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

Pasha L. HSIEH
ASEAN Law in the New Regional Economic Order: an Introductory Roadmap to the ASEAN Economic Community

PASHA L. HSIEH AND BRYAN MERCURIO

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.

---

The eleven-party CPTPP was signed in March 2018. It includes Brunei, Malaysia, Singapore and Vietnam. Another major initiative, the RCEP, is “an ASEAN-led process.” The sixteen-country RCEP will encompass the ten ASEAN Member States and incorporate the mechanisms of existing ASEAN agreements. 

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. The postcolonial mindset energized the “ASEAN Way,” which rests upon noninterference and consensus-based principles. 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. 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. 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.

---

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.
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.\textsuperscript{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.\textsuperscript{11} Guided by the ASEAN Vision 2020, ASEAN leaders endorsed the plan for an ASEAN Community under the Bali Concord II in 2003.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{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


\textsuperscript{11} Tang Siew Mun, \textit{Is ASEAN Due for a Makeover}, 39 (2)Contemporary Southeast Asia 239, 243 (2017).


\textsuperscript{13} \textit{Id.}

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

\textsuperscript{15} ASEAN Economic Community Blueprint (2007), paras. 4–9.

\textsuperscript{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. RCEP members also affirmed the pledge of the negotiating partners to integrate the legal mechanism consistently with coexisting ASEAN+1 FTAs. These agreements have strengthened ASEAN centrality, a notion that the ASEAN Charter mandated to ensure the bloc’s indispensable status in the region.

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).


We propose the NREO as the normative framework to understand the contemporary dynamics of Asia-Pacific FTAs, which shape the evolution of ASEAN law. 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. 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. 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. 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.

Since the Uruguay Round, the Washington Consensus – based on the North’s concept of neoliberalism – became the dominant force for the trading system. 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

---


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).


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. 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. 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.

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 unprecedented speed of regionalism. 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

60 to 25 percent. 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.

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. To some extent, the increase of Asia’s intraregional trade share to 57 percent has also lessoned regional economies’ reliance on the developed markets. 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

---

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 supernational 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. National constitutions of ASEAN states are unlikely to be interpreted as granting regional agreements self-executing power. 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. The legal obligation of ASEAN Member States is limited to the “endeavor to develop common positions and pursue joint actions.” 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).
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. 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. 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. 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. 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.
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 labour 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.

Connectivity. In particular, the ASEAN Single Aviation Market Implementation Framework will commence the review of aviation agreements and further liberalize air transport ancillary services. More developed than in the previous Blueprint, the AEC Blueprint 2025 pledges to promote e-commerce transactions by developing an ASEAN Agreement on Electronic Commerce. With the EU General Data Protection Regulation taking effect in 2018, the global community places additional importance on privacy in digital trade. The protection of personal data is also envisioned in the new Blueprint.

The fourth characteristic is “A Resilient, Inclusive, People-Oriented and People-Centred ASEAN.” The AEC Blueprint 2015 focused on the development of small and medium enterprises, whereas the AEC Blueprint 2025 extends the scope to cover micro enterprises. Concrete steps are planned to increase the utilization of rules of origins under FTAs and the ASEAN self-certification scheme for exporters. Additionally, the new Initiative for ASEAN Integration Work Plan III will narrow the regional development gap by providing CLMV countries with additional capacity-building assistance.

The fifth characteristic, “A Global ASEAN,” is to strengthen the principle of ASEAN centrality by orienting the bloc as the center of today’s hub-and-spoke trade system. The AEC Blueprint 2025 is far more ambitious than its predecessor. The latest ASEAN+1 FTA was concluded with Hong Kong in 2017. In addition to advancing the Doha Development Agenda, ASEAN’s immediate priority is to accelerate RCEP negotiations and review and upgrade external FTAs. Finally, the success of the AEC hinges on an effective implementation mechanism. Departing from the conventional ASEAN Way, the AEC Blueprint 2025 mandates that the ASEAN Economic Community Council “enforce compliance of all measures.” The ASEAN Secretariat is also tasked with developing an enhanced monitoring framework.

