

Improving Governance in the ASEAN Economic Community

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Abstract

The ASEAN countries recently ratified a Charter to apply rules to their operations and increase economic competitiveness. The goal is an ASEAN Economic Community (AEC), a single market in trade and investment. ASEAN leaders correctly understand that their grouping's informal consensus-based approach may negatively affect their economic competitiveness.

ASEAN is a young institution of countries who recently became independent and in some cases are still engaged in nation-building. Its members have been reluctant to intervene in each others' affairs and cede or share sovereignty with ASEAN regional institutions. The ASEAN members are thus attempting to construct a single regional market but without constructing a regional infrastructure of institutions, laws and policies to govern that market.

The author asserts without bolstering of ASEAN institutions and rulemaking, the AEC will be unable to develop. The author believes that these steps are necessary because investors and consumers have minimum expectations of (1) rule of law, (2) feedback to policymakers and (3) resolution of grievances from their market regulators. Otherwise, economic actors will move their investments to markets which can meet those expectations or can provide higher returns that offset the costs associated with deficiencies in market regulation.

I. Introduction

In late 2007 the leaders of the Association of Southeast Asian Nations (ASEAN) signed a Charter.² The ASEAN Charter calls for regional integration on security, sociocultural and economic matters. It is the last item which has both the greatest promise and the greatest urgency for the grouping. ASEAN is competing with other trading blocs such as the EU, NAFTA and Mercosur, as well as major developing nations such as China and India.

The ASEAN Charter is a good first step to achieving the ASEAN Economic Community (AEC) envisaged by its leaders. It provides greater formal structure and organization to the grouping, which had operated mainly through informal consensus.

This paper argues that further steps are necessary to achieve a thriving AEC. The ASEAN Charter alone does not provide a sufficient framework. In particular, the ASEAN Charter does not provide for the rights and obligations of the private sector with regard to ASEAN and the ASEAN institutions.

The absence of such provisions reflects the diversity among the ASEAN member states. A grouping that includes countries run by democracies, monarchies,

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² Charter of the Association of Southeast Asian Nations, Singapore, 20 November 2007 (ASEAN Charter); <http://www.aseansec.org/ASEAN-Charter.pdf> (accessed 8 June 2009).

military leaders and communist parties will have varying interpretations of the relationship between the private sector and the government. Furthermore, nations that are still engaged in nation-building are reluctant to delegate hard-won sovereignty to a supranational authority by allowing their citizens to deal directly with ASEAN.

Nevertheless, on economic matters, the private sector increasingly expects direct participation in policy formation, implementation and dispute resolution. Market participants who cannot rely on countries or trading blocs to provide these opportunities will either move their economic activity elsewhere or impose a price premium when they do business in those jurisdictions. The ASEAN Charter, while a good first step towards achieving the AEC, must be supplemented with these aspects of a fully functioning market before the AEC will flourish.

II. Background

ASEAN was founded by Indonesia, Malaysia, the Philippines, Singapore and Thailand.³ They were subsequently joined by Brunei, Cambodia, Laos, Myanmar (Burma) and Vietnam. The grouping has emphasized regional cooperation in the “three pillars” of security, sociocultural and economic integration. The regional grouping has made the most progress in economic integration, aiming to create an AEC by 2015.⁴ The AEC would have a combined population of over 560 million and a GDP exceeding US\$ 1.1 trillion.⁵

The foundation of the AEC is the ASEAN Free Trade Area (AFTA), which promotes the free flow of goods within ASEAN.⁶ Other elements of economic integration, such as free flow of investment, services and elimination of non-tariff barriers, are planned by the ASEAN leaders.

Over time, the ASEAN members determined that a Charter was necessary to move ASEAN from an informal grouping to a more rules-based organization. The leadership felt that by imposing such rules, development of the AEC could be improved. The first commitment to the ASEAN Charter was set forth in 2004 at a summit in Vientiane.⁷

³ Bangkok Declaration on ASEAN, 8 August 1967, <http://www.aseansec.org/1212.htm> (accessed 8 June 2009).

