Harv. Int'l L. J.* 419, 426–57 (2001).

²⁷ Bhagwati, *supra* note 26, at 540–2; World Trade Report 2011, *supra* note 26, at 52–3.

²⁸ For the background, see Richard E. Baldwin, *Managing the Noodle Bowl: The Fragility of East Asian Regionalism*, Working Paper Series on Regional Economic Integration, No. 7 (2007), at 6–7; Amitav Acharya, *Foundations of Collective Action in Asia: Theory and Practice of Regional Cooperation*, ADBI Working Paper Series, No. 344 (2012), at 14.

²⁹ Regional Trade Agreements, www.wto.org/english/tratop_e/region_e/region_e.htm (last visited May 2, 2018); World Trade Report 2011, *supra* note 26, at 55.

60 to 25 percent.³⁰ These developments, along with the fact that more than half of the world's FTAs are in the Asia-Pacific, have led to paradigm shifts in world trade law.³¹

The deviation from the West-centric liberalization to multipolar trade governance has become a reality. The economic and geopolitical changes in the Third Regionalism have enabled the NREO to rejuvenate the South's efforts to alter the existing economic order. For instance, Asia's ascending power has contributed to the relative decline of US hegemony. The trade prong of President Obama's "pivot to Asia" strategy culminated in the TPP, which was perceived not only to strengthen ties with Asian allies but also to contain a rising China. Of course, the goodwill has been undone by soaring populist protectionism in the United States. Current President Trump's policies have eroded the intended strategic goals as well as damaged the cross-Atlantic alliance on which the previous NIEO was premised.

Furthermore, as illustrated by ASEAN Member States such as Indonesia and Vietnam, developing countries have switched their economic priorities from import substitution to export-driven orientation. This policy change resulted in more than 75 percent of Asian FTAs incorporating WTO-plus components.³² To some extent, the increase of Asia's intraregional trade share to 57 percent has also lessened regional economies' reliance on the developed markets.³³ The converging policies of Asian countries on ASEAN, including China's much ballyhooed "One Belt, One Road" initiative, Korea's New Southern Policy and Taiwan's New Southbound Policy, ought to strengthen the NREO in the Asia-Pacific.

The context of the NREO builds the theoretical foundation for ASEAN's development as an economic community. Its legal architecture in turn provides an alternative model for the Global South. It is true that political scientists often compare ASEAN with the European Union, but it is an oversimplification to characterize the AEC as an incomplete version of the EU. Some commentators similarly ignore different political backgrounds to argue for ASEAN to follow the European model. Despite its legalization process, the ASEAN Way continues to uphold its

³⁰ World Trade Report 2011, *supra* note 26, at 55–6; Asia-Pacific Trade and Investment Report 2016 (2016), at 90.

³¹ Asia-Pacific Trade and Investment Report 2016, *supra* note 30, at 88.

³² E.g., Richard Baldwin & Masahiro Kawai, *Multilateralizing Asian Regionalism*, ADBI Working Paper Series, No. 431 (2013), at 8–9.

³³ Asian Economic Integration 2017 (2017), at 16.

relevance in the bloc's operational structure. While ASEAN is an inter-governmental organization, the EU is a supranational institution. ASEAN's soft law approach based on horizontal integration makes it fundamentally different from the EU, which consolidates its members through a hard law, top-down approach. The EU's embedded problems with the euro crisis and border control contributed to the discontent that led to Brexit and populist nationalism in various European states. Hence, what the AEC envisions is intensifying its FTA-plus arrangements rather than pursuing the European version of a common market or customs union.

Two areas further exemplify the legal distinctions between ASEAN and the EU. First, EU treaties and regulations have "direct effect" to override national legislation, but the ASEAN Charter mandates that members "take all necessary measures" to implement ASEAN treaties.³⁴ National constitutions of ASEAN states are unlikely to be interpreted as granting regional agreements self-executing power.³⁵ Second, the treaty-making power provisions of the ASEAN Charter do not amount to the EU concept of competences conferred by Member States. For matters that fall with the EU's exclusive competences, the EU alone can negotiate and conclude international treaties that bind individual members. Nevertheless, ASEAN's power is severely restricted because it does not extend to the conclusion of agreements that would create obligations on individual states.³⁶ The legal obligation of ASEAN Member States is limited to the "endeavor to develop common positions and pursue joint actions."³⁷ A resultant political exercise is to convene the ASEAN Caucus meetings to converge stances before negotiating trade agreements. The practice of concluding external agreements by ten states collectively remains unchanged.

1.3 Consolidating the ASEAN Economic Community

As an integral part of the new ASEAN Community, the AEC marks a milestone in Asia-Pacific regionalism. The legalization of the AEC,

³⁴ ASEAN Charter, art. 5(2).

³⁵ See generally Diane A. Desierto, *ASEAN's Constitutionalization of International Law: Challenges to Evolution under the New ASEAN Charter*, 49 Colum. J. Transnat'l L. 268, 300–03 (2010–11).

³⁶ ASEAN Charter, art. 41(7); Rules of Procedure for Conclusion of International Agreements by ASEAN (2011), rule 1.

