

ASEAN FEATURES

THE ASEAN WAY AND THE ROLE OF LAW IN ASEAN ECONOMIC COOPERATION

by PAUL J. DAVIDSON*

There has been a movement internationally towards a rules-based framework to regulate international economic relations, particularly as manifested by the WTO legal framework. In contrast, within ASEAN, much economic cooperation has been achieved by the “ASEAN way”, not through rules and regulations, but through discussion, consultation and consensus. The “ASEAN way” relies to a large extent on the personal approach in contrast to the Western way of dependence on structures and their functions. However, it has been suggested that East Asian countries must move away from this “relationship-based” way of doing business and creating wealth to one that is more “rules-based” and “market-driven.”¹ This article examines the relation between the “ASEAN way” and the role of law in ASEAN economic cooperation.

I. INTRODUCTION

In many issue-areas, the world is witnessing a move towards law.² In particular, there has been a general international trend to develop a more rules-based system to regulate international economic activity.³

It would seem that the expanding number and the variety of international economic agreements, the new international economic organisations that are being established to realise their objectives and the legislative, executive and judicial organs which have been set up under them are the significant aspects of a system (systems?) of international economic regulation which is evolving in response to a desire for a rule-oriented economic society.⁴

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¹ H.E. Rodolfo C. Severino, Jr., ASEAN Secretary-General, “Reforms and Integration in East Asia Could Strengthen Regional Stability” (14 August 1999), online: ASEAN official website<<http://www.aseansec.org/golek.html>>.

² Judith Goldstein *et al.*, “Introduction: Legalization and World Politics” (2000) 54 (3) *Int'l Organization* 385 at 385.

³ The following discussion is restricted to the development of an international legal framework for regulating economic relations. Although there have been developments in other areas of international law, international legal frameworks to regulate other behaviour are more contentious and have been more difficult to develop.

⁴ Palitha Kohona, *The Regulation of International Economic Relations Through Law* (Dordrecht: Martinus Nijhoff Publishers, 1985) at Ch. 2. The regulation of international economic relations through multilateral agreements and international organisations at 38.

This is apparent in the development of the World Trade Organisation (WTO) with its rules for regulating international trade and its unified dispute settlement mechanism, including its Dispute Settlement Body (DSB) and a standing Appellate Body to hear appeals on issues of law covered in the panel report and the legal interpretations developed by the panel.⁵

International economic law provides the framework for regulating economic activity among the members of the international community. In considering the establishment and development of international economic relations, governments are constrained in their policy choices by sets of rules, procedures and principles that may limit their options. International economic law forms the international legal framework which establishes the parameters within which international trade in goods and services and foreign investment is conducted. Such a framework is necessary in order to promote increased order and predictability in international transactions. While it includes steps that are taken to achieve harmonisation of domestic or regional laws dealing with private aspects of trade or investment, such as the international sale of goods or international arbitration, the present discussion will be limited to a consideration of the role of international economic law in providing the international framework to regulate international economic cooperation among states.

This article will examine the role that law has played in economic cooperation in the Association of Southeast Asian Nations (ASEAN). In particular, this article examines the relation between the "ASEAN way" and the role of law in developing a legal framework for economic cooperation in ASEAN.

The members of ASEAN have been reluctant to be too legalistic in their relations with each other, preferring to conduct relationships in the "ASEAN way". However, with economic expansion in the region and closer economic cooperation among the members of ASEAN, it is arguable that they too have developed the need for more of a rules-based system to regulate their economic activity *inter se*.⁶ In this regard, international trade and investment in the region are increasingly subject to international regulation by a rules-based system and an international legal framework is evolving to regulate economic relations amongst trading partners. The member states of ASEAN have been moving slowly towards developing a legal framework for economic cooperation among themselves.

This development has been driven not only by integration, but also by ASEAN's desire to be seen as an attractive location for foreign investment. In order to attract foreign investment, a state (or a region) must provide a legal framework to guarantee foreign investors' legal rights and commercial entitlements. In general, the greater the distance between the social, political and economic systems of the host country and those of the investing country, the greater the need for a highly developed legal framework.⁷ Such a framework is necessary in order to promote increased order and predictability in international transactions.

II. THE ASEAN WAY—DECISION MAKING IN ASEAN

In order to better understand how the legal framework is developing within ASEAN and some of the factors which may limit the development and structure of the legal framework, it is necessary to have some appreciation of the decision-making process within ASEAN. ASEAN has followed the "ASEAN way" in relations among the member states. This approach is based in history and culture.

The underlying approach to decision-making in ASEAN is the consensus approach, embodied in the Malay terms *musyawarah* and *mufakat*, which relies largely on patient consensus-building to arrive at informal understandings or loose agreements. As the former

⁵ Arie Reich, "From Diplomacy to Law: The Juridicization of International Trade Relations" (1996/97) 17 *Nw.J.Int'l L.& Bus.* 775.

⁶ *Supra* note 1.