---

48 AEC Blueprint 2025, paras. 45–66.
49 Id., paras. 67–78.
50 E.g., id., paras. 68–9; AEC Blueprint 2015, para. 60.
51 AEC Blueprint 2025, paras. 79–80.
52 Id., paras. 81–2.
1.4 The Approach and Outline of the Book

Based on the AEC Blueprint 2025, this book provides the most up-to-date and comprehensive analysis of ASEAN law in the new era of global regionalism, including recent developments that have taken place after the conclusion of the CPTPP. These developments have led to even more challenges. For instance, given the differences between the AEC Blueprint 2015 and the AEC Blueprint 2025, what are the prospects of ASEAN integration and implications for foreign investors? To what extent will the AEC and the new commitments within ASEAN agreements with China and India influence the ongoing RCEP negotiations? How should multinational corporations and small and medium-sized enterprises effectively respond to the ASEAN architecture, particularly in diverse emerging markets such as the Philippines and Myanmar? Such questions have cast doubt on the conventional wisdom but have not been systematically addressed by the international and regional economic law literature.

In filling this gap and exploring pressing issues for academic and professional communities, this book is divided into four main themes: (a) ASEAN Agreements in the Global Context; (b) Services Trade and Financial Integration; (c) Investment Liberalization and Protection; and (d) Intellectual Property, Digital Trade and Consumer Protection. These themes collectively examine the concept of ASEAN law through the lens of the intersection of regional treaties and business and commercial laws. By focusing on the cutting-edge areas of ASEAN law, this collection distinguishes itself from the existing books that focus primarily on the rules of law or the regional public law framework. Furthermore, various chapters provide insight into the legal regimes of ASEAN countries from comparative law perspectives. Using case studies, we take a holistic approach to understanding ASEAN law at both national and regional levels. Built on the legal experts’ findings, we have been able to identify actual gaps in the regional framework and suggest potential reforms based on best practices.

---

53 E.g., Imelda Deinla, The Development of the Rule of Law in ASEAN (2017); Pieter Jan Kuijper et al., From Treaty-Making to Treaty-Breaking: Models for ASEAN External Trade Agreements (2015); Stefano Inama & Edmund W. Sim, The Foundation of the ASEAN Economic Community: An Institutional and Legal Profile (2015); Sanchita Basu Das et al. eds., The ASEAN Economic Community: A Work in Progress (2013).
1.4.1 ASEAN Agreements in the Global Context

Part 1 of the book discusses the “Global ASEAN” initiatives, since external context provides both the fundamental rationale and environment within which ASEAN law has operated. The chapters center on systemic issues of ASEAN agreements’ status vis-à-vis WTO obligations and RCEP negotiations. In particular, these chapters unveil the implementation of upgraded agreements that will shape mega-regionals and the Free Trade Area of the Asia-Pacific, which Asia-Pacific Economic Cooperation envisioned. Following this introductory chapter, Minh Hue Nguyen, Deborah Elms and Lavanya N in Chapter 2 assess the evolution and regional implications of the ATIGA, which governs ASEAN’s trade in goods. They evaluate the status of ASEAN’s tariff eliminations and rules of origin under the ATIGA and six ASEAN+1 FTAs. These current updates, as well as their observations of rising nontariff measures, benefit manufacturers and exporters.

Given the rise of China and its expanded trade ties with Southeast Asia, Heng Wang in Chapter 3 analyzes China’s FTA strategy and its flexible approach to ASEAN. The ASEAN-China FTA is not only the first ASEAN+1 FTA, but also China’s first FTA that has been upgraded. The new commitments under ASEAN’s agreements with China and Hong Kong are expected to form the benchmark for RCEP negotiations. Of course, the enforcement of trade commitments entails a functional dispute settlement mechanism for resolving economic conflicts. In Chapter 4, Henry Gao analyzes systemic issues within dispute settlement mechanisms under ASEAN agreements and compares them with the system under the WTO Dispute Settlement Understanding. While ASEAN FTAs with China, Japan and Korea are largely consistent with the WTO and the ASEAN Protocol for Enhanced Dispute Settlement Mechanism, notable differences exist in panel procedures and alternative dispute resolution clauses. The RCEP’s consolidation of these rules will empower developing countries and ensure ASEAN centrality in Asia-Pacific regionalism.