⁴ Bali Declaration of ASEAN Concord II, 7 October 2003, <http://www.aseansec.org/15159.htm> (accessed 8 June 2009). The original deadline for establishing the AEC was 2020; it was moved up to 2015 by the Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015, 13 January 2007, <http://www.aseansec.org/19260.htm> (accessed 8 June 2009).

⁵ ASEAN Secretariat website, www.aseansec.org/64.htm (accessed 8 June 2009).

⁶ Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area (CEPT Agreement), Singapore, 28 January 1992, <http://www.aseansec.org/12375.htm> (accessed 8 June 2009).

⁷ Vientiane Action Programme, 29 November 2004, <http://www.aseansec.org/VAP-10th%20ASEAN%20Summit.pdf> (accessed 8 June 2009). Further commitments on the issue were made at later summits in Kuala Lumpur and Cebu.

In 2005, the ASEAN leaders established an Eminent Persons Group (EPG) to provide a first draft of the charter.⁸ The EPG's report and draft charter were accepted at the early 2007 summit in Cebu.⁹ Official drafting of the ASEAN Charter began shortly afterwards, with the final version announced in Singapore in late 2007. The ASEAN Charter was ratified in late 2008.¹⁰

III. Structure of ASEAN

The supreme authority in ASEAN is the ASEAN Summit of national leaders.¹¹ Decisions made at the ASEAN Summit represent the consensus among the ASEAN nations, although their legal authority has not been tested. The ASEAN Charter aims to imbue those decisions with greater status.¹² ASEAN Summit meetings had been held annually; the ASEAN Charter establishes semiannual meetings, along with special meetings when necessary.¹³ The chairmanship of ASEAN is held each year by an ASEAN member, with the rotation based on alphabetical order of the members' names in English.¹⁴

The ASEAN Charter establishes ministerial level councils to handle substantive matters.¹⁵ The ASEAN Economic Community Council (formerly known as the ASEAN Economic Ministers meeting) made up of economic ministers meets

⁸ Kuala Lumpur Declaration on the Establishment of the ASEAN Charter, 12 December 2005, <http://www.aseansec.org/18030.htm> (accessed 8 June 2009).

⁹ Cebu Declaration on the Blueprint of the ASEAN Charter, 13 January 2007, <http://www.aseansec.org/19257.htm> (accessed 8 June 2009).

¹⁰ List of Dates of ASEAN Charter Ratification, <http://www.aseansec.org/AC-Update.pdf> (accessed 8 June 2009).

¹¹ See <http://www.aseansec.org/13103.htm> (accessed 8 June 2009).

¹² ASEAN Charter, Art. 7, para. 2.

¹³ ASEAN Charter, Art. 7, para. 3.

¹⁴ ASEAN Charter, Art. 31.

¹⁵ The ASEAN Charter also establishes an ASEAN Coordinating Council made up of ASEAN foreign ministers, to meet semiannually. Its tasks include (a) preparing the meetings of the ASEAN Summit; (b) coordinating the implementation of agreements and decisions of the ASEAN Summit; (c) coordinating with the ASEAN Community Councils to enhance policy coherence, efficiency and cooperation among them; (d) coordinating the reports of the ASEAN Community Councils to the ASEAN Summit; (e) considering the annual report of the Secretary General on the work of ASEAN; (f) considering the report of the Secretary General on the functions and operations of the ASEAN Secretariat and other relevant bodies; (g) approving the appointment and termination of the Deputy Secretaries-General upon the recommendation of the Secretary General; and (h) undertaking other tasks provided for in the ASEAN Charter or such other functions as may be assigned by the ASEAN Summit. ASEAN Charter, Art. 8.

semiannually and coordinates the development of the AEC.¹⁶ The Council is supported by the Senior Economic Officials Meeting (SEOM), a grouping of ASEAN national government bureaucrats which meets frequently between Council meetings.¹⁷