⁷ Jing-dong Yuan & Lorraine Eden, "Export Processing Zones in Asia: A Comparative Study" (1992) XXXII *Asian Survey* 1045.

Prime Minister of Singapore, Lee Kuan Yew, has commented, “We have made progress in an ASEAN manner, not through rules and regulations, but through *Musyawarah* and consensus.”⁸

Musyawarah, the process of decision-making through discussion and consultation, and *mufakat*, the unanimous decision that is arrived at, are associated with the traditional approach to decision-making in the region and have played a role in village politics for centuries and, culturally, can be identified as part of the regional social system.⁹ The concept involves processes including intensive informal and discreet discussions behind the scenes to work out a general consensus which then acts as the starting point around which the unanimous decision is finally accepted in more formal meetings, rather than across-the-table negotiations involving bargaining and give-and-take that result in deals enforceable in a court of law. The “ASEAN way” relies to a large extent on the personal approach in contrast to the Western way of dependence on structures and their functions.¹⁰ “(T)he way of making regional decisions dealing with co-operation among the member States adopted by ASEAN reflects its attitude of rejecting being a supra-national body like the European Communities.”¹¹ This consensus approach has become known as the ASEAN Way and is reflected in the processes and structures of ASEAN.¹² This ASEAN way is in contrast to the formal legalism of most Western international institutions.

III. ELEMENTS OF A LEGAL FRAMEWORK

A legal system performs two main functions in a society:

- (i) **Establishing Rules**—A legal system provides rules for the orderly interaction among members of the society.
- (ii) **Dispute Settlement/Rule Interpretation**—A legal system and laws provide a mechanism for settling disputes that arise among members of a society concerning the rules established by that society, and for interpreting those rules.

A legal regime emphasises the adjudication of disputes based on detailed rules, procedures and precedents; a commercial diplomacy regime relies on the negotiation of unique solutions to individual problems based on general principles applied to the circumstances at hand.¹³ In considering the degree of legalisation, Abbott, Keohane, *et al.*, consider legalisation as a particular form of institutionalisation characterised by three components: obligation, precision, and delegation.¹⁴

⁸ Opening Address by H.E. Lee Kuan Yew, (then) Prime Minister of Singapore, in *15th ASEAN Ministerial Meeting and Post-Ministerial Meeting with the Dialogue Countries*, Singapore, 14–18 June 1982, (Jakarta: ASEAN Secretariat, 1982), at 9.

⁹ For a more detailed discussion of the consensus model, see Pushpa Thambipillai and J. Saravanamuttu, *ASEAN Negotiations—Two Insights* (Singapore: ISEAS, 1985), esp. at 10–13.

¹⁰ Estrella D. Solidum, “The Role of Certain Sectors in Shaping and Articulating the ASEAN Way” in R.P. Anand & P.V.-Quisumbing, eds., *ASEAN Identity, Development and Culture* (Manila: U.P. Law Center and East West Center Culture Learning Institute, 1981) 130 at 138; see also, Estrella Solidum, “An ASEAN Perspective on the Decision-Making Process in the European Community” in Purificacion V. Quisumbing & Benjamin B. Domingo, eds., *EEC and ASEAN: Two Regional Community Experiences* (Manila: Foreign Service Institute and UP Law Center, 1983) 127.

¹¹ Teuku Mohammad Radhie, “Regional Cooperation in Law and Development Study in the ASEAN Region” in Teuku Mohammad Radhie & Nobuyuki Yasuda, eds., *Law and Development Study in ASEAN Countries* (Tokyo: Institute of Developing Economies, 1991) 43.

¹² Seiji Naya & Michael G. Plummer, “Economic Co-operation after 30 Years of ASEAN” (1997) 14 ASEAN Economic Bulletin 117 at 119 (“The ‘ASEAN Way’ is one of consensus; the regional organization was only able to move forward when all countries were ready.”)

¹³ Michael Hart, *A North American Free Trade Agreement—The Strategic Implications for Canada* (Ottawa: Centre for Trade Policy and Law and the Institute for Research on Public Policy, 1990) at 15.

¹⁴ Kenneth W. Abbott *et al.*, “The Concept of Legalization” (2000) 54 (3) Int’l Organization 401.

These characteristics are defined along three dimensions: obligation, precision, and delegation. *Obligation* means that states or other actors are bound by a rule or commitment or by a set of rules or commitments. Specifically, it means that they are *legally* bound by a rule or commitment in the sense that their behavior thereunder is subject to scrutiny under the general rules, procedures, and discourse of international law and often of domestic law as well. *Precision* means that rules unambiguously define the conduct they require, authorise, or proscribe. *Delegation* means that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules.¹⁵ (Italics in original)

Each of these three dimensions is variable (see Figure 1), and the place of an international norm, agreement, or regime on each dimension is an indicator of the degree of legalisation. Legalisation is a continuum ranging from hard legalisation, where all three dimensions fall to the right of the scale through multiple forms of softer legalisation, to the complete absence of legalisation.