1.4.2 Services Trade and Financial Integration

After considering the global context surrounding and impacting ASEAN law, in Part 2 this collection turns to services trade and financial

---

54 AEC Blueprint 2025, para. 79; ASEAN Economic Community 2025 Consolidated Strategic Action Plan (2015), at 47.
integration. These two intertwined areas are essential to both multilateral corporations and banks. Trade in services is the backbone of trade in goods and has been the critical driver for ASEAN’s growth. The service sector now accounts for more than half of the bloc’s Gross Domestic Product and FDI inflows. Recognizing the prominence of services trade, ASEAN commenced negotiations under the AFAS in 1995. Ten packages of commitments covering main service sectors, along with separate packages for air transport and financial services, jointly form members’ AFAS obligations.

In Chapter 5, Bryan Mercurio provides a detailed overview of services commitments and reviews the structure and performance of the AFAS. Negotiating the ATISA, an integrated services agreement, is a top priority of the AEC Blueprint 2025. He argues for the ATISA to adopt trade-friendly principles, including most-favored nations and transparency. He also identifies the loophole in the flexibility scheme and how the CPTPP and the prospective Trade in Services Agreement may shape the ASEAN modality for scheduling services commitments. Markedly, among the four modes of trade in services, the movement of natural persons (Mode 4) directly enables professional mobility. In Chapter 6, Yoshifumi Fukunaga points out that ASEAN mutual recognition arrangements are distinct from those of the EU and the Trans-Tasman arrangement. In particular, the ASEAN scheme focuses on recognizing professional qualifications rather than facilitating the movement of professionals. By evaluating existing agreements that govern engineers, nurses and tourism professionals, this chapter offers the best practices for the AEC.

The following chapters consider cutting-edge areas of specific service sectors. The AEC Blueprint 2025 elaborates on the roadmap to financial integration. Federico Lupo-Pasini in Chapter 7 explores the challenges to regulatory cooperation for the integration of ASEAN banks, which are not entitled to “single passport” rights like their EU counterparts. He explains the rationale for bilateral agreements that enable Qualified ASEAN Banks under the regional framework. By conceptualizing ASEAN’s banking trilemma, he finds it difficult to simultaneously achieve the goals of financial sovereignty, financial stability and banking integration. Chapter 8 authored by Michelle Dy emphasizes a closely related issue of

---

56 Id., at 25–9; Chairman’s Statement of the Thirty Second ASEAN Summit, Apr. 28, 2018, para. 12.
57 AEC Blueprint 2025, paras. 16–17; ASEAN at 50: Achievements and Challenges in Regional Integration, supra note 6, at 30–3.
financial inclusion, which energizes inclusive growth by allowing smaller-scale enterprises to raise financing in the capital market. In her chapter, she analyzes the impact of the Asian financial crisis and the ASEAN Capital Markets Forum Action Plan 2016–2020 on regulatory reforms. A comparison between the approaches adopted by the Philippine Securities and Exchange Commission and the Indonesian Financial Services Authority unveils different paths to capital market integration.

With international and ASEAN-based law firms expanding operations in the Asia-Pacific, Pasha L. Hsieh in Chapter 9 sheds light on the liberalization of transnational legal services. He examines the WTO concept of legal services and the business impact of legal provisions under the CPTPP, the Korea-US FTA and China’s FTAs with Australia and Korea. Based on AFAS legal services commitments, he also deciphers new regulatory regimes in Singapore and Malaysia and law firms’ corresponding structural changes. Moreover, as the world’s only aviation market to possess as many aircraft on order as it has in its current operative fleet, ASEAN’s budget carriers and national airlines such as Thai Airways and Garuda Indonesia substantially contribute to the flow of regional passengers.58 To be better aware of the directions of the ASEAN Single Aviation Market, Jae Woon Lee in Chapter 10 explores current air transport and open skies agreements. This chapter also explains the commercial practice of joint venture airlines and ASEAN’s remaining infrastructure and regulatory challenges.

### 1.4.3 Investment Liberalization and Protection

Due to its rapid growth and emerging markets, the ASEAN bloc has been an attractive investment magnet. One of the important economic rationales for forging an economic community is to ensure the bloc’s competitiveness in attracting FDI. In the past two decades, ASEAN’s FDI inflows have increased over six-fold, and the value of FDI now accounts for 21 percent of FDI stock in all developing nations.59 Excluding intra-ASEAN trade, the top sources of investments come from the EU, Japan, the United States and China.60 As FDI is a critical tool for development, the AEC Blueprint 2025 stresses improving the investment environment.

59 ASEAN at 50: A Historic Milestone for FDI and MNEs in ASEAN, supra note 38, at xiii & 6–7.
In the first chapter of Part 3, devoted to investment, Sufian Jusoh discusses the evolution of the ACIA as the central pillar that guides intra-ASEAN investment and examines the scope of national treatment and most-favored-nations provisions under the agreement. In addition, this chapter illustrates the ACIA’s impact on domestic legislation by comparing investment law reforms in Laos and Myanmar. Notwithstanding different results, the two least-developed nations offer valuable lessons for ASEAN’s investment policy and South-South FTAs. To complement the analysis of investment liberalization, Julien Chaisse in Chapter 12 emphasizes the investment protection that the ACIA accords to ASEAN investors. In particular, he explains key provisions on fair and equitable treatment, the prohibition of direct and indirect expropriation and the free transfer of funds. The role of the ATIGA and the AFAS in strengthening the investment environment is also examined in detail.

To enforce rights under investment agreements, ISDS is commonly included in bilateral investment treaties and FTAs, and entitles foreign investors to bring complaints against host governments before international panels. However, such mechanism has attracted public criticism and has become the main source of global protectionism. ISDS is perceived as bypassing domestic courts’ jurisdiction and as creating a “regulatory chill” that makes public policies vulnerable for multinational corporations’ legal challenges. Reflecting these concerns, the CPTPP narrows the scope of ISDS under the original TPP by disallowing an investor to sue a host government on the basis of the investment agreement and by suspending the minimum standard of treatment pertinent to financial services.

The EU’s new policy to replace ISDS with an investment court system further complicates the debates. The new system, which creates a permanent tribunal including an appellate mechanism for investor-state disputes, has been incorporated into EU agreements with Canada, Vietnam, Singapore and Japan. Trinh Hai Yen in Chapter 13 observes

---

62 The Annex attached to the preamble to the CPTPP suspended certain Trans-Pacific Partnership provisions in Chapter 9 (Investment) and Chapter 11 (Financial Services); see also CPTPP: The Five Countries that Won’t Sue NZ, According to the Government, Newshub, Mar. 9, 2018, www.newshub.co.nz/home/politics/2018/03/cpptp-the-five-countries-that-won-t-sue-nz-according-to-the-government.html (last visited Jun. 29, 2018).
64 The text of the EU-Singapore FTA was renegotiated following the 2017 judgment of the Court of Justice of the EU on the scope of the EU’s competences in concluding trade
the fragmented nature of ISDS mechanisms by examining the legal designs under the ACIA and ASEAN’s external investment treaties. She also focuses on the investment court system in the EU-Vietnam FTA and compares it with the WTO mechanism. Her findings suggest that the drawbacks of the EU initiative could result in an inflexibility of the court structure and confusing jurisdiction of the appeal tribunal.

In Chapter 14, Yip Man offers her insight into prodevelopment dispute resolution mechanisms for commercial and investment disputes.65 Going beyond the ACIA, she addresses the practical need for small and medium-size investors to solve business disputes in a cost-efficient manner. She thus provides a comparative analysis of arbitration and mediation mechanisms in Indonesia, Vietnam and Singapore, including the innovative hybrid structure of the Singapore International Commercial Court. Similarly underscoring the development dimension, Nimnual Piewthongngam in Chapter 15 considers the role of CLMV countries in realizing the AEC’s target as a single investment destination. Using the case study of Myanmar, she examines Aung San Suu Kyi’s legal reforms in key areas covering investment law, telecommunications law and rules governing special economic zones. These first-hand observations offer an assessment of the actual correlation between the ASEAN framework and domestic legislation pertinent to investment.

1.4.4 Intellectual Property, Digital Trade and Consumer Protection

Part 4 of the book centers on the core elements that contribute to ASEAN’s competitiveness, productivity and its participation in global value chains, as highlighted in the AEC Blueprint 2025. This part addresses regional and national frameworks on intellectual property rights, e-commerce and product safety standards. It also proposes best practices for realizing legal harmonization based on ASEAN’s horizontal integration model. In Chapter 16, Irene Calboli investigates the relationship between intellectual property rights and the principle of free movement of goods in intra-ASEAN trade. In particular, she addresses

agreements. Released in Apr. 2018, the provisions on the international investment court are included in Chapter 3 (Dispute Settlement) of the EU-Singapore Investment Protection Agreement.

65 For a review of ASEAN’s present dispute settlement barriers, see Locknie Hsu et al., Improving Connectivity between ASEAN’s Legal Systems to Address Commercial Issues (2018), at 102–11.
domestic laws on trademark, copyright and patent exhaustion in ASEAN states such as Brunei, Cambodia and Malaysia and their impact on the regional flow of commercial goods. After finding the divergences among states and even in a single state’s treatment of different types of intellectual property, this chapter provides NAFTA and EU experiences for the AEC’s reference.

Significantly, with the escalating middle class and the prevalence of mobile phone use, ASEAN is now the world’s fastest-growing Internet region.\(^66\) By 2025, the population having Internet access in this region will triple to 600 million and e-commerce sales will soar to $88 billion.\(^67\) The AEC Blueprint 2025 notes the indispensable roles of information and communications technology and e-commerce in accelerating trade and investment.\(^68\) To assess the roadmap, Chapter 17 authored by Eliza Mik examines legal and regulatory challenges to facilitate e-commerce in ASEAN. More specifically, she offers insight into the impact of the UNCITRAL Model Law on Electronic Commerce on national legislation. Critical to commercial transactions, this chapter also investigates legal issues of electronic signatures, consumer protection and privacy rights.

In Chapter 18, Han-Wei Liu explores an intertwined topic on data localization, which has given rise to digital trade debates for the TPP and other FTAs. He considers various types of data storage requirements and data transfer restrictions, exemplified by the EU’s General Data Protection Regulation. By deciphering recent personal data protection or privacy acts enacted in countries such as Indonesia and Singapore, he offers suggestions for ASEAN’s enhanced connectivity. Furthermore, Luke Nottage and Jeannie Paterson in Chapter 19 evaluate ASEAN countries’ consumer protection regimes in light of the AEC Blueprint 2025 and EU and East Asian jurisdictions. They find the harmonization of ASEAN consumer protection laws problematic. To substantiate their position, this chapter identifies the limited scope and enforcement weaknesses of ASEAN regulations on product safety and liability, as well as consumer protection laws.

Chapter 20 concludes the collection. ASEAN as a bloc for developing nations has transformed and progressed dramatically since its inception

---


\(^{68}\) AEC Blueprint 2025, paras. 50–3.
in 1967. A sound legal architecture for implementing the AEC Blueprint 2025 is essential for consolidating the new economic community. Built on experts’ findings of key issues at regional and national levels, we offer concise yet concrete legal and policy advice for ASEAN enterprises and governments. We hope these recommendations will contextualize ASEAN law in the new regional economic order and make ASEAN a unique model for the Global South.