

## Salient Aspects and Issues concerning AFTA

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*Having been created amidst communist expansion, racial conflicts, and territorial disputes between its members, and given that their levels of development were hardly different from each other, the objective of ASEAN to eradicate poverty at first was viewed as an unattainable one. Yet ASEAN prospered beyond expectation for two decades on account of foreign investments. The economic boom in ASEAN countries would have persisted for several years more, if it had not been for the financial crisis in Thailand only shortly after the advent of NAFTA that largely diverted the flow of investment from the ASEAN region. Both of these events - NAFTA and the economic crisis - have badly compromised the economic growth of the ASEAN region. AFTA<sup>1</sup> was designed to counter such adverse impacts of NAFTA, and to revitalize the *raison d'être* for ASEAN, which paradoxically became diluted following the establishment of peace in Cambodia. This article recounts the advent of AFTA and analyzes in depth the essence of the CEPT scheme, giving a full account of its subsequent development, and stressing the legal problems that impeded its integral implementation. Though target dates for a comprehensive compliance with the AFTA project have not yet been met for a number of products, AFTA has not totally missed its rendez-vous with the CEPT scheme and has even accelerated the rhythm of its application and envisaged an even deeper integration under the ASEAN Vision 2020.*

### Preface

In view of the fact that the author's articles on AFTA were written

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<sup>1</sup> ASEAN Free Trade Area

and published a long time ago<sup>2</sup> and that the circumstances have since radically changed in many areas, and also given that for technical reasons the publication of the first edition of one of these articles was infested with numerous clerical errors, rendering many of its essential parts incomprehensible, the author has, consequently, decided to re-edit this article in order to rectify the errors and at the same time update it by taking into account new substantial variants such as the promulgation of ASEAN Vision 2020,<sup>3</sup> the Hanoi Plan of Action (HPA),<sup>4</sup> the creation of the WTO<sup>5</sup> as a partial substitution to the GATT and particularly the monetary crisis that erupted in 1997-1998 in ASEAN<sup>6</sup> countries.

To ensure the clarity of the subject matter, this present study will be dealt with in two parts, i.e., one on the creation of AFTA and the other on its implementation.

## **Part 1: The Creation of AFTA**

### **1. Economic cooperation in ASEAN before the creation of AFTA<sup>7</sup>**

AFTA was created under the framework of ASEAN, which is itself

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<sup>2</sup> Cf. *Inter alia*, Jaturon Thirawat (1993) Some observations on AFTA. *Thammasat Law Review*, no.1, pp.55-64, translated into Japanese and published by Nihon Keizai Shimbun (1993) in Global Thinkers, Challenge Orthodox: Japanese Views of the World's Economy and Political Situations, pp.229-248.

<sup>3</sup> At Kuala Lumpur on December 15<sup>th</sup>, 1997. (For the text of this promulgation, cf. <http://www.rwgmechanism.com/vision.html>)

<sup>4</sup> Adopted by the ASEAN Heads of States and Governments in Hanoi on December 15<sup>th</sup>, 1998. (For the integral text of this document, cf. [http://www.aseansec.org/view.asp?file=/summit/6th/prg\\_hpoa.html](http://www.aseansec.org/view.asp?file=/summit/6th/prg_hpoa.html))

<sup>5</sup> World Trade Organization.

<sup>6</sup> Association of South East Asian Nations, comprising 10 Southeast Asian countries, i.e. Brunei, Cambodia (the newest member, joining ASEAN on April 30, 1999), Indonesia, Laos, Malaysia, Myanmar (formerly Burma), the Philippines, Singapore, Thailand and Vietnam.

<sup>7</sup> For an overview, cf. Sompong Sucharitkul (1991) ASEAN partnership and cooperation with non-ASEAN partners. *Singapore Journal of Legal Studies*, p.562-594.

an international organization<sup>8</sup> whose objective is to ensure ASEAN integration with a view to promoting and accelerating the economic development of the Southeast Asian region. No matter what its official objectives are, practically, until the launching of the AFTA project, cooperation in this domain had not progressed as fast as initially anticipated due to a number of factors, which will be analyzed hereinafter. Before the inception of AFTA, ASEAN economic cooperation and achievements could be divided into two major phases.

**The first phase** was during ASEAN's first ten years of existence, from 1967 to the first Summit in 1976. Although ASEAN conferences and meetings were frequently held, the only really tangible good coming out of them was that the leaderships and high-ranking officials of member countries got to know each other and became friends. During this period, very few of the initiatives and projects for the promotion of economic cooperation were concretely implemented and followed up.<sup>9</sup>

**The second phase** from 1976 to 1997,<sup>10</sup> was the period of active cooperation and the economic boom in ASEAN, during which formal agreements for economic cooperation among member States, focusing primarily on creating necessary institutions for economic cooperation, were effectively implemented. The ASEAN Preferential Trade Arrangement (PTA) and three industrial cooperation agreements were concluded and

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<sup>8</sup> With regard to the international juridical personality of ASEAN, there used to be doubt as to whether ASEAN was an international organization, given that the Bangkok Declaration, which is its constituent instrument, is silent on this question. However, this doubt has already been dissipated by several arguments which are expounded in detail in the Ph.D. thesis (1984) of the author: the Ph.D. thesis of Dr. Anne-Laure Nguyen Tran Hoaung, Associate Lecturer of International Law at the University of Paris I (2001); and LL.M. thesis of Dr. Lawan Thanad-Silpakul (1986).

<sup>9</sup> Seiji Naya and Pearl Imada, The long and winding road ahead for AFTA. In: *AFTA. The Way Ahead*, edited by Pearl Imada and Seiji Naya, Institute of Southeast Asian Studies, Singapore, 1992, p.55.

<sup>10</sup> Prior to the regional and global financial crisis.

periodically reviewed and improved. Very few of these agreements, however, succeeded in the promotion in real terms of intra-ASEAN trade and investments.<sup>11</sup> Their efforts were, nonetheless, not in vain, given that they have contributed to a large extent to the flamboyant success in extra-ASEAN trade and investments, which has accounted for the two consecutive decades of the economic boom in ASEAN, causing some ASEAN countries to be categorized as near developed countries, one of which was even flattered as having become a newly developed country.<sup>12</sup> As a matter of fact, although a number of economic cooperation projects under the framework of ASEAN did exist, there were many elements which have constrained efforts at cooperation in the past, on account of which ASEAN member countries have been discouraged by some negative factors, as follows:

1) The inadequacy of political will to push regional economic integration further was the most vital factor that impeded genuine economic cooperation among ASEAN countries. Government leaders were more preoccupied with the cost effectiveness of their cooperation than the potential benefits to derive therefrom, hence the reluctance of some member countries to push further for a more extensive cooperation.<sup>13</sup> Government leaders gave priority to the problems of peace and stability in the region at that moment in the wake of the menace of communist invasions, believing that national and regional security could be better guaranteed through collective position and policy in foreign affairs, thus leaving economic cooperation to only a perfunctory role.<sup>14</sup>

2) ASEAN countries have similar production structures and their

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<sup>11</sup> Paul J. Davidson (1997) *The legal framework for international economic relations*. ASEAN and Canada, Institute of Southeast Asian Studies, Singapore, pp.66-77.

<sup>12</sup> This country is Singapore.

<sup>13</sup> Narongchai Akrasanee and David Stifel, The political economy of the ASEAN Free Trade Area, *supra note* 10, p.30-31.

<sup>14</sup> *Ibid.*, p.28.

exports compete with, instead of being complementary to, each other in the same export markets. In spite of the lack of complementarity between the ASEAN economies, natural resources and agricultural goods continue to account for the large shares of ASEAN countries' exports in their trade with non-ASEAN industrialized and newly industrialized countries.<sup>15</sup>

3) The success of economic cooperation was hampered and restricted by a time-consuming approval process and red tape in the Administration. The frustrating bureaucracy in the procedures, both at the ASEAN and the national levels, to secure approvals often caused an excessively undue delay, thus weakening the attractiveness of several ASEAN schemes. Mechanisms designed to develop and promote economic cooperation could therefore progress only as fast as the slowest member country on account of ASEAN's consensual decision-making process.<sup>16</sup>

4) There has often been a lack of compliance with the commitment to implement these projects. Initiatives were not always executed and followed up with adequate efforts, and information was not diffused to all parties in a timely manner that enabled them to fully benefit from the cooperation.<sup>17</sup>

5) The absence of the private sector's involvement<sup>18</sup> may, perhaps, be regarded as a shortfall that, to a certain extent, constitutes a drawback in the realization of many ASEAN projects.