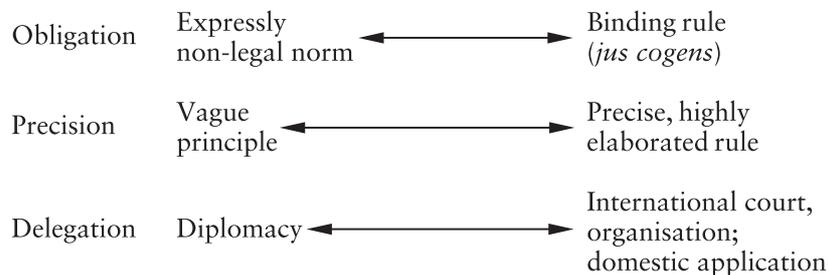


Figure 1. *The Dimensions of Legalisation*¹⁶

IV. ASEAN'S LEGAL FRAMEWORK

Within ASEAN, the framework regulating economic relations in the region is evolving. Just as there has been a move to more of a rules-based system to regulate international economic relations at the broader international level (as exemplified by developments within the WTO),¹⁷ so too have there been developments within ASEAN towards greater legalism in regulating the economic relations of the members. Initially, ASEAN had a very loose framework for cooperation and the members were reluctant to be too legalistic in their relations with each other. Although the members of ASEAN still prefer to conduct their relations in the “ASEAN way”, there has nevertheless been a development of a legal framework for regulating their economic relations *inter se*.¹⁸

Founded at a time of political uncertainty and instability in the region, and at a time of recent military conflict and considerable continuing tension amongst several of ASEAN's members, the founding of ASEAN was motivated primarily by political objectives. Although

¹⁵ *Ibid.*

¹⁶ *Ibid.* at 404. In Figure 1, each element of the definition appears as a continuum, ranging from the weakest form (the absence of legal obligation, precision, or delegation, except as provided by the background operation of the international legal system) at the left to the strongest or hardest form at the right.

¹⁷ See, *inter alia*, John H. Jackson, *The World Trading System—Law and Policy of International Economic Relations*, 2nd ed., (Cambridge/London: The MIT Press, 1997); Michael J. Trebilcock & Robert Howse, *The Regulation of International Trade*, 2nd ed., (London/New York: Routledge, 1999).

¹⁸ For a fuller discussion, see Paul J. Davidson, *ASEAN—The Evolving Legal Framework for Economic Cooperation* (Singapore: Times Academic Press, 2002).

the members sought a firm basis for development,¹⁹ and although collaboration in the economic field was mentioned in its founding document,²⁰ little was done in this area and the Association concentrated on political concerns. ASEAN performed a valuable role in maintaining peace in the region. Gradually, objectives of economic co-operation became more prominent in ASEAN and with the development of closer economic relations, the need for more of a legal framework to govern these relations grew.

The initial organisational structure of ASEAN was loose and ASEAN avoided the trappings of a strong regional organisation. The creation of the ASEAN Secretariat in 1976 to act as a central administrative organ to promote greater efficiency in the coordination of the ASEAN organs and more effective implementation of ASEAN projects and activities was an important step in the evolution of ASEAN as a legal entity. In January 1993, the ASEAN Secretariat was restructured and vested with an expanded set of functions and responsibilities to initiate, advise, coordinate and implement ASEAN activities. Although the members have not given any real decision-making powers to the Secretariat, the evolution of the Secretariat indicates the maturation of ASEAN as an entity and may be considered as an initial step in formalising the legal personality of ASEAN as a corporate entity governed by its own constitution and by-laws.²¹

However, unlike the European Community, ASEAN in its present form does not have any legal controls over the regional economy. Although there has been a slow movement towards more structure in the institutions and organisation of ASEAN as an entity, the emergence of a strong ASEAN identity has been constrained by a preoccupation with consensus and the mistrust of a strong ASEAN identity with powers paralleling those of the member states in some areas.²²

The increasing role of law in regulating the economic cooperation of the members of ASEAN can be seen by looking at developments in ASEAN in light of the elements of a legal system set out above.

A. Rules

ASEAN has made remarkable strides in economic co-operation since its inception. Starting in the late 1980s and early 1990s, ASEAN leaders began to develop more ambitious means of economic co-operation, which were increasingly framed in terms of international agreements among the ASEAN members.²³ These initiatives are indicative of the intentions of the ASEAN leaders to create a unified marketplace in a wider Southeast Asian region, and the need for more of a binding legal framework to govern the relationships resulting from such a development.²⁴

¹⁹ Ross Garnaut, "ASEAN and the Regionalization and Globalization of World Trade" (1998) 14 ASEAN Economic Bulletin 215.

²⁰ Joint Communique, 1st Ministerial Meeting, Bangkok, 8 August 1967—The ASEAN Declaration, 1967 reproduced in Paul J. Davidson, *Trading Arrangements in the Pacific Rim* (New York—London—Rome: Oceana Publications, Inc., 1995) (hereafter *TAPR*), Document I.B.2.