³⁷ ASEAN Charter, art. 41(4).

which connects ten diverse developing nations, exhibits the NREO by providing a new model for South-South cooperation. The AEC consolidates ASEAN agreements that govern trade in goods and services, investment and dispute settlement mechanisms.³⁸ The ATIGA integrates previous goods-related agreements that had been signed since the 1990s. The agreement aims to eliminate tariffs and nontariff measures and improve trade facilitation measures.

Based on its incremental modality, the AFAS enabled multiple rounds of negotiations that led to successive “packages” of services commitments. Having been negotiated as separate packages, the liberalization of air transport and financial services also forms an integral part of the AFAS. To facilitate the flow of intraregional professional mobility, ten states concluded the ASEAN Agreement on the Movement of Natural Persons and mutual recognition arrangements for selected professional services. In addition, the ACIA increases the bloc’s competitiveness to attract FDI. Importantly, the ACIA consolidates former agreements to streamline the schedule of reservations and accord substantive benefits to investors. ASEAN has also developed multilayered schemes for the resolution of trade conflicts. While state-to-state disputes fall within the realm of the ASEAN Protocol for Enhanced Dispute Settlement Mechanism, the ACIA enables private investors to resort to investor-state arbitration.

Adopted in 2015, the AEC Blueprint 2025 succeeded its predecessor and is incorporated into the guiding document, “ASEAN 2025: Forging Ahead Together,” which charts the roadmap of the ASEAN Community from 2016 to 2025.³⁹ To better understand the AEC, we now turn to a much-needed analysis of key differences between the AEC Blueprint 2015 and the AEC Blueprint 2025. In 2015, the implementation rate of original AEC goals was 79.5 percent.⁴⁰ On this basis, the AEC Blueprint 2025 pushes for further liberalization to realize the ASEAN Community Vision 2025. The new features of the Blueprint will similarly fortify the linkage between the ASEAN architecture with domestic business and commercial laws.

Five main characteristics are found in the AEC Blueprint 2025. The first characteristic, “A Highly Integrated and Cohesive Economy,” comprises the most significant steps for the new phase.⁴¹ The AEC

³⁸ For the timeline of the key agreements, see ASEAN at 50: A Historic Milestone for FDI and MNEs in ASEAN (2017), at 8–9.

³⁹ Kuala Lumpur Declaration on ASEAN 2025: Forging Ahead Together (2015).

⁴⁰ ASEAN at 50: Achievements and Challenges in Regional Integration, *supra* note 6, at 15.

⁴¹ AEC Blueprint 2025, paras. 7–24.

Blueprint 2025 will create “a more unified market” by facilitating “the seamless movement of goods, services, investment, capital and skilled labour.”⁴² This language modifies the aspirations of the AEC Blueprint 2015 to form “a single market and production base.”⁴³ The seamless movement provision suggests a step further than the previous Blueprint, which promoted the “free flow” of goods, services, investment and skilled labor and the “freer flow” of capital.⁴⁴

Given that the bloc has achieved over 98 percent of the intra-ASEAN tariff elimination, ASEAN’s tariff liberalization demonstrates clear progress for the AEC.⁴⁵ The key area for trade in goods is to strengthen the ATIGA and to manage proliferating nontariff measures that hinder the result of tariff liberalization. As for services trade, the target of the AEC Blueprint 2015 is to remove substantially all restrictions for remaining sectors was unmet. The AEC Blueprint 2025 will lower barriers to services trade and integrates currently fragmented commitments by enacting the ATISA. On the investment side, the ACIA will finalize the built-in agenda for decreasing or eliminating investment restrictions.

Tellingly, the AEC Blueprint 2025 substantially expands the coverage for financial integration. It seeks to bolster Qualified ASEAN Banks under the ASEAN Banking Integration Framework and facilitate capital market linkages for multi-jurisdictional equity and debt offerings. Moreover, the completion of national single windows for trade facilitation and regulatory reforms that enhance ASEAN’s participation in global value chains illustrate the salient features of the new Blueprint.

The second characteristic of the new Blueprint, “A Competitive, Innovative and Dynamic ASEAN,” is built on the previous Blueprint and reiterates regional cooperation of competition policy, consumer protection and intellectual property rights.⁴⁶ The new focus on sustainable economic development as the growth strategy reinforces ASEAN’s collective commitments to the UN-led 2030 Agenda for Sustainable Development.⁴⁷ The third characteristic, “Enhanced Connectivity and Sectoral Cooperation,” aims to implement the Master Plan on ASEAN

⁴² *Id.*, para. 7.

⁴³ AEC Blueprint 2015, paras. 6 & 9.

⁴⁴ *Id.*, para. 9.

⁴⁵ ASEAN at 50: Achievements and Challenges in Regional Integration, *supra* note 6, at 15–18.

⁴⁶ AEC Blueprint 2025, paras. 25–44.

⁴⁷ Complementarities between the ASEAN Community Vision 2025 and the United Nations 2030 Agenda for Sustainable Development: A Framework for Action (2017), at 16–17.