In spite of such negative aspects, there have been both internal and external compelling factors leading to the creation of AFTA.

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<sup>15</sup> *Ibid.*, p. 31 and Paul J. Davidson, *supra note* 12, p.69.

<sup>16</sup> *Ibid.*, pp.29-30.

<sup>17</sup> *Ibid.*, p.30.

<sup>18</sup> *Ibid.*,p.30.

## 2. Factors contributing to the creation of AFTA

### 2.1 Internal factors

a) Necessity and desire to maintain the existence and survival of ASEAN itself in the post-Cold War era.

While common foreign policy interests, especially peace in Indochina, have, since the foundation of ASEAN, constituted a unifying ingredient to ASEAN, the absence of external threat on account of the termination of the Cold War in Southeast Asia, ensuing from the dissolution of the Soviet Union, has created a doubtful atmosphere among ASEAN countries as to whether ASEAN still has a reason for being (*raison d'être*).<sup>19</sup> Its usefulness has thus become questionable. After all, when the need to curb the communist expansion in the region had subsided, it was to be feared that ASEAN might therefore lose its former *raison d'être* and the conflicts among the ASEAN States might not be brushed aside as in the past. In light of these considerations, ASEAN member countries realized that to maintain ASEAN, it was necessary to continue and further their efforts in regional cooperation under the framework of this regional grouping, which they perceive as the most appropriate instrument whereby they can consolidate their bargaining power and face the trade war at the moment. The creation of AFTA is thus not only timely but also an excellent proof of such a conviction.

b) Indispensable exercise for all ASEAN countries in preserving and upholding their trade competitiveness and in adapting themselves to the new trend and environment of world trade law.

Given that seven out of ten ASEAN member countries are now members of the WTO (only the Lao PDR, Myanmar and Kampuchea are not yet WTO members) and as such, have to comply with WTO's rules and regulations, especially the cardinal principle of MFN and the obligations to eliminate various trade barriers, the reduction of trade barriers in AFTA

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<sup>19</sup> Jaturon Thirawat, *supra note* 3, p.58.

is seen as a first step in the process of reducing tariff and non-tariff barriers. This gradualist approach allows domestic industries to be subject to a greater competition from within ASEAN before being exposed to the rigor of the world market. Although certain inefficient industries will fold under greater international competition, leaders of ASEAN countries are confident that the economies of ASEAN have the capacity to undergo adjustments and benefit therefrom in the long run.<sup>20</sup> Domestic suppliers will not face the shock of adjustment to a stronger competition with suppliers from outside because they will already have been more or less accustomed to the rules and practice of competition under AFTA.<sup>21</sup>

c) Usefulness for exploitation of new sources of natural resources and markets in the region.

Southeast Asia is a region of abundant precious natural resources that will benefit the industrialization of ASEAN member countries and contribute considerably to the economic independence of the region *vis-à-vis* other countries.

d) The supplementary reason of its foundation, i.e. the change of policy due to the gains from the adaptation.

The inward-looking economic policies of several member countries in the past have accounted for the weakening of the economic structures of ASEAN countries. Hence, until recently manufactured goods represented only a small part of total intra-ASEAN exports. But the rapid industrialization which took place in the 1980s and 1990s in all member

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<sup>20</sup> Suthiphand Chirathivat, ASEAN economic integration with the world through AFTA. In: Joseph L. H. Tan (1996) *AFTA in the Changing International Economy*, Institute of Southeast Asian Studies, Singapore, pp.27-30; cf. Narongchai Akrasanee and David Stifel, The political economy of the ASEAN Free Trade Area. op.cit. p. 33, 36.

<sup>21</sup> Rolf J. Langhammer, Shaping factor and business conditions in the post-fourth ASEAN summit period. *AFTA. The Way Ahead*, *supra note 7*, p.3; Martin Rudner (1992) Asean, Asia Pacific economic co-operation, and hemispheric free trade for the Americas. *World Competition Law and Economies Review*, 16(2), p.137-143.

countries has caused the percentage of manufactured goods exports to rise drastically, thus increasing intra-ASEAN trade in industrial and manufactured products in the region, and rendering their international trade between the ASEAN nations more complementary than competitive.<sup>22</sup>

ASEAN was compelled by external circumstances in the 1980s to reform its economies by generally liberalizing its international trade policies and adopting an outward-oriented industrialization strategy so as to strengthen the economies in ASEAN. The gains from such cooperation have thus substantively increased. The improved competitiveness stemming from these policies has instilled a sense of confidence in ASEAN national leaders. Domestic industries have gained significantly from the international competition and trade, and government officials are resolved to enhance such gains.<sup>23</sup>

## 2.2 External factors

### a) Adverse impacts from other trading blocs: trade diversion.

The development of economic blocs in Europe and North America has heightened the apprehensions of leaders in the developing world and has been a major cause of concern in ASEAN.<sup>24</sup> In effect, large economic groupings taking shape in the world present a challenge to ASEAN. The inclusion of Mexico and possibly other developing Latin American countries<sup>25</sup> in NAFTA in the future has diverted trade and investment away from ASEAN. The trade diversion resulting from the creation of these trading blocs has prompted ASEAN to take more cognizance of the need for ballast to overcome the loss of market share in trade with these

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<sup>22</sup> Seiji Naya and Pearl Imada, *op.cit.*, pp.55-56.

<sup>23</sup> Narongchai Akrasanee and David Stifel, *op.cit.*, p.33.

<sup>24</sup> Seiji Naya and Pearl Imada, *op.cit.*, pp.56-58.

<sup>25</sup> The first potential one is Chile.

blocs.<sup>26</sup> ASEAN is thus obliged to take counter-measures to mitigate such adverse effects while seeking alternative markets for its products. Market diversification has to take place in a short time to prevent significant revenue losses.<sup>27</sup> The creation of the ASEAN Free Trade Area (AFTA) is conceived of both as such a counter-measure and as a possible alternative in that direction, through the creation of a market in their own region. This is the factor that has compelled ASEAN countries to orient their economic policy towards more cohesion among themselves in order to enhance effectiveness in their economic cooperation. AFTA is regarded as a major step in building such an internal cohesion.

Furthermore, in the wake of the deadlock of the URUGUAY Round of multilateral negotiations on international trade relations under the framework of the GATT,<sup>28</sup> resulting from the latent undeclared economic war between the United States and the EC,<sup>29</sup> the emerging division of the contemporary world into several opposing trading blocs has become more and more obvious. Even in the Eastern hemisphere, notwithstanding the repeated declarations of ASEAN that APEC<sup>30</sup> was not meant to be a trading bloc, the world at large cannot help keeping its fingers crossed, secretly hoping that the reality would not be just the other way round.<sup>31</sup>

The EC's evolution into the EU<sup>32</sup> and the creation of the "European

<sup>26</sup> Kathryn L. McCall (1995) What is Asia Afraid Of? The diversionary effect of NAFTA's rules of origin on trade between the United States and Asia. *California Western International Law Journal*, vol.25 (Spring), p.410-413.

<sup>27</sup> Sree Kumar, Policy issues and the formation of the ASEAN free trade area. *AFTA. The Way Ahead, supra note 10*, p.72.

<sup>28</sup> General Agreement on Tariffs and Trade.

<sup>29</sup> European Community, formerly European Economic Community (EEC), nowadays European Union (EU).

<sup>30</sup> Asian Pacific Economic Cooperation, regional regrouping of Pacific rim countries and non-state entities, such as Taiwan, participating in the capacity of an "economy".

<sup>31</sup> Manifestly to counter the creation of APEC, the EU has subsequently initiated the creation of a forum, called ASEM, for dialogues on trade relations between the EU and Asian countries.

<sup>32</sup> European Union.