The ASEAN Charter also requires that each ASEAN member station a permanent representative in Jakarta, location of the ASEAN Secretariat.¹⁸ A committee of permanent representatives serves as the liaison with the ASEAN Secretariat, ministerial councils, and ASEAN national secretariats established within the various ASEAN members' national governments.¹⁹

The ASEAN Secretariat provides administrative support to ASEAN. The staff members of the ASEAN Secretariat are hired competitively for fixed term contracts. The ASEAN Secretary General heads the ASEAN Secretariat and is appointed for a non-renewable 5 year term.²⁰ The nationality of the ASEAN Secretary General also rotates based on alphabetical order.²¹ The ASEAN Charter created four positions of ASEAN Deputy Secretary General (there had been two such positions).²²

The ASEAN Charter imbues the ASEAN Secretariat and ASEAN Secretary General with the usual privileges and immunities of working for a supra-national institution, like the Commission in the EU.²³ However, unlike what the Treaty of Rome does for the European Commission, the ASEAN Charter does not assign any coercive authority to the ASEAN Secretariat or the ASEAN Secretary General.

IV. Foundations of the ASEAN Economic Community (AEC)

A. ASEAN Free Trade Agreement (AFTA)

1. The Common Effective Preferential Tariff (CEPT) scheme

¹⁶ The ASEAN Charter also established ASEAN Politico-Security Council and the ASEAN Socio-Cultural Community Council. These councils are made up of appropriate ministers (*i.e.*, defense ministers for the ASEAN Politico-Security Council) and meet semiannually. The Charter also established ASEAN Sectoral Ministerial Bodies which support the various councils. ASEAN Charter, Art. 9.

¹⁷ CEPT Agreement, Art. 7, para. 1.

¹⁸ ASEAN Charter, Art. 12.

¹⁹ ASEAN Charter, Art. 13.

²⁰ ASEAN Charter, Art. 11, para. 1.

²¹ The rotation had been followed informally; the ASEAN Charter established the rotation formally. See <http://www.aseansec.org/13103.htm> (accessed 8 June 2009).

²² ASEAN Charter, Art. 11, para. 4. The ASEAN Charter also established an ASEAN Human Rights Body. See Art.14. Discussion of the Human Rights Body is beyond the scope of this article.

²³ ASEAN Charter, Art. 17-19. This is keeping with the ASEAN Charter's provision of international legal personality for ASEAN. ASEAN Charter, Art. 3.

Unlike the EU, AFTA does not apply a common external tariff on imported goods. Each ASEAN member may impose tariffs on goods entering from outside ASEAN based on its national schedules. However, for goods originating within ASEAN, ASEAN members are to apply a tariff rate of 0 to 5 percent (the more recent members of Cambodia, Laos, Myanmar and Vietnam were given additional time to implement the reduced tariff rates).²⁴ This is known as the Common Effective Preferential Tariff (CEPT) scheme.²⁵

ASEAN members have the option of excluding products from the CEPT in 3 cases: temporary exclusions; sensitive agricultural products; and general exceptions.

Temporary exclusions refer to products for which tariffs will be lowered to 0-5%, but which are being protected temporarily by a delay in tariff reductions.²⁶

Sensitive agricultural products include commodities such as rice. ASEAN members have until 2010 to reduce the tariff levels to 0-5%.²⁷

General exceptions refer to products which an ASEAN member deems necessary for the protection of national security, public morals, the protection of human, animal or plant life and health, and protection of articles of artistic, historic, or archaeological value.²⁸

2. Rule of Origin

The CEPT only applies to goods originating within ASEAN. To qualify for ASEAN-origin, the general rule is that local ASEAN content must be at least 40% of the FOB value of the good. The local ASEAN content can be cumulative, that is, the value of inputs from various ASEAN members can be combined to meet the 40% requirement.²⁹ The following formula is applied:³⁰

²⁴ See Protocol for the Accession of the Socialist Republic of Vietnam to the Framework Agreements on Enhancing ASEAN Economic Cooperation, Bangkok, 15 December 1995, <http://www.aseansec.org/12372.htm> (accessed 8 June 2009); Protocol to Amend the Framework Agreements on Enhancing ASEAN Economic Cooperation, Bangkok, 15 December 1995, <http://www.aseansec.org/12369.htm> (accessed 8 June 2009).

²⁵ See CEPT Agreement.

²⁶ CEPT Agreement, Art. 2, para. 3. See also Protocol on the Special Arrangement for Sensitive and Highly Sensitive Products, Singapore, 30 September 1999, <http://www.aseansec.org/1207.htm> (accessed 8 June 2009); Protocol Regarding the Implementation of the CEPT Scheme Temporary Exclusion List, Singapore, 22 November 2000, <http://www.aseansec.org/12365.htm> (accessed 8 June 2009).

²⁷ CEPT Agreement, Art. 3. See also Protocol to Amend the Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area for the Elimination of Import Duties, 31 January 2003 (accessed 8 June 2009).

²⁸ CEPT Agreement, Art. 9.

²⁹ CEPT Agreement, Art. 2, para. 4.

Raw material cost
+ Direct labor cost
+Direct overhead cost
+Profit
+Inland transport cost
FOB value

The exporter must obtain a “Form D” certification from its national government attesting that the good has met the 40% requirement. The Form D must be presented to the customs authority of the importing government to qualify for the CEPT rate.³¹ Difficulties have sometimes arisen regarding the evidentiary proof to support the claim, as well as how ASEAN national customs authorities can verify Form D submissions. These difficulties arise because each ASEAN national customs authority interprets and implements the Form D requirements without much coordination with other ASEAN customs authorities.

3. Administration

Administration of AFTA is handled by the national customs and trade authorities in each ASEAN member.³² The ASEAN Secretariat has authority to monitor and report on compliance with AFTA measures, but has no legal authority to enforce compliance. This has led to inconsistent rulings by ASEAN national authorities. The ASEAN Charter was designed to bolster the ASEAN Secretariat’s ability to ensure consistent application of AFTA measures.³³

ASEAN national authorities have also been traditionally reluctant to share or cede sovereignty to authorities from other ASEAN members (although ASEAN trade ministries routinely conduct cross-border on-site inspections in antidumping investigations). Unlike the EU or NAFTA, joint teams to ensure compliance and investigate non-compliance have not been widely used. Instead, ASEAN national authorities must rely on the review and analysis of other ASEAN national authorities to determine if AFTA measures such as rule of origin are being followed. Disagreements may result between the national authorities. Again, the ASEAN Secretariat may help mediate a dispute but has no legal authority to resolve it.

ASEAN Comprehensive Investment Agreement (ACIA)

³⁰ “Rules of Origin,” AFTA Reader, Vol. 1, November 1993, <http://www.aseansec.org/10149.htm> (accessed 8 June 2009).

³¹ “Operational Certification Procedures for the Rules of Origin of the ASEAN Common Effective Preferential Tariff Scheme for ASEAN Free Trade Area,” AFTA Reader, Vol. 1, November 1993, <http://www.aseansec.org/10148.htm> (accessed 8 June 2009).

³² *Ibid.*

³³ ASEAN Charter, Art. 27.

The ACIA is currently under negotiation. It is based on the ASEAN Investment Area, a precursor scheme to create a single market in investment. When completed, the ACIA will encourage the free flow of investment through pursuing the following:

- Industries are to be opened up for investment, with phase-out of exclusions
- National treatment for investors with few exclusions
- Elimination of investment impediments
- Streamlining of investment procedures
- Enhancing transparency
- Undertaking investment facilitation measures

Full realization of the ACIA with the removal of temporary exclusion lists in manufacturing, agriculture, fisheries, forestry and mining is scheduled by 2010 for most ASEAN members and by 2015 for the CLMV countries.³⁴

C. ASEAN Framework Agreement on Trade in Services

An ASEAN Framework Agreement on Trade in Services was adopted at the ASEAN Summit in Bangkok in December 1995.³⁵ Under the agreement, ASEAN members are negotiating intra-regional services liberalization in several sectors, including air transport, business services, construction, financial services, maritime transport, telecommunications and tourism. Although some sectors have liberalized faster, such as air transport, other sectors remain subject to continued negotiation. Efforts to expand the scope of the Framework Agreement are subject to continued negotiations.

D. Dispute Resolution

Although the ASEAN national customs and trade authorities coordinate among themselves, disputes can arise. The ASEAN Secretariat has no legal authority to resolve such disputes, so disputes are resolved bilaterally through informal means or through formal dispute resolution.

An ASEAN Protocol on Enhanced Dispute Settlement Mechanism governs formal dispute resolution in AFTA and other aspects of ASEAN.³⁶ ASEAN members may seek mediation and good offices consultations. If these efforts are ineffective,

³⁴ Framework Agreement on the ASEAN Investment Area, Bangkok, 7 October 1998, <http://www.aseansec.org/6466.htm> (accessed 8 June 2009).

³⁵ ASEAN Framework Agreement on Services, Bangkok, 15 December 1995, <http://www.aseansec.org/6628.htm> (accessed 8 June 2009).

³⁶ Protocol on Dispute Settlement Mechanism, 20 November 1996, <http://www.aseansec.org/16654.htm>; ASEAN Protocol on Enhanced Dispute Settlement Mechanism, 29 November 2004, <http://www.aseansec.org/16754.htm> (accessed 8 June 2009).

they may ask SEOM to establish a panel of arbitrators to review the dispute. Panel decisions can be appealed to an appellate body formed by the ASEAN Economic Community Council.

The Protocol has never been invoked because of the role of SEOM in the dispute resolution process.³⁷ SEOM decisions require consensus among all ASEAN members, and since both the aggrieved party and the alleged transgressor are both participating in SEOM, such consensus cannot be achieved.³⁸ This discourages ASEAN members from invoking the Protocol, and often they seek dispute resolution in other fora such as the WTO.³⁹ This can also be frustrating for companies affected by an AFTA dispute, as they have no rights to invoke dispute resolution yet their home ASEAN government may not be willing to invoke the Protocol. The ASEAN Secretary General has listed dispute resolution as requiring necessary reform for proper administration of the AEC.

The ASEAN Charter provides some relief from this situation by mandating that unresolved disputes shall be referred to the ASEAN Summit for resolution by national leaders.⁴⁰ This allows for the possibility of decisions based on a basis other than consensus, as the ASEAN Charter does allow the members to adopt decisions using a majority or supermajority rule.⁴¹ This is an important deviation from the traditional consensus approach although its actual use itself depends on consensus among the ASEAN members.

V. Assessment

³⁷ There has been resort to dispute resolution under the ASEAN Agreement for the Promotion and Protection of Investments, 15 December 1987, <http://www.aseansec.org/8007.htm>. In *Yaung Chi Oo Trading Pte. Ltd. v. Government of Myanmar*, 42 ILM 540 (2003), the tribunal established under that agreement ultimately declined jurisdiction. The Protocol to Amend the 1987 Agreement for the Promotion and Protection of Investments, 12 September 1996, adopts the Dispute Settlement Mechanism as an alternative means of dispute resolution. <http://www.aseansec.org/6465.htm> (accessed 8 June 2009).

³⁸ The Protocol states that SEOM must establish a panel unless a consensus exists not to establish a panel. Nevertheless, from the author's experience, ASEAN members have continued to apply the consensus principle informally and in the opposite manner – with members very reluctant to invoke the Protocol -- such that panel requests are not made unless there is a consensus. Consensus has never been reached.

³⁹ See, e.g., *Thailand-Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS/371 (7 February 2008) (complaint raised by the Philippines); *Malaysia-Prohibition of Imports of Polyethylene and Polypropylene*, WT/DS/1 (10 January 1995) (complaint raised by Singapore).

⁴⁰ ASEAN Charter, Art. 26.

⁴¹ ASEAN Charter, Art. 21, para. 2 states that “In the implementation of economic commitments, a formula for flexible participation, including the ASEAN Minus X formula, may be applied where there is a consensus to do so.”

The ASEAN Charter is a good first step towards addressing some, although not all, of the necessary building blocks for establishing the AEC. Imposing a definite legal structure, instituting more formalized rules and roles, and giving ASEAN an international legal personality help transform ASEAN from an informal club into a true international organization.

However, this is not enough. Properly established roles and rights for the private sector are necessary for the AEC to flourish. Yet the ASEAN Charter contains no defined role for the private sector. This failure, if not rectified, could hamstring the AEC. Economic integration must necessarily include the private sector, as the private sector provides the main actors for the economy. Without the private sector, there would be no economy.

ASEAN thus needs to encourage the participation of the private sector in the AEC, and demonstrate that its market operations will be as efficient and effective as those in other markets with regard to the following items:

- Feedback
- Implementation
- Dispute Resolution

Otherwise the private sector will simply move its investments to those other markets, whether nation-states such as China and India, or trading blocs such as the EU and Mercosur, which already have systems to handle these items.

A. Need for Feedback

The private sector needs opportunities to interact with the policymakers responsible for the administration of the AEC. In nation-states the private sector can deal with the central government. In trading blocs the private sector can consult with supranational entities such as the Commission in the EU.

In ASEAN, private-public consultations on the operation of the ASEAN institutions are *ad hoc*. To paraphrase Henry Kissinger's comment about the EU, "whom do I call when I want to call ASEAN" -- the ASEAN Secretary General? the Chair of ASEAN? the ASEAN Secretariat? Although the ASEAN Charter lays the groundwork for strengthening the role of the ASEAN Secretary General, continued efforts to improve his standing and that of the ASEAN Secretariat are necessary.

At the upper level of ASEAN, the ASEAN Charter provides for semi-annual meetings of ASEAN leaders, coordinating council meetings of foreign ministers, as well as ministerial council meetings dealing with economic, political-security and socio-cultural issues. Private-public consultations should be institutionalized at those meetings, and not limited to the annual business and investment summits.

The ASEAN Secretariat should increase its interaction with the private sector, and ASEAN members should ensure that their permanent representative delegations include experts who are well-versed in the arcana of economic integration and can work with the private sector. Through these fora, the private sector can have a role in providing notice and comment on proposed policy matters that affect the AEC.

B. Need for Better Implementation

The private sector needs to know that the policymaking and rulemaking of the AEC will be consistent. In nation-states the private sector can rely on a hierarchy of rules

and laws, whereas in trading blocs it knows that treaty obligations provide regularity to the markets.

Implementation of ASEAN economic integration initiatives has been difficult to date. ASEAN Member States too often adopt a “me-first” attitude instead of looking for collective benefits. For example, government ministries often give priority to domestic interests over ASEAN-wide interests. Nor do the national level governments understand that not all economic initiatives can benefit all ASEAN member states equally. The author worked on an ASEAN Industrial Cooperation project involving 4 members that was delayed over 2 years because each of the 4 members insisted on net trade inflow benefit for itself.

There is also a need to increase cross-border cooperation and relax sovereignty on economic matters. ASEAN customs agencies often refuse to cooperate on cross-border AFTA matters, citing sovereignty issues. Nor do the national governments cooperate, as ministries in one member often take measures inconsistent with measures taken elsewhere. Others are unaware of AEC commitments.

The ASEAN Charter attempts to address this issue by authorizing the ASEAN Secretariat to monitor the implementation of AEC-related decisions and rulings by ASEAN member governments. However, the ASEAN Secretariat is given only the power of adverse publicity through regular reports on AEC implementation. The ASEAN Charter provides no recourse for the ASEAN Secretariat should a member government be unable or unwilling to implement an AEC measure. This needs to be addressed in the future, because adverse publicity alone will be insufficient.

At the member level, the ASEAN Charter requires ASEAN member governments to establish national secretariats that will serve as the information hub and coordination center for ASEAN integration in that country. ASEAN members should follow another example of the EU and establish separate ministries to serve as the national secretariats or place the national secretariats under the direct control of the national leaders. AEC development will involve many different ministries, not just the foreign or trade ministries which have traditionally been involved in ASEAN decisionmaking. This will require high level coordination within each ASEAN member government.

Beyond the ASEAN Charter, ASEAN members should pool or delegate sovereignty in the administration of the AEC. Such delegation has already taken place in many of the ASEAN economic integration initiatives. ASEAN members routinely send government teams to conduct on-site inspections in antidumping investigations yet this is not seen as a violation of sovereignty. Joint agency efforts, modeled on the “jump teams” used in NAFTA should be implemented.

Finally, the ASEAN Secretariat should ensure the proper dissemination of rules and decisions through its website and elsewhere. ASEAN members should encourage giving priority to the overall benefits to ASEAN, and not just themselves. Acceptance of an “AEC governing body of law”, whether binding or guiding only, with principles that can be applied at the national level, will help the AEC to develop.

C. Need for Effective Dispute Resolution

The private sector needs reassurance that should it encounter difficulties in the AEC, it can seek relief through dispute resolution. In nation-states the private sector can go to court, and in trading blocs like the EU it can go to supranational courts or tribunals.

The ASEAN Charter does not address this issue. Proposals to give private parties the right to seek dispute resolution were rejected in the drafting stage. The

ASEAN Secretariat also does not have this right, which limits its ability to enforce AEC compliance as described above.

Instead, the ASEAN Charter repeats that existing mechanisms will continue to be followed. This is potentially bad news for the private sector. The existing dispute resolution systems are bogged down by the need for “ASEAN-way” consensus among members and national governments reluctant to bring cases against fellow ASEAN members. Indeed, the national bureaucrats who may have caused the problem in the first place are involved in the dispute resolution process itself. These flaws are why the existing dispute resolution process is unused and unloved.

However, the ASEAN Charter does allow room for some reform. The ASEAN Charter states that unresolved disputes shall be referred to the ASEAN leaders’ summit. This is an improvement over the limbo where many intra-ASEAN disputes currently reside. This language also allows the ASEAN leaders the flexibility to designate economic issues as not requiring absolute consensus. Allowing for majority approval of dispute decisions will improve the system.

Outside the ASEAN Charter, ASEAN could lay the groundwork for improved dispute resolution by naming a standing panel of experts to serve on panels, establish a code of conduct and procedure for cases, and expand the role of the private sector. ASEAN Member States should recognize ASEAN decisions as guiding principles in resolving questions of law and policy. The principle of nonjusticiability should be recognized for security and sociocultural matters to reassure ASEAN leaders that these sensitive issues would not be affected. Such small steps will help instill private sector confidence in the system as well as encourage more use of the system.

VI. Conclusion

The AEC will be competing against countries and economic blocs that already have existing systems to handle feedback, implementation and dispute resolution. The private sector expects such systems. Admittedly, such systems are still developing in countries such as India and China, and even in the EU. Nevertheless they do exist and are progressing in development. Failure to establish such systems properly in the AEC will handicap the bloc as it tries to compete against these other markets.

In this context, the ASEAN Charter does not provide any immediate benefits for the private sector. Yet the private sector should view the ASEAN Charter not as the end of the integration process but as another step of a process that will take several years. If the ASEAN members and the private sector can work together to fill in the gaps left by the ASEAN Charter, a vibrant AEC can develop.