²¹ Jose D. Ingles, "Problems and Progress in Regional Integration: The Case of ASEAN" in R.P. Amand & P.V.-Quisumbing, eds., *ASEAN Identity, Development and Culture* (Manila: U.P. Law Center and East-West Center Culture Learning Institute, 1981) 217 at 224.

²² Vitit Muntarbhorn, "ASEAN and the Treaty-Making Process" in *ASEAN Economic Cooperation for the 1990s* (Philippines: Philippine Institute for Development Studies and ASEAN Secretariat, 1992) 106 at 116. See also Joseph Sedfrey S. Santiago, "A Postscript to AFTAs False Start—The Loss of Sovereignty Issue" (1995) 12 ASEAN Economic Bulletin 18.

²³ For a fuller discussion of this development, see Paul J. Davidson, *supra* note 18.

²⁴ Rodolfo C. Severino, former Secretary-General of ASEAN, "The ASEAN Way and the Rule of Law" (Address at the International Law Conference on ASEAN Legal Systems and Regional Integration, Kuala Lumpur, 3 September 2001), online: ASEANofficial website <http://www.aseansec.org/newdata/asean_way.htm>. ("This may be an indication of ASEANs growing realization that closer regional economic integration requires

The rationalisation of the framework for economic cooperation, and the development of rules to set the guidelines within which this cooperation can take place is now occurring within the context of The Framework Agreement for Enhancing ASEAN Economic Cooperation.²⁵ Although it is a framework agreement and does not set out any details for implementing and supervising economic cooperation in the region, it is important as it sets out a commitment to cooperate in a number of areas and envisages a number of agreements arising from this Framework Agreement. The Framework Agreement outlines potential cooperation in a variety of fields, such as industrial investment, finance, agriculture and forestry, transportation, communications, technology transfer, tourism, and human resources. Agreements in more precise and specific terms have been enacted by the ASEAN states in a number of areas to implement the mandate of the Framework Agreement and agreements in other areas are being considered.

The following is a brief look at some of these developments to illustrate this movement to more detailed agreements. A full discussion of these developments is beyond the scope of this paper.²⁶ Article 2, Part A of The Framework Agreement deals with cooperation in trade. The most significant step towards enhancing cooperation in trade in ASEAN was the decision to establish the ASEAN Free Trade Area (AFTA), and this part of the Framework Agreement sets out the agreement of the Member States to establish and participate in the AFTA. This part of the agreement has been implemented primarily through the Common Effective Preferential Tariff (C.E.P.T.) Agreement.²⁷

... the ASEAN Free Trade Area agenda is undoubtedly the most ambitious, and corollarily (sic), the most demanding [among all intra-ASEAN economic co-operation programmes devised by the ASEAN member states]. Imposing *relatively more specific and strict obligations* on the parties thereto, the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area in fact ended ASEAN's 25-year self imposed prohibition against "*binding* economic targets and schedules."²⁸ (Emphasis added)

It was recognised that the AFTA scheme alone is not viable unless the liberalisation process is supplemented by a comprehensive AFTA-Plus programme which goes beyond trade liberalisation measures.²⁹ Thus, ASEAN has also adopted a number of measures aimed at other aspects of economic cooperation. These measures have also necessitated rules which have contributed to the evolving legal framework. In particular, the members of ASEAN place a high emphasis on attracting Foreign Direct Investment (F.D.I.) to ASEAN and are committed to providing and maintaining a highly competitive and conducive investment environment. The members of ASEAN have entered into a number of agreements to render investment in ASEAN more attractive. Since the Fifth ASEAN Summit, held in December 1995 in Bangkok, ASEAN cooperation in the area of investment has made significant advances. One notable development is the progress made towards realising the decision of the ASEAN

basing it on binding legal foundations if integration is to be stable, credible and effective. The commitments undertaken must be clear, firm and enforceable, and those making them cannot lightly back out of them.")

²⁵ Signed in Singapore, 28 January 1992. (TAPR Document I.B.8)

²⁶ For a fuller discussion, see Paul J. Davidson *supra* note 18.

²⁷ Agreement on the Common Effective Preferential Tariff (C.E.P.T.) Scheme for the ASEAN Free Trade Area (AFTA), signed in Singapore, 28 January 1992 (TAPR Document I.B.8). Andrew Harding, "Strengthening ASEAN Integration: Lessons from the European Unions Rule of Law", (Paper presented at a conference on the Legal Aspects of Regional Integration: the EU and ASEAN Compared, Centre for European Studies, Chulalongkorn University, 19 February 2001): ("the point of interest here is in the iron framework for tariff reduction; this is not just warm words as previously, as AFTA is essentially self-executing, There are therefore signs here of a more rigorous and legalistic approach emerging in the area of ASEAN economic law.")

²⁸ Santiago, *supra* note 22.

²⁹ Suthiphand Chirathivat, "ASEAN Economic Integration with the World through AFTA" in Joseph Tan, ed., *AFTA in the Changing International Economy* (Singapore: ISEAS, 1996) at 29-30.

Heads of Government to establish the ASEAN Investment Area (AIA),³⁰ under which each country legally undertakes to open up its industrial sector to investments from other ASEAN countries and accord national treatment to such investors. The objective of the AIA is to help ASEAN attract greater and sustainable levels of F.D.I. flows into and within the region. This is to be achieved by undertaking collective measures that would enhance the attractiveness, competitiveness and the complementarity of the region for F.D.I. A ministerial-level ASEAN Investment Area Council has been established to oversee the implementation of the Framework Agreement. The Council is assisted by the ASEAN Coordinating Committee on Investment. This delegation is a further example of the legalisation³¹ of ASEAN. At the Sixth Summit in Hanoi, the Heads of State and Government of ASEAN adopted the Hanoi Plan of Action.³² In this plan, ASEAN members agreed to implement the three programmes of the AIA (Cooperation and Facilitation, Promotion and Awareness, and Liberalisation Programme) through individual and collective action plans and within agreed schedules. Proponents are hopeful that the signing of this agreement will assure investors of ASEAN's firm resolve to revitalise the region and inspire confidence among investors. The complexity of the schemes and the need for detailed rules again demonstrates a move to greater legalisation.

In addition to the measures for cooperation in trade in goods and in investment, ASEAN members are moving ahead with agreements in a number of other areas. For example, ASEAN members have agreed to open up trade in services to one another.³³ In order to provide a framework for the protection of intellectual property rights (I.P.R.) within ASEAN, the ASEAN countries agreed to the ASEAN Framework Agreement on Intellectual Property Co-operation in December 1995.³⁴ Other agreements have also been initiated. A Secretary-General of ASEAN has stated:

ASEAN should explore the possibility of undertaking more *legally binding* agreements to promote cooperation in various fields, such as economic dispute settlement, the environment, and transnational crime. As ASEAN economies integrate and as more serious transnational problems emerge more *binding agreements* rather than informal understandings may be needed to manage the integrated economy and the problems that transcend national boundaries.³⁵ (Emphasis added)

As shown above, as the members of ASEAN moved toward closer economic cooperation, more detailed rules to regulate this cooperation have evolved, and further rules are needed. These agreements are legally binding and are forming a legal framework for economic cooperation among the ASEAN members.

B. *Dispute Settlement*

As discussed above, the second element of a legal framework is a mechanism for interpreting the rules and settling disputes which arise among the members of the community. A further indication that a legal framework is evolving within ASEAN would be the move to a more formalised dispute settlement mechanism. In addressing this question, one must keep in

³⁰ The Framework Agreement on the ASEAN Investment Area was signed on 8 October 1998 in Manila and entered into force on 21 June 1999 (TAPR Document I.B.12.f).

³¹ See text above of note 15.

³² Hanoi Declaration of 1998, 16 December 1998, and Hanoi Plan of Action. (TAPR Document I.B.5.i and Document I.B.5.j.)

³³ The ASEAN Framework Agreement on Services was signed during the Fifth ASEAN Summit in December 1995 in Bangkok (TAPR Document I.B.7.l).

³⁴ Signed in Bangkok, 15 December 1995 (TAPR Document I.B.10.a).

³⁵ Report of the Secretary-General of ASEAN to the 32nd ASEAN Ministerial Meeting, Singapore, 22-24 July 1999.

mind the nature of ASEAN and the historical context within which economic cooperation within ASEAN has arisen. As mentioned earlier, ASEAN relations in the early formative years were very much shaped by political and ideological undercurrents and economic cooperation was very much in the background. Even in the mid-seventies and eighties when various ASEAN initiatives were taken to promote greater economic cooperation there was still a strong desire to preserve the individuality of the member states and to recognise their national interests. It is not surprising therefore that where differences have arisen in the past, they have tended to be resolved through political and diplomatic means rather than through judicial or quasi-judicial organs.

The first mention of general provisions for settlement of disputes was not made until almost ten years after the signing of the Bangkok Declaration which established ASEAN in 1967. It was not until the Declaration of ASEAN Concord and the Treaty of Amity and Cooperation were signed in Bali on 24 February 1976,³⁶ that the ASEAN member states adopted the settlement of intra-regional disputes by peaceful means as soon as possible as part of the programme of action and as a framework for ASEAN cooperation. The treaty has been called a benchmark in ASEAN development as it marks a maturation stage for the Association, and by providing a framework for settling disputes the members acknowledged the existence of disruptive forces within the region which, if not dealt with, could erode whatever gains had been achieved thus far.

They had gone past the stage of building and nursing the fragile foundations of the early stages and in the now familiar "step-by-step ASEAN approach" to region-building they set out to shape the framework for peaceful solutions to outstanding conflicts. Thus, as an event the Treaty might well represent one of the major achievements of ASEAN.³⁷

This mechanism has remained unused. However, the High Contracting Parties, at their meeting held on 23 July 2001 in Hanoi, adopted Rules of Procedure of the High Council.³⁸ This represents a further step in the juridicisation of ASEAN. Although these provisions are meant to deal with political disputes and are not really meant to provide a mechanism for resolving economic disputes, they are of interest in examining the development of the legal framework for economic cooperation as they indicate a general trend to a more legalistic, rules-based framework for governing relations among members of ASEAN.

As further developments in economic cooperation took place, mechanisms to deal with the possibility of economic disputes were developed. For example, earlier agreements dealing with economic co-operation include the Agreement to establish a Preferential Trade Area (P.T.A.)³⁹ and the Agreement to Establish ASEAN Industrial Projects (AIP).⁴⁰ Both contained provisions for settling disputes which might arise in their implementation. The Agreement for the Promotion and Protection of Investments⁴¹ also contained provisions dealing with the settlement of disputes.

³⁶ Signed in Bali, 24 February 1976 (*TAPR Document I.B.3*).

³⁷ Purificacion Valera-Quisumbing, "Can ASEAN Forge a Viable Legal Regime for Regional Cooperation?", (1981) 56 *Philippine L.J.* 209 at 221.

³⁸ Rules of Procedure of the High Council of the Treaty of Amity and Cooperation in Southeast Asia, adopted in Hanoi, 23 July 2001, (*TAPR Document I.B.3.j*).

³⁹ Agreement on ASEAN Preferential Trading Arrangements (P.T.A.), Manila, 24 February 1977 (*TAPR Document I.B.7.a*).

⁴⁰ Basic Agreement on ASEAN Industrial Projects, Kuala Lumpur, 6 March 1980 (*TAPR Document I.B.7.d*).

⁴¹ Agreement among the Governments of Brunei Darussalam, The Republic of Indonesia, Malaysia, The Republic of the Philippines, The Republic of Singapore, and The Kingdom of Thailand for the Promotion and Protection of Investments, Manila, 15 December 1987 (*TAPR Document I.B.12.a*).

Article 9 of the Framework Agreement on Enhancing ASEAN Economic Cooperation addresses the question of dispute settlement and provides that:

Any differences between the Member States concerning the interpretation or application of this Agreement or any arrangements arising therefrom shall, as far as possible, be settled amicably between the parties. Whenever necessary, an appropriate body shall be designated for the settlement of disputes.

The first mechanisms dealing with dispute settlement pursuant to this provision drew from the dispute settlement provisions of the original General Agreement on Tariffs and Trade (GATT).⁴² As has been detailed elsewhere,⁴³ there has been considerable evolution of the GATT process, and within ASEAN, the need for a more efficient, detailed dispute settlement was also becoming apparent as ASEAN expanded its membership and as the level of economic cooperation deepened. At the Bangkok Summit in December 1995, the Heads of State and Government of ASEAN agreed that ASEAN would adopt a General Dispute Settlement Mechanism (D.S.M.) which will apply to all disputes arising from ASEAN economic agreements.⁴⁴ The Protocol on Dispute Settlement Mechanism was entered into on 20 November 1996 in Manilla.⁴⁵ This Protocol is patterned after the WTO Dispute Settlement Understanding, and is applicable to all past and future ASEAN economic agreements, including the CEPT Agreement. As with the new WTO dispute settlement mechanism, the new D.S.M. provides much more detailed procedures for dispute settlement and, as the development of the WTO dispute settlement mechanism is indicative of more juridicisation⁴⁶ of the WTO, development of the dispute settlement mechanism in ASEAN is indicative of the evolving legal framework in ASEAN.⁴⁷ Although the ASEAN mechanism is less legalistic in nature than the WTO dispute settlement mechanism and leaves much discretion to its political organs, its establishment is a testament to the growing legalism in the field of international economic cooperation and is a promising development towards a more transparent approach to dispute settlement in the region.

An important new element introduced by the D.S.M. is that rulings by the Senior Economic Officials Meeting (SEOM), the body to rule on disputes, is by simple majority and not by consensus. Hence the ASEAN D.S.M. represents the first formal use of non-consensual decision making in ASEAN.⁴⁸ Under the Protocol, the ASEAN Economic Ministers serve as the final appellate body and their decisions on appeals is to be by simple majority. The decision is to be final and binding on all parties to the dispute.

Further developments of the D.S.M. are taking place. As part of the move to an ASEAN Economic Community, the Leaders of ASEAN have stated that,

[I]n moving towards the ASEAN Economic Community, ASEAN shall, inter alia strengthen the institutional mechanisms of ASEAN, including the improvement of the existing ASEAN Dispute Settlement Mechanism to ensure expeditious and *legally binding resolution* of any economic disputes.⁴⁹ (Emphasis added)

⁴² For a fuller discussion, see Paul J. Davidson, *supra* note 18, chapter 7.

⁴³ See, e.g., Jackson *supra* note 17 and Trebilcock & Howse *supra* note 17.

⁴⁴ Bangkok Summit Declaration of 1995, Bangkok, 15 December 1995, para.8 (TAPR Document I.B.5.e).

⁴⁵ The Protocol on Dispute Settlement Mechanism, Manilla, 20 November 1996 (TAPR Document I.B.7.o).

⁴⁶ *Supra* note 5.

⁴⁷ See Paul J. Davidson, "Dispute Settlement in ASEAN" (TAPR Document I.C.4) for a more detailed discussion of the new D.S.M.

⁴⁸ APEC Secretariat, Economic Committee, *The Impact of Subregionalism in APEC*, (Singapore: APEC Secretariat, 1997).

⁴⁹ Declaration of ASEAN Concord II (Bali Concord II), Bali, Indonesia, 7 October 2003. (TAPR Document I.B.3.k).

The recommendations of the High Level Task Force on ASEAN Economic Integration which are annexed to the Declaration include the following:

By end-2004, establish an effective system to ensure expeditious resolution of any disputes. The new system should provide for adjudicatory mechanisms as follows:
Enhanced ASEAN DSM to make it more practical.

(Adjudication B amend the ASEAN DSM to ensure expeditious and legally binding decision in resolving trade disputes.)⁵⁰ (Emphasis added)

As these developments demonstrate, the member states of ASEAN seem to be moving towards more formalised dispute mechanisms.⁵¹ This is in keeping with the development of a more legal framework to regulate economic activity *inter se*, and in keeping with the general international trend towards legalism in regulating international economic relations.⁵²

V. THE DEGREE OF LEGALISATION

In considering the legalisation of a framework, in addition to determining the existence of the elements of a legal framework, it is also necessary to consider the degree of legalisation. As noted above,⁵³ legalisation is a particular form of institutionalisation characterised by three components: obligation, precision, and delegation, and each of these three dimensions is variable. Legalisation is a continuum ranging from hard legalisation, where all three dimensions are present to a high degree, through multiple forms of softer legalisation, where the components may be present to a lesser degree, to the complete absence of the components (absence of legalisation).

Let us first consider the *obligation* dimension as applied to ASEAN. *Obligation* means that states or other actors are bound by a rule or commitment or by a set of rules or commitments. Specifically, it means that they are *legally* bound by a rule or commitment.⁵⁴ The agreements entered into which define the framework for their economic cooperation are increasingly entered into under terms which indicate an intention to be bound by the rules or commitments set out. Even the ASEAN-x formula, while it gives some flexibility to the framework, in that x is excluded for the time being from the obligations, indicates that the other members are to be bound.

The rules which are being developed are also becoming more *precise* in unambiguously defining the conduct they require, authorise, or proscribe. Although the Framework Agreement for Enhancing ASEAN Economic Cooperation does not set out any details for implementing and supervising economic cooperation in the region, it is important in that it sets out an agreement to cooperate in a number of areas and envisages a number of agreements arising from the Framework Agreement. Agreements in more precise and specific terms have been enacted by the ASEAN states in a number of areas to implement the mandate of the Framework Agreement and agreements in other areas are being considered.

The third dimension of legalisation is *delegation*. *Delegation* means that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and

⁵⁰ *Ibid.*, Annex, para.14(v).

⁵¹ In 1996, the ASEAN economic ministers decided to set up a disputesettlement mechanism that would cover disagreements on the AFTA and other significant ASEAN economic agreements, an important step toward a more rules-based regime.: Severino, Rodolfo C., former Secretary-General of ASEAN, Asia Policy Lecture: What ASEAN is and what it stands for, The Research Institute for Asia and the Pacific, University of Sydney, Australia, 22 Oct. 1998.

⁵² Jennifer L. Haworth & Mark D. Nguyen, Law and Agreement in APEC, (TAPR Document II.C.10). (“the ASEAN mechanism is less legalistic in nature than the WTO dispute settlement mechanism and leaves much discretion to its political organs. However, its establishment is a testament to the growing legalism in the fora of international commerce, especially in a region that has long resisted such efforts.”)

⁵³ See discussion at above, *supra* notes 15-17.

⁵⁴ Abbott *et al.*, *supra* note 14 at 401.

(possibly) to make further rules.⁵⁵ This dimension is one in which the framework has been slowest to legalise. There are two aspects to this dimension: (1) delegating the authority to interpret/apply the rules and resolve disputes; and (2) delegating the authority to make further rules.

With regard to the first aspect, the development of the dispute settlement mechanism in ASEAN has been discussed. As indicated, there has been an evolution of the mechanism to become more legalised.

With regard to the authority to make further rules, ASEAN does not have the institutional apparatus of, for example, the European Union. It is in this respect, that ASEAN still accords with the ASEAN way. However, this does not detract from the legality of the framework. The international legal framework differs from a domestic legal framework in that, in most cases, there is no delegation of rule-making authority to a separate body. The states themselves retain the rule-making authority, and in many cases, rules only develop by consensus. Even within the WTO, the reason for the slow development of that framework has largely to do with the informal requirement for consensus within that institution. The ASEAN-x principle provides some flexibility to the system by enabling those members that are able to agree, to agree, while allowing those members who are not yet ready to commit to certain obligations to agree in principle while at the same time not being bound until they are ready. This may allow the framework to develop faster than it would otherwise.⁵⁶ Although there may be some difficulty with uniformity within the framework, the framework does satisfy the requirements of certainty and predictability which are two of the main objectives of a legal framework.

VI. CONCLUSION—TOWARDS A MORE LEGALISTIC APPROACH?

Although legalisation is often cast as a global phenomenon, institutions that display rules with high levels of obligation and precision and that delegate rule interpretation and enforcement to third parties are heavily concentrated in West Europe and North America.

If Europe and North America provide an implicit benchmark for high legalization, the Asia-Pacific region offers an important example of low legalization and possibly an explicit aversion to legalization those regional institutions constructed with significant Asian participation remained highly informal and explicitly rejected legalization in their design.⁵⁷

However, this may be changing. As economic development within ASEAN has evolved and matured, the framework for regulating economic cooperation and integration has become much more legalised. As ASEAN further develops and matures, there may be a need for more institutionalisation of its work and the dependence on cultural and traditional ways may further recede.⁵⁸ If economic cooperation is to have substance and real effect, agreements must be binding.⁵⁹

Much of the economic development in ASEAN has been based on cooperation rather than integration through law.⁶⁰ However, ASEAN has made a leap from cooperation

⁵⁵ *Ibid.*

⁵⁶ While not binding on all the members of the framework, the rules are a part of the framework and binding on certain parties. They are also indicative of the trends in the framework and may also serve a soft law effect.

⁵⁷ Miles Kahler, "Legalization as Strategy: The Asia-Pacific Case" (2000) 54 (3) *Intl Organization* 549 at 549.

⁵⁸ Severino, *supra* note 24, ("it is about time that people looked upon ASEAN in terms of legal obligations and norms I thus envision ASEAN as evolving into a more rules-based association.")

⁵⁹ *Ibid.*

⁶⁰ Harding, *supra* note 27, ("So far ASEAN has done without too much formality: it is clearly based on *co-operation* rather than integration through law.")

to integration.⁶¹ As ASEAN moves into further integration, we can expect an expanded number of binding undertakings.⁶² As levels of integration grow, the binding character of liberalising agreements becomes more important and as levels of obligation and precision increase, delegation of rule interpretation and dispute adjudication is often observed.⁶³

H.E. Rodolfo C. Severino, Jr., former ASEAN Secretary-General, has pointed out that the financial crisis had convinced East Asian countries that they must move away from a “relationship-based” way of doing business and creating wealth to one that is more “rules-based” and market-driven.⁶⁴ Obviously, the AFTA commitments have to be legally binding if they are to be credible both to the member-states themselves and to the business sector.⁶⁵

As indicated, a legal framework to regulate economic relations among members of ASEAN is developing. ASEAN still has further to go in developing this framework⁶⁶ and as ASEAN moves into further integration, an expanded number of binding undertakings will be required. The evolution has been from a loose organisation based on the ASEAN way to a more legalistic framework based on rules and a dispute settlement mechanism. This development will continue.

⁶¹ Rodolfo C. Severino, former Secretary-General of ASEAN, “Regional Economic Integration: The Challenges Ahead” (Presented at the Second Regional Workshop on Beyond AFTA: Facing the Challenge of Closer Economic Integration, Bangkok, 2 October 2000.

⁶² Severino, *supra* note 24.

⁶³ Kahler, *supra* note 57 at 550. This is one of several competing explanations for legalisation in Pacific regional institutions explored by Kahler.

⁶⁴ Rodolfo C. Severino, former Secretary-General of ASEAN, “Reforms and Integration in East Asia Could Strengthen Regional Stability” (14 August 1999), online: ASEAN official website <<http://www.aseansec.org/golek.html>>.

⁶⁵ Severino, *supra* note 24. See also Cari Produk Hukum, “ASEAN Legal Cooperation in the Framework of ASEAN Integration: Strength, Weaknesses, Opportunity, & Threat (Swot) Analysis” (5 March 2004) online: The Center for Law Information <<http://www.theceli.com/berita/detail.php?type'a&news71>>, (“the legal cooperation among ASEAN members will provide a better assurance for international economic partners and investors, thus, producing more economic benefits to the ASEAN member as a whole.”)

⁶⁶ Report of the Secretary-general of ASEAN to the 32nd ASEAN Ministerial Meeting, Singapore, 22-24 July 1999: “ASEAN should explore the possibility of undertaking more legally binding agreements to promote cooperation in various fields, such as economic dispute settlement, the environment, and transnational crime. As ASEAN economies integrate and as more serious transnational problems emerge more binding agreements rather than informal understandings may be needed to manage the integrated economy and the problems that transcend national boundaries.”