Single Market," preceded by the creation of EFTA<sup>33</sup> and of the EEC,<sup>34</sup> or the "Common Market," were viewed by the rest of the world with apprehension and skepticism. In spite of the utmost efforts of the EC to reassure the world that neither EFTA nor the Common Market (which has finally become the European Single Market) was conceived of for the purpose of protectionism, which may undermine the World Community's attempts to liberalize international trade flows by gradually eradicating international trade barriers, a persistent feeling of uneasiness has been omnipresent throughout the business world. In the same vein, no matter how categorical the United States is in its assertions to the contrary, the creation of NAFTA<sup>35</sup> is inevitably viewed as a counter-measure to the creation of the EC Common Market, which has ultimately evolved into the EU "Single Market."<sup>36</sup>

With the establishment of the Common Market, and subsequently of the EU Single Market and of NAFTA, the Southeast Asian countries that were seen as an emerging new economic center in this part of the globe were compelled to consolidate their integration in order not to be left out of the main stream of the business world. To cope with such a menacing situation, ASEAN has resorted to the creation of AFTA as a counter-measure to mitigate the detrimental impacts of the creation of NAFTA, which has substantially diverted the flows of international trade and investments from Asian countries to Mexico, on account of the following factors:

*Primo*, the products manufactured in Mexico can be exported to the United States and Canada, and potentially also to Chile in the not too

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<sup>33</sup> European Free Trade Area, which comprised only 4 countries.

<sup>34</sup> European Economic Community. The EEC was established by the Treaty of Rome of 25 March 1957 (effective on 1 January 1958.)

<sup>35</sup> North American Free Trade Area, comprising Canada, the United States and Mexico (and potentially Chile in the not too distant future).

<sup>36</sup> The latest form of economic entity that the EEC has evolved into.

distant future,<sup>37</sup> duty free, thus rendering their prices highly competitive *vis-à-vis* the same type of commodity imported from outside NAFTA.

*Secundo*, the cost of living and the minimum wage are very low in Mexico, thus rendering the manufacturing costs of the local products as low as those of products from Asian countries. This is an infinite advantage compared to commodities imported from Asia *a fortiori* when coupled with the duty free privilege and much lower shipping expenses on account of the proximity between the markets and their manufacturing base.

The creation of NAFTA entails, therefore, a great risk for ASEAN countries to lose not only their part in the market in the United States to the same type of products that are manufactured in Mexico, such as textiles, etc., but also their part in the markets in Mexico and Canada for ASEAN commodities that are similar to those produced and exported to these two countries by the United States, such as rice, etc.

The creation of AFTA as a counter-measure to that of NAFTA is of course not a panacea that can remedy all of the detrimental effects of NAFTA for ASEAN countries, but it is, nonetheless, capable of playing down the harms that NAFTA can generate for ASEAN to a considerable extent. For instance, at least as far as foreign investments are concerned, it is manifest that the creation of NAFTA is more beneficial to American investors than to investors from other countries, because the mere proximity of the USA and Mexico is already a big advantage for American investors, at least with regard to shipping expenses and the expenses of the relocation of their manufacturing bases from the United States to Mexico. Furthermore, nationalism is likely to induce Americans to buy American products rather than those of foreign countries, especially when their qualities are more or less similar to each other. Moreover, as next-

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<sup>37</sup> Chile is currently in the process of negotiating its accession into NAFTA (cf. <http://www.sice.oas.org/CP061096/english/toc.asp>.)

door neighbours, the United States and Mexico would logically feel that they are better placed to be trading partners to each other than to trans-Atlantic countries, let alone to remote overseas countries, and consequently would prefer purchasing products coming from each other. AFTA provides an ideal alternative for the major Asian investment exporting countries like Japan, Korea and Taiwan for very much the same reasons.

It is noteworthy, however, that initially AFTA was not at all meant to be a counter-balance to NAFTA. The fundamental rationale that prompted ASEAN countries to create AFTA was that regional security concerns and the Cambodian crisis were imminent threats to their very existence. These threats constituted the principal factors that compelled non-communist countries in Southeast Asia to join hands to consolidate their security through economic integration,<sup>38</sup> whereby they hoped to contain the communist expansion in the region *via* the eradication of poverty, which was the root cause that pushed peoples in Asia toward communism. Now that the “Cold War” is more or less over,<sup>39</sup> the threat against regional security in this hemisphere has by and large been mitigated and the situation in Cambodia has largely ameliorated.<sup>40</sup> Under such a fundamental change of circumstances, it was feared that

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<sup>38</sup> The founding members of ASEAN were persuaded that the image of a military and political grouping, even for a defensive purpose, could risk being viewed as defiance or a confrontational attitude, which could heighten the tension in the region, and that only the eradication of poverty through economic prosperity could eliminate the root cause of people being converted to communism. Hence their reluctance even to use the term “Organization” in the formulation of the name for their regional grouping, and their consequent decision to instead use the word “Association,” which connotes a milder intent and a non-aggressive finality.

<sup>39</sup> The living proofs of which are that today the “non-communist country” criterion is no longer a *sine qua non* pre-condition for accession into ASEAN and that Vietnam and Laos, which still declare themselves communist, as well as Cambodia and Myanmar, whose political regimes are still in the gray area between being communist and non-communist, have already acquired full membership in ASEAN.

<sup>40</sup> Up to the point that Cambodia has finally acquired full membership in ASEAN as of April 30, 1999.

ASEAN might no longer have a *raison d'être* and would eventually disintegrate. That was precisely the underlying reason why Prime Minister Anand Panyarachun of Thailand conjured up the AFTA Project as a catalyst for a much higher degree of economic cooperation between ASEAN countries, with high hopes that it will constitute a new challenge and a new *raison d'être* for ASEAN countries to stick together and further consolidate their status and bargaining power in international *fora*. Paradoxically, the unforeseen creation of NAFTA, which has entailed tremendous detrimental impacts on ASEAN, followed by the financial crisis in Asia, has, instead of plunging ASEAN into despair or resignation, spurred the acceleration of the AFTA integration process, whereby ASEAN member countries hope to dissipate or counter the adverse effects of NAFTA in this hemisphere of the world.

b) Attraction for foreign investment: Exclusive market in ASEAN countries.

The economic growth strategies adopted by ASEAN governments in the 1990s stress the need to attract foreign direct investment, which has already contributed to the two decades of economic boom and the relatively rapid rates of industrialization in ASEAN. In the relentless race with China, Eastern Europe, and Mexico (resulting from the creation of NAFTA) for increasingly scarce capital, an effort has been made to maintain these inflows. Not only the incentives offered to foreign investors throughout the region, but also the size of the ASEAN market are important determinants of its economic attraction. In fact, AFTA will form an exclusive enlarged market with half a billion people, instead of ten individual markets, for investors. This should undoubtedly be attractive to foreign investors who look forward to gaining the profits from economies of scale both by producing for local consumption in the region and by manufacturing truly regional products for export to countries outside ASEAN.<sup>41</sup> This potential capability to attract foreign investment was

<sup>41</sup> Narongchai Akrasanee and David Stifel, *op.cit.*, p.36; Suthiphand Chirathivat, *op.cit.*, pp.29-30.

certainly one of the most compelling arguments for the creation of the ASEAN Free Trade Area.

Furthermore, when more international investors emerge from newly industrialized economies, and the costs of transport and communication decline as a result of technological innovation and shrinking language barriers, globalization of production will continue, as will new methods of production. With new technologies that facilitate globalization, the pressing need to improve the infrastructure becomes stronger<sup>42</sup> - hence the need for the change in policy and for regional integration in general and Free Trade Areas in particular.

c) The need to enhance bargaining power *vis-à-vis* foreign countries and trading partners.

Although, in several instances, political momentum has been the main feature of ASEAN in the international arena-*a fortiori* when it has nowadays become ASEAN of 10 member countries- with the advent of AFTA, ASEAN can no longer be perceived as a mere political bloc, but must also be seen as an economic integration grouping that cannot be overlooked. Greater solidarity will bolster the bargaining power of ASEAN. However, the experiences of other similar regional groupings of developing countries have shown that the group's strength in the international arena is contingent upon the performance of each individual constituent economy. The cumulative bargaining power of the group will be much stronger if the outcome of the creation of AFTA is a greater competitiveness in the economies of the ASEAN member states.<sup>43</sup> It is well understood that each member state will benefit from acting as a unit. In fact, the whole will be greater than the sum of its individual parts.

All of these factors largely contributed to the formation of AFTA upon the proposal of the Prime Minister of Thailand at the Fourth ASEAN

<sup>42</sup> Rolf J. Langhammer, *op.cit.*, pp.5-6.

<sup>43</sup> Narongchai Akrasanee and David Stifel, *op.cit.*, pp.37-38.

Summit Meeting held in Singapore in January 1992.

The key facets of AFTA that ASEAN countries have since been trying to sell to potential foreign investors are, *inter alia*, that:

*Primo*, once ASEAN has achieved its objectives by accomplishing the full-fledged establishment of AFTA after a lapse of 15 years from January 1, 1993, every investor in any of the ASEAN countries will have an exclusive market of approximately 500 million people<sup>44</sup> for their own.<sup>45</sup> This remark is by no means an exaggeration, considering that all commodities manufactured in any ASEAN country can be exported duty free to any other ASEAN country at a highly competitive price, compared to those commodities imported from other countries, *a fortiori* where those countries are remotely overseas. The outstanding regular economic growth rate of ASEAN member countries<sup>46</sup> for over three decades constitutes an impeccable guarantee for the high purchasing power of ASEAN peoples, who traditionally have the *de luxe* taste of a typical consumer society. The debts of ASEAN countries are relatively small, while their incomes keep increasing at a regular rate, thus ensuring the infallibility of the speculation that ASEAN will continue to be an ideal market for foreign investors for years and years to come.<sup>47</sup> Low minimum wages for unskilled labor for labor intensive industries and qualified man-

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<sup>44</sup> At the time that the author's first article on AFTA was published, the population of ASEAN countries already amounted to 360 million people and was expected to reach 450 million in 15 years. This number has substantially increased with the accessions of Vietnam, the Lao PDR, Myanmar and lastly Cambodia.

<sup>45</sup> The current population of ASEAN countries is greater than the population of NAFTA countries and also greater than that of all EC countries combined (Poland, Hungary and the Czech Republic, which are new EU members, included).

<sup>46</sup> During the two decades of economic boom.

<sup>47</sup> Although the ASEAN economy has been in recession for the past two years on account of the regional and global financial crisis, there have already been several encouraging signs of a slow but gradual recovery (cf. Dr. Visoot Tuvayanond (2002) Opportunities for economic rebound in ASEAN countries with the advent of AFTA. *In-House Briefing Asia-Pacific*, Pacific Business Press, p.1-5.

power for hi-tech industries, with very few and mild social problems; the availability of local natural resources in abundance, particularly petroleum and natural gas, as well as a rich variety of mineral deposits in ASEAN; plus a very low rate of transport expenses in intra-ASEAN trades; these factors make it practically impossible for goods imported from outside AFTA countries to compete with locally manufactured ones, at least as far as the prices are concerned. If the countries exporting into ASEAN substantially lower the prices of their products, their practice will run the risk of being condemned as subsidization or as dumping, either or both of which will entitle ASEAN to levy Countervailing Duties (CVD) or Anti-dumping Duties (AD) on the products in question, thus completely neutralizing their competitiveness<sup>48</sup> in ASEAN markets.

*Secundo*, even before ASEAN became the ASEAN of 10, it was already an ideal site for manufacturing base and investments, given that not only did it already constitute in itself an enormous market for local investors, but also it was a spring-board or gateway to the three Indo-chinese countries as well as to Myanmar.<sup>49</sup> Furthermore, it was predictable even then that eventually all of these three countries would become member States of ASEAN. Vietnam and the Lao PDR were then already halfway to becoming members by virtue of their formal adherence to the ASEAN fundamental instrument, known as the *"Treaty of Amity and Cooperation in Southeast Asia."*<sup>50</sup>

Apart from the aims of providing a new *raison d'être* for the

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<sup>48</sup> Although this remark was made during the glorious time of ASEAN's exceptional economic growth, after the monetary crisis broke out in Asia the situation has in some respects radically changed. The accumulating internationally recognized signs of a gradual recovery in some ASEAN countries such as Thailand and the Philippines can, however, be regarded as the debut of the possibility for ASEAN's "comeback", which somewhat revalidates the foregoing optimistic analyses.

<sup>49</sup> Formerly called Burma.

<sup>50</sup> The adherence to this Treaty of Amity is a prerequisite for the commencement of the process of acquiring ASEAN full membership, and both of these countries adhered to this treaty on February 24, 1986.

maintenance of ASEAN solidarity and integration and of counter-balancing the creation of the aforementioned Western World's trading blocs, one of the prime objectives of ASEAN in this connection is to enhance intra-ASEAN trades.

Several academics viewed with skepticism and pessimism the possibility of ASEAN attaining such goals, whilst foreign governments do take the creation of AFTA seriously, as is evidenced by the fact that AFTA has become a current issue in all international *fora* as well as in bilateral diplomatic talks and consultations when dealing with economic matters. It has to be admitted, however, that the pessimism of the academic world with respect to AFTA is, in fact, far from being groundless in view of a variety of potential impediments that may arise and in several areas, have already arisen out of the rivalry and conflict of interests between a number of ASEAN member countries. Nevertheless, in spite of such negative factors, the creation of EFTA and then the EC, which has subsequently evolved into the EU Single Market, and the creation of NAFTA<sup>51</sup> respectively, may be the decisive factors that prompted ASEAN countries to strive head-on to implement the AFTA project in order to parry the adverse effects arising from the creation of these Western trading blocs at an even faster pace.<sup>52</sup>

Thailand was the prime mover behind the notion of an "ASEAN Free Trade Area," or AFTA, which was launched at the initiative of Prime Minister Anand Panyarachun of Thailand on 24 January 1991 during the

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<sup>51</sup> Which was obviously designed to be a counter-measure to the creation of the European Single Market.

<sup>52</sup> For details on the evolution of the economic integration trend in the Americas, cf. Dr. Visoot Tuvyanond (2002) Opportunities for economic rebound in ASEAN countries with the advent of AFTA, *In-House Briefing Asia-Pacific*, Pacific Business Press, 2(2), p.4.

official visit to Thailand of the Prime Minister of Singapore.<sup>53</sup> The ASEAN Summit Meeting endorsed this initiative of Thailand in its session IV, which was held in Singapore on 27-28 January 1992. As the outcome, three AFTA basic documents were concluded at the end of the Summit Meeting on 28 January 1992, *viz*, the *Singapore Declaration of 1992*,<sup>54</sup> the *Agreement on the Common Effective Preferential Tariff (CEPT) Scheme for the ASEAN Free Trade Area (AFTA)*,<sup>55</sup> and the *Framework Agreement on Enhancing ASEAN Economic Cooperation*.<sup>56</sup> Of all these basic documents, CEPT is the most important one. Subsequently, during the 24<sup>th</sup> Meeting of the *ASEAN Economic Ministers (AEM)* in Manila, Philippines, on 22-23 October 1992, an interpretative note on the CEPT Agreement<sup>57</sup> was adopted. This interpretative note represents the common understanding of the ASEAN member States that will serve as an operative guide in the implementation of the CEPT Agreement and should be read in conjunction with relevant provisions of the CEPT Agreement. It must, therefore, be regarded as forming an integral part of the CEPT Agreement. It is noteworthy in this respect that such an interpretative note provides for the possibility of the CEPT Agreement being subsequently modified to take into account any future developments in this area.

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<sup>53</sup> As a matter of fact, the concept of the ASEAN Free Trade Area is nothing new to ASEAN countries, because at ASEAN's very inception, this question was already touched upon as a future prospect, which at that time appeared to be too ambitious to be realizable in the foreseeable future. It was even implicitly agreed that if this notion of ASEAN integration was to be implemented at all, the establishment of a Free Trade Area would be the furthest that ASEAN countries would go. But nowadays, according to the ASEAN vision 2020, ASEAN countries have already envisaged the eventual creation of an ASEAN Common Market.

<sup>54</sup> Singapore Declaration of 1992, Jan. 28, 1992, 31 I.L.M.498.

<sup>55</sup> Agreement on the Common Effective Preferential Tariff Scheme for the ASEAN Free Trade Area, Jan.28, 1992, 31 I.L.M.513.

<sup>56</sup> Framework Agreement on Enhancing ASEAN Economic Cooperation, Jan.28, 1992, 31 I.L.M.506, 508.

<sup>57</sup> Cf. the text in Nimnuan Puethongngam (1999) *Asean Free Trade Area*, LL.M. thesis, Faculty of Law, Thammasat University, Annexe D, p.136-148.

This overview of the advent of AFTA warrants an in-depth study of the main issues relating to the implementation of this regional free trade area arrangement.

## **Part 2: The Implementation of AFTA: Modalities, Problems, and Impacts on Member Countries**

This part will deal with the following questions:

*Primo*, the implementation of the AFTA project, and the measures that ASEAN countries have to undertake to create this regional free trade area.

*Secundo*, the institutions and organs responsible for the implementation of the project.

*Tercio*, major obstacles and impediments encountered in the implementation of the AFTA project, and the impacts of AFTA on ASEAN countries, and on Thailand in particular.

### **1. Elimination of trade barriers in intra-ASEAN trade**

The scope of the project covers: the trade barriers to be eliminated; the timeframe for their elimination; an itemization of the products falling within the coverage of the CEPT Scheme and the *criteria* for the determination of the products that are eligible to enjoy benefits under AFTA; and finally the exceptions to the general rules and the safeguard measures provided for in the relevant AFTA constituent instruments.<sup>58</sup>

#### **1.1 Trade barriers to be eliminated**

The AFTA project aims at eliminating both tariff and non-tariff barriers.

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<sup>58</sup> John H. Jackson and William J. Davey (1986) *Legal Problems on International Economic Relations*, 2<sup>nd</sup> edition, West Publishing Co., St. Paul, Minnesota, p.364.

### a) Tariff barriers

The first objective of the creation of a free trade area is to reduce and eventually eliminate the excessive tariff of the customs duties imposed on imported goods at the border or upon their entry into the territory of the importing country, known as tariff barriers. Tariffs are thus the most basic and simple device whereby the government can inhibit and restrain imports. There are *grosso modo* three types of tariffs: *ad valorem*, specific and mixed. An *ad valorem* tariff is an import tax calculated by taking a percentage of the value of the goods imported. For instance, a 10% *ad valorem* tariff would cost a 10 baht tariff for an item that is valued at 100 baht upon import. A specific tariff is a flat rate charge per unit or quantity of the goods- *e.g.*, 1 baht per ton. A mixed tariff combines these 2 concepts, such as 5 baht per kilo plus 10% of the value.

The ultimate goal of AFTA is to reduce intra-regional tariffs to 0%-5%. ASEAN countries agreed to reduce tariffs according to a pre-determined schedule announced in 1993. There are two programs in the CEPT Scheme- *i.e.*, “Fast Track” and “Normal Track”.

For the “Normal Track” scheme, initially, the tariffs on the products included in the CEPT Scheme were to be lowered to the range of 0 to 5% by 2008. (At present, this deadline had been accelerated and fixed at 2003 in 1994, and again accelerated to 2002 in 1998, at the 6<sup>th</sup> ASEAN Summit.) Tariff rates on goods currently exceeding 20% will be lowered to 20% within 5 to 8 years. Subsequent reduction of tariffs to between 0 and 5% is to be made within another 7 years. The minimum rates of reduction during this period have been set at a *quantum* of 5%. For products with existing tariff rates of 20% or below, the tariff rates were scheduled to be reduced to 0-5% by the year 2000.

The “Fast Track” scheme covers 15 product groups *viz.* cement, pharmaceuticals, fertilizers, chemicals, vegetable oils, plastics, rubber products, leather and leather products, textile articles, ceramic and glass

products, gems and jewelry, electronics, pulp, copper cathodes, and wooden and rattan furniture. Tariffs above 20% will be lowered to 0-5% within 10 years and tariffs at 20% or below will be reduced to 0-5% within 7 years. This timeframe has been speeded up to the years 2000 and 1998 respectively.

Up to September 14th, 2001, although not all targets had been reached, each of the original six members had reduced tariffs to 0-5% on at least 90% of its tariff lines in the inclusion list. A total of 40,911 tariff lines (representing 92.9% of the inclusion list of the first six members) have tariffs of 0-5%. The average CEPT tariff rate for the six countries is down to 3.21%.<sup>59</sup> The Statement on Bold Measures announced by the ASEAN leaders<sup>60</sup> in December 1998 required the original six members to accelerate the implementation of AFTA from 2003 to 2002 with some flexibility. Hence, in spite of the desirability of AFTA's sticking to the timetable for liberalizing trade in automobiles in the region by reduction of tariffs on automobiles to 0-5% for all ASEAN members, ASEAN has, upon the request of Malaysia, granted a temporary postponement of this liberalization to a date that is a little later than originally scheduled. After all, no free trade area can be free of the need for flexibility in dealing with difficult and sensitive sectors.<sup>61</sup>

There was then a clear ambitious effort to push the tariff reduction further to 0%. In effect, the original six members agreed in the 1998 Statement on Bold Measures to eliminate customs duties of the tariff

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<sup>59</sup> Cf. Joint Press Statement of the Fifteenth Meeting of the AFTA Council, September 14<sup>th</sup>, 2001, Hanoi.

<sup>60</sup> Paper on *Recent Developments in ASEAN Economic Integration*, Jakarta, September 1999, prepared by the ASEAN Secretariat (cf. [http://www.aseansec.org/view.asp?file=/general/publication/as\\_ei.htm](http://www.aseansec.org/view.asp?file=/general/publication/as_ei.htm).)

<sup>61</sup> Cf. Opening Remarks of Rodolfo C. Severino (2002) Secretary-General of ASEAN, at the AFTA 2002 Symposium on *The ASEAN Free Trade Area: Reaching Its Target*, at Jakarta, January 31<sup>st</sup>, 2002.

lines in their inclusion list.<sup>62</sup> In 1999, ASEAN leaders agreed to eliminate all import duties among the original six members by the year 2010, and by 2015 for the newer members.<sup>63</sup>

With regard to the timeframe of the AFTA project, the implementation of CEPT has been marked by its continuous acceleration. For instance, the original timeframe of 15 years was reduced to 10 years by the 26<sup>th</sup> AEMM and then to 9 years by the 6<sup>th</sup> ASEAN Summit.<sup>64</sup> The acceleration of the implementation of the AFTA project to the year 2002 for the six original signatories of the CEPT agreement shows ASEAN's firm commitment to regional liberalization and integration.

#### b) Non-tariff barriers in ASEAN

The impediments to an increase in intra-trade among ASEAN countries include quotas (or quantitative restriction), stringent standard testing procedures, customs classifications and valuation procedures, subsidy schemes for domestic producers and purchasers, local content rules, and health and safety standards. They are measures that are not directly related to commercial policy but that are intentionally employed to restrict imports or to stimulate exports. In some cases, such as licensing requirements and monopoly positions of state trading companies, they have been instrumental in preventing the expansion of trade.

According to Article 5 of CEPT, ASEAN member states must eliminate NTBs on a gradual basis within a period of five years after the enjoyment of concessions applicable to their products. But this Article is too vague and is not sufficient to cope with this problem. Therefore, the ITWG (Interim Technical Working Group) is now charged with NTB identification and classification according to UNCTAD guidelines.<sup>65</sup> Finally,

<sup>62</sup> *Supra note 57.*

<sup>63</sup> *Supra note 59.*

<sup>64</sup> ASEAN Secretariat Paper (1999) *Review of the CEPT Scheme for AFTA*, presented at the AEM Retreat, Phuket, Thailand.

<sup>65</sup> ASEAN Secretariat (1995) Non-tariff barriers, *AFTA Reader*, vol.3, September.

at the 10<sup>th</sup> AFTA Council, it was decided that NTBs must be eliminated by 2003; custom surcharges must be eliminated by 1996; and as for technical standards, the effort of harmonization must be undertaken. The substantial ensuing developments are, *inter alia*, the simplification and harmonization of customs procedures and, specifically, measures such as the harmonization of tariff nomenclature; the accelerated implementation of the WTO Valuation Agreement in the year 2000,<sup>66</sup> the conclusion of a Framework Agreement on Mutual Recognition Arrangements (MRAs) in December 1998, allowing member countries to recognize one another's product standards or regulations to facilitate intra-ASEAN trade; and the conclusion of a Framework Agreement on the Facilitation of Goods in Transit also in December 1998.<sup>67</sup>

## **1.2 Product coverage<sup>68</sup>**

Initially, the CEPT Scheme only covered manufactured and processed agricultural products to be included on a sectoral basis in the so-called "Inclusion List". As earlier mentioned, 15 specific products will follow the "Fast Track" program of tariff reduction, while the rest will be subject to the "Normal Track" program. However, if and when a member state considers that a particular product is sensitive, it can exclude this product temporarily from the CEPT Scheme. This product will then fall under the "Temporary Exclusion List" (TEL). The lack of precision in the definition of the terms "sensitive" and "temporary" as well as the deadline of the transfer to the "Inclusion List," is an open door to abuses. So to avoid an unnecessarily long list of products, each proposed list must be discussed and approved *a priori* by member countries. For instance, 4000 Thai products proposed as sensitive were reduced to only 224 items, some of which have since been transferred to the "Inclusion List". In 1999,

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<sup>66</sup> Cf. [http://www.aseansec.org/view.asp?file=/general/publication/as\\_ei.htm](http://www.aseansec.org/view.asp?file=/general/publication/as_ei.htm).

<sup>67</sup> *Ibid.*

<sup>68</sup> Nimnuan Puethongngam, *op. cit.*, p. 60-76.

there were only 63 items in the Thai TEL.<sup>69</sup>

Moreover, to eliminate loopholes in the implementation of CEPT resulting from imprecision in the procedures and the definition of relevant terms, it was decided that member countries would transfer the products in the TEL to the IL within the year 2000. The products concerned will be subject to the following tariff reduction program:

- 1) For products with an existing tariff of over 20%, the tariff will be lowered to 20% on the 1<sup>st</sup> of January 1998 and to 0-5% on the 1<sup>st</sup> of January 2003.
- 2) For products with an existing tariff of 20% or below, the tariff will be reduced to 0-5% on the 1<sup>st</sup> of January 2003.

In 1994, the AEMM decided to phase unprocessed agricultural products (UAP) into the CEPT scheme. In 1995, a total of 1995 tariff lines were classified as UAPs. About 1,358 tariff lines were immediately included in the IL in 1996. Another 402 tariff lines were placed in the TEL to be phased into the CEPT scheme in seven equal instalments beginning on 1<sup>st</sup> January 1997 and ending on 1<sup>st</sup> January 2003.

The difficulty lies with the remaining UAPs, which were classified as "Sensitive" or "Highly Sensitive" (HS), and for which a special arrangement had to be developed. These sensitive products are considered by member states as those whose domestic producers need to be protected. They could not be liberalized in the same way as manufactured goods and other agricultural products. The special arrangement extended the timeframe for sensitive and highly sensitive products to the year 2010. The difference between these two categories of products resides in the tariff rate of HS products, which is not necessarily lowered to 0-5%. For instance, ending tariff rates for rice (the only highly sensitive product for Thailand) could be set above 0-5%. SEOM is now in the process of

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<sup>69</sup> *Ibid.*, p.95.

finalizing a Protocol on the Special Arrangement for “Sensitive and Highly Sensitive Products.” The EMM targeted the completion and signing of the Protocol for the 13<sup>th</sup> AFTA Council Meeting in Singapore in September 1999.

Under Article 9B of the CEPT Agreement, products posing a threat to national security, public morals, human life, etc., arising from trade and/or consumption of such products could be placed in the “General Exclusion List.” However, analysis of the products currently listed in member countries’ GELs shows that these lists are unnecessarily long and that the reasons for exception do not appear to comply strictly with Article 9B. In 1999 there were a total of 811 tariff lines in the member countries’ GELs, the longest being 203 tariff lines and the shortest 0. (Thailand has decided to abolish its GEL).<sup>70</sup>

Member countries have been reviewing and revising their GELs unilaterally since 1996, during which time some member countries have transferred products from the GEL to either the TEL or IL. However, since the problem continued to persist, the 12<sup>th</sup> AFTA Council tasked SEOM with undertaking a thorough review of the products in the GEL and formulating concrete and clear-cut *criteria* to justify products placed in the list. SEOM has agreed that international and domestic trade prohibitions and bans will be key considerations in allowing a product to be retained in the GEL. Otherwise member countries will have to provide germane and cogent reasons to justify the retention of their products in the GEL.

ASEAN may wish to consider two options: abolishing the GEL, as Thailand has done, or elaborating operational rules or criteria to identify which products can remain in the GEL and, by implication, removing those that do not meet the qualification requirements.<sup>71</sup>

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<sup>70</sup> *Ibid.*, p.91.

<sup>71</sup> ASEAN Secretariat Paper, *op.cit.*,p.2.

### 1.3 Determination of the qualified products: Rules of origin

#### a) Rationale and different approaches<sup>72</sup>

Internally, AFTA is like a customs union, but externally, states maintain their respective tariff and trade policies vis-à-vis non-members. Since there are differences in tariffs, there could be an influx of imports into the member countries with higher tariffs *via* countries with the lowest tariffs. Therefore, the rules of origin have to be designed to confine trade among member countries to only products originating or mainly produced in the free trade area. The purpose of the rules of origin is thus to limit the enjoyment of the benefits of such an agreement to producers in member states only. Two fundamental approaches to the problem have normally been used in real practice.

One approach is a “substantial transformation” principle, whereby a product becomes attributed to the last exporting country only if within that country there has been a substantial transformation of the input goods obtained from any other member country(ies).

The second approach is a “value added” or “percentage value” approach. Under this principle, goods are attributed to the last country of export if that country has added a certain percentage of value to those goods.<sup>73</sup>

#### b) System of ASEAN

To be qualified as a product originating in ASEAN and consequently entitled to benefit from AFTA concessions, two *sine qua non* conditions are imposed by the rules of origin for the CEPT Scheme,<sup>74</sup> as follows:

<sup>72</sup> B. Hoekman (1993) Rules of origin for goods and services: conceptual issues and economic considerations. *Journal of World Trade*, 27(4), pp.81-99.

<sup>73</sup> John H. Jackson (1989) The world trading system. *Law and policy of international economic relations*, M.I.T., Cambridge, Massachusetts, p.143.

<sup>74</sup> Cf. the text in Nimnuan Puethongngam, *op.cit.*, Annexe F, p. 159-163.

Primo, the product must be qualified as originating in ASEAN and certified under the process defined in the Operational Certification Procedures for the Rules of Origin of the ASEAN CEPT for AFTA - "ASEAN CEPT Certificate of Origin."<sup>75</sup>

The product is regarded as originating in ASEAN when it is, on the one hand, wholly produced or obtained in ASEAN as described in Rule 2 of the Rules of Origin for the CEPT, or on the other hand, under Rule 3, when at least 40% of its content originates from any member states. This is what we call the "*rule of 40% of local content*", which means that the product is deemed to be originating in ASEAN as long as the total value of its materials, parts or produce originating in non-ASEAN countries does not exceed 60% of the product and the final process of the manufacture is performed within the territory of the exporting member state.

With regard to the issue of "local content", it is noteworthy that ASEAN countries were at first reluctant and divided in preference between the so-called "single local content" and the "cumulative local content" *formulae*<sup>76</sup> - in other words, between the formula requiring that the entire 40% of the local content must come from any one of the ASEAN countries and the formula allowing the local content to come from more than one member country. In view of the fact that the underlying intent of ASEAN is to assimilate the situation in AFTA to that of a country, where products manufactured in any province or any part of the country can circulate and be sold freely in any other part of the country, regardless of where and how much of the local content of such products comes from within that country, the "single local content" formula should, from the idealistic standpoint, be adopted. It is undeniable, however, that under the prevailing circumstances, this rationale is not as yet entirely applicable, simply because the degree of integration in AFTA is still far too remote from that of a single

<sup>75</sup> *Ibid.*, Annexe G, p.164-173.

<sup>76</sup> Jaturon Thirawat, *op.cit.*, pp. 62-64.

state. In a single state, the single local content formula is entirely admissible in view of the fact that the enrichment of any part of the country can always contribute either directly or indirectly to the improvement of the economy and well-being of the country as a whole through an appropriate distribution of wealth by the central government. The case is entirely different for ASEAN and, by extension, AFTA, because neither of them is comparable to a country in spite of the ambitious so-called economic integration of the "new generation". If and when ASEAN's integration has already become analogous to that of a highly integrated collectivity like the EU, the single local content formula will surely have to prevail. A premature application of such an ambitious *criterion* will be beneficial only to member countries that are endowed with a high degree of technological development, to the detriment of member countries of a lower degree of development, whose markets will inevitably be flooded by an overwhelming influx of goods that they are still incapable of producing.<sup>77</sup> It was probably for this reason that the single local content formula was rejected, and the more pragmatic cumulative local content formula was ultimately adopted by the AFTA Council.<sup>78</sup> Even after the adoption of the "cumulative local content" formula, the divergence of views persisted,<sup>79</sup> because ASEAN countries were still divided with respect to the ratio of local contents from different member countries. Indonesia moved, in this connection, for the adoption of a formula that states that the local content can come from any one or many of the member countries, provided that 25% out of the required 40% of the local content comes from the last exporting country of the products in question. It was easily predictable right from the outset that this Indonesian- proposed proportion

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<sup>77</sup> In practice, however, high-tech products do not always have to be produced by less developed member countries, and can very well be produced in such countries by foreign investors. (The manufacture of automobiles and high-tech products in many ASEAN countries nowadays is living proof of this.)

<sup>78</sup> The AFTA Council was conceived as the highest governing body of AFTA.

<sup>79</sup> Cf. Bangkok Post, December 11, 1992, p. 17.

would be inadmissible for Singapore, given that it would be tantamount to automatically excluding Singapore from enjoying the benefits deriving from the creation of AFTA, because Singapore, as a micro-island state, naturally does not possess a lot of natural resources, and as its major role is more that of an international broker than a manufacturing base for heavy industrial finished products,<sup>80</sup> it will hardly be capable of fulfilling such a requirement.

Under these circumstances, the compromise solution ultimately adopted was to maintain the “cumulative local content” formula with the required percentage of the local content from *the last exporting country* set at 10% of the total required 40%. This percentage was worked out by an *ad hoc* working group established by the ASEAN Senior Economic Officials,<sup>81</sup> officially baptized, the *Interim Technical Working Group (ITWG)* whose mandate and responsibilities are to work out a CEPT interpretative note, a draft *Rules of Origin*, and a working paper on the procedure for the issuance of the Certificate of Origin.

Compared to other regional economic groupings, which fix the percentage of local content at 50%, ASEAN rules of local content are much more flexible.<sup>82</sup>

ASEAN prefers the cumulative local content to the single local content formula. Therefore, under Rule 4, it is permissible for the local content of the product to come from more than one ASEAN member state, provided, however, that the aggregate ASEAN content of the final product is not less than 40%. And in that case, the product shall be considered as originating in the (last exporting) member state where the working or processing of the finished product took place.

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<sup>80</sup> Except of course for those whose production requires particular geographical conditions, such as the jackets for petroleum drilling platforms, etc.

<sup>81</sup> Commonly referred to as SEOM.

<sup>82</sup> Seiji Naya and Pearl Imada, *op.cit.*, *supra note* 10, pp.59 and 65.

*Secundo*, the direct consignment of the product strictly within ASEAN is the other condition in the AFTA rules of origin- i.e., the product must be directly consigned from the exporting member state to the other member state in accordance with Rule 5.

Failing such a requirement, the member countries with the lowest import duties tariffs will be in a very advantageous position, because commodities will pour exclusively into the Free Trade Area through those countries, thus allowing them to be the only countries to levy taxes on imports into the Free Trade Area. The aim of this condition is therefore to prevent a re-export of products from a non-member country into other member countries, given that only ASEAN products can benefit from the duty-free privilege when exported into other member countries.

#### **1.4 Exceptions and safeguard clauses**

The founders of AFTA have not forgotten to provide an escape clause or exception to the CEPT Scheme, which constitutes a sort of safety valve whereby member states may forestall the adverse effects of the establishment of AFTA whenever they deem it necessary.

Exceptions to the CEPT Scheme are expressly provided for in Article 9B of the CEPT Agreement, which allows a member country to take any actions (including those which normally are not quite in conformity with the CEPT Agreement) when it is really necessary for the protection of its national security, the protection of human, animal or plant life and health or the protection of articles of artistic, historic and archeological value. In practice, the action in connection to this exception corresponds to the GEL that we have previously analyzed.

As for the safeguard clause, it is defined in Article 6.1 and 6.2 under the rubric of “Emergency Measures”.

Article 6.1 allows the importing member country to suspend provisionally, without discrimination, application of CEPT Scheme, to the

extent and for such time as may be necessary to prevent or remedy serious injuries caused by the increasing volume of imports to sectors producing the products that are like or directly competitive with products of the importing member country. Under such circumstances, instead of putting the product in question into the CEPT IL, that country may introduce the product it considers sensitive into the TEL.

Article 6.2 also allows a member state to create or intensify the application of quotas or any measures limiting imports with a view to forestalling threats or stopping a serious decline in its monetary reserves.

This kind of exception and safeguard clause is nothing new in international trade, but the vagueness of the relevant provisions constitutes a matter of concern for ASEAN member countries. In fact, out of fear of abuse, member countries decided at the 11th AFTA Council that the application of these provisions will have to be in conformity with the WTO's Agreement on Safeguards, the details of which are regarded as sufficient to cope with the problem of potential abuse.

## **2. The structure of AFTA: Implementing organs and mechanism for the settlement of disputes between member countries**

### **2.1 Implementing organs**

The structure of AFTA is relatively rudimentary and embryonic.<sup>83</sup> At the regional level, decision-making on AFTA matters is under the responsibility of different ASEAN organs, *viz*, the Meeting of ASEAN Heads of Government (or ASEAN Summit) and ASEAN Economic Ministers (AEM).

In the hierarchical order, the ASEAN Summit is the highest political

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<sup>83</sup> Peter Kenevan and Andrew Winden (1993) Flexible free trade: the ASEAN free trade area. *Harvard International Law Journal*, vol.34, pp.238-239.

organ of ASEAN, and is in charge of the ASEAN economic cooperation policy in general. It is also responsible for AFTA implementation in particular. At the Fourth ASEAN Summit, when ASEAN member countries decided to undertake the AFTA project and to set up the AFTA Council as the executive organ of this scheme, it was also decided that the ASEAN Summit would take place regularly every three years. However, subsequently at the Fifth ASEAN Summit, member countries agreed to also convene an ASEAN *Informal* Summit annually. Its first meeting took place in 1996.

The ASEAN Economic Ministers (AEM) is an organ that, as its name indicates, is composed of ASEAN member countries' economic ministers. It also has policy-making power, and hierarchically it functions under the authority of the ASEAN Summit. In fact, its role is not as symbolic as that of the ASEAN Summit, because it determines the orientation of AFTA by coordinating with various relevant implementing organs, especially the AFTA Council. In addition, according to the AFTA Dispute Settlement mechanism, the AEM can render binding decisions on the appeals of member countries in connection with AFTA implementation. (It is the organ of appeal whose mission in this regard is to consider the dispute of the member countries and give a ruling with binding force.)

As for the AFTA Council, it is an executive organ whose principal responsibility consists of monitoring the implementation of AFTA as well as coordinating with other organs. It can meet as often as it deems appropriate but must meet at least once a year. It has competence in all matters that concern AFTA. However, the fact that there is no precise scope and limit to its authority may be an impediment or cause of delays in the realization of the AFTA Scheme. Hence, more precision in this area is obviously needed.

With regard to the Senior Economic Officials' Meeting (SEOM), it is

composed of senior officials, such as Director Generals or Permanent Secretaries, from relevant ministries of all member countries. It has the initiating, coordinating, and supporting role for the AFTA executive organ - the AFTA Council- and AFTA national organs in the AFTA scheme implementation. The SEOM may be assisted by a technical organ called the Interim Technical Working Group (ITWG), comprising representatives of various government agencies concerned, such as representatives from customs or trade departments, etc. The SEOM is also the responsible organ for the settlement of disputes in conformity with the Protocol on this matter, which will be analyzed later on.

The ASEAN Secretariat was created at the first ASEAN Summit in 1976 with the major mission of coordinating and implementing all ASEAN activities. At the ASEAN Ministerial Meeting in Kuala Lumpur in 1998, one more Deputy Secretary-General was added to the Secretariat, with the specific task of assisting the Secretary-General in AFTA affairs. In addition, there is another supporting organ in the Secretariat called the ASEAN AFTA Unit, which is in charge of the review and supervision of AFTA implementation and of particular matters such as NTB elimination and customs evaluation. It coordinates the work of the Meeting of ASEAN Directors-General of Customs Matters and of the ASEAN Consultative Committee on Standards and Quality and also coordinates the works of national AFTA units of member countries. In addition to this coordination mission, it is also in charge of research work and public relations. The ASEAN Secretary-General is an *ex officio* member of the AFTA Council.

The lowest regional organ of AFTA, which is of a technical nature, is the Coordinating Committee on the Implementation of the CEPT Scheme for AFTA - the CCCA. The CCCA is composed of representatives from ASEAN member countries whose rank is generally that of technical officer. Thailand is represented in this organ by the Director of the National AFTA Unit Division. Its principal task consists of coordinating the positions of national AFTA units on issues involving AFTA affairs. It has to make all

efforts to reach an acceptable conclusion and common position before reporting to the SEOM, which in turn, after its approval, will submit its conclusion to the AFTA Council.

In practice, these AFTA regional organs have to work closely with AFTA national organs- i.e., the AFTA Implementation Committee (AIC) and the national AFTA units.

The AIC is the highest organ responsible for AFTA affairs at the national level. In fact, it has the authority to determine the position of the country in all issues regarding AFTA without having to wait for the Cabinet's meeting. The composition of Thailand's AIC is as follows: the Minister of Finance is the President of the Committee, while the Minister of Commerce and the Minister of Industries are both Vice Presidents. The other fourteen members of the Committee are all senior officers (generally of Director-General rank) and representatives from the private sector, such as the President of Thai Chamber of Commerce and the President of the Industries Council. Finally, the Director of the Office of Public Finance's-Economy assumes the position of Secretary-General of the Committee. The AIC is, then, the policy-making organ of the country. Its decisions are transmitted to the national AFTA unit which, on the one hand, is the implementing organ whose responsibility is concentrated on considerations of AFTA implementation and measures to be taken in accordance with CEPT, as well as on the enactment of relevant legislation. On the other hand, as a coordinating organ, it constitutes a channel for communications between ASEAN countries through their national AFTA units.

In brief, policy at the regional level is followed and implemented by national organs that themselves may have an initiating role, and the executive organ, the AFTA Council, monitors and supervises the conformity of different measures undertaken with AFTA policy and regulations.

When the AIC adopts a particular position, the national AFTA unit

will endeavor to coordinate its position with the positions of other national AFTA units until they can reach a common ground. The Thai National AFTA Unit is represented by the Office of the Public Finance's Economy.

## **2.2 ASEAN mechanism for the settlement of disputes**

### a) Presentation of the system

According to Article 8 of CEPT, a dispute arising between contracting parties (to this instrument) may be settled by means of consultation, failing which, it may be submitted to the AFTA Council, which can request guidelines from the AEM or transfer the case directly to the AEM. This sole Article is too brief to really enable any of the mentioned organs to operate appropriately. In effect, while the imprecision of many rules is apt to give rise to differences in interpretation and application of AFTA regulations, this Article may prove to be insufficient to cope with the problem due to the fact that it is totally silent as to the authority of the organs in question, the rules of procedure, etc. This situation constitutes a great risk for AFTA and may cause both delays and major obstacles to the implementation of AFTA whenever member countries consider that the stake in the unsolved dispute is more important than the continuation of the project itself. That was the main reason that led the ASEAN member countries to adopt a specific mechanism of dispute settlement at the AEM Meeting in 1996 in the document called Protocol on Dispute Settlement Mechanism (DSM).<sup>84</sup> This Protocol contains a number of provisions that regulate the procedure for dispute settlement in detail (compared to the pre-existing CEPT Article 8).

The fundamental idea of this mechanism can be described as follows:

The favored means of dispute settlement between member countries have always been and still are political or diplomatic, especially

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<sup>84</sup> Cf. the text in Nimnuan Puethongngam, *op.cit.*, Annexe E, p.149-158.

consultation, good office, conciliation, and mediation.

There is, however, a novelty that resides in the presence of an option for exceptional means having binding effect- i.e., at the request of a conflicting party, the SEOM may create a panel that is composed of three to five independent experts in international trade law and policy. This panel will examine questions of both fact and of law and submit a confidential report to the SEOM, which will, in turn, give a *ruling* by a majority vote, which is really exceptional, in view of ASEAN's fundamental consensual decision-making principle. If the party to the dispute disapproves of that ruling, it is entitled to make an appeal before the AEM, which, after due consideration, will render a *binding* decision that is final. In case of non-compliance, at the request of the party concerned, the delinquent party risks being precluded by the AEM from the benefits deriving from any concessions or other obligations under AFTA. In addition, the timeframe for the process of a dispute settlement is clearly defined and shall not exceed a period of 290 days.

b) Analysis of the mechanism

An analysis of this mechanism indicates that it is very similar to the mechanism of the World Trade Organization in many points. However, compared to WTO rules, it lacks detail, especially on exact procedural measures. But the most significant remark is that the entire mechanism is exclusively based on the consent of the parties to the dispute. In other words, there is no automatic compulsory procedure for the settlement of disputes. The instituting of procedure is contingent totally on the willingness of the parties concerned. And it is not at all surprising to learn that so far there is no precedent for application of this mechanism. This is explicable by the fact that ASEAN member countries are always zealously attached to their national sovereignty; therefore, the acceptance of a binding decision is regarded as a limitation of and encroachment on their national sovereignty, which is undesirable to them. Furthermore, the uncertainty of the binding decision resulting from the discretion of a third party organ provokes a

sentiment of apprehension and distrust that prevents the member countries from voluntarily accepting this means to settle the dispute. So, in actual practice, they prefer solving the conflict by diplomatic and classical means rather than having recourse to this proposed mechanism in order to ensure the respect of their sovereignty,<sup>85</sup> this, unfortunately, at the expense of the smooth and punctual implementation of AFTA. However, the regulation of this mechanism is still useful, especially whenever member countries are convinced that avoiding complications by using this mechanism is more beneficial than arguing for the respect of sovereignty and losing the chance to obtain the benefits of AFTA.

### **3. Problems in the implementation of AFTA**

Problems in the implementation of AFTA can be of a legal as well as a political nature.

#### **3.1 Problems of a legal nature**

The legal problems are of three prongs, i.e.

##### **a) Legal status of the basic instruments constituting AFTA and consequences on compliance with the project.**

##### **Position of the problem**

The question as to whether the Basic Texts of AFTA and especially the CEPT Agreement have legal binding force is of vital importance for the realization of AFTA. In the affirmative, these texts will be treaties entailing rights and obligations for the parties concerned, the non-performance of which, as well as the violation of any rights and obligations, would give rise to a state responsibility of the non-compliant party. The state responsibility would result in an obligation to admit publicly its wrongful act and an obligation of reparation for all injury arising therefrom. And

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<sup>85</sup> *Ibid.*, p. 58; R.P.Anand (1984) The role of Asian states in the development of international law. *The future of international law in a multicultural world workshop*, Martinus Nijhoff Publishers, The Hague, pp.108-109.

these obligations are incumbent on the entire country. On the other hand, if the texts are only of a political nature, without any legal binding force, their violation may entail a more or less serious political consequence but not a state responsibility, as in the case of the breach of a treaty. Therefore, the consequences of non-compliance with the AFTA basic documents may depend on the legal status of these texts. Even the reactions of the member states will be different.

### **Analysis**

The procedure for the determination of the legal nature of an international instrument was established by the International Court of Justice in its decision rendered in 1978 in the Aegean Continental Shelf Case. The Court required the examination of the text, its form, and the context of its adoption in order to establish the genuine intention of the parties.<sup>86</sup>

In the case of AFTA, the decisive factor would reside in the context of its adoption, which involves the circumstances before, during, and after the adoption of the text. The context is quite in favor of the affirmation that they are international agreements having a binding effect due to the conformist attitudes of member countries in the application of AFTA texts. This is not at all surprising, since the text adopted is normally the result of acceptable conclusions reached in negotiations both at the national and regional levels.

Nevertheless, in practice, there do exist some cases of non-compliance with these agreements on the part of certain member countries, such as non-compliance within the determined timeframe, failure to phase in some products in the IL, etc., which do not necessarily connote a negation of the legal effect of AFTA texts. Occasional contraventions of a regulation by some member countries do not imply an *opinio juris* of those member countries that that regulation has no binding force. As a matter of

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<sup>86</sup> Judgment of 19 December 1978, paras.100-106.

fact, it is obvious that the member countries concerned did not deliberately reject the binding force of the texts (nor were they opposed thereto). On the contrary, oftentimes it is a matter of purely involuntary negligence or just a different interpretation of some provisions of the texts in the process of their application. With regard to the reactions of other member countries, generally ASEAN countries would adopt an indulgent attitude towards non-compliant states and prefer using diplomatic means to settle the differences, rather than litigation. This is due to the conviction of the countries in the region that exercising legal rights may worsen the situation and would not facilitate the resolution of the conflict, because it always involves a ruling on right and wrong-doings, which may easily affect the honor and integrity of the country and perhaps even jeopardize the spirit of solidarity of the member countries by implication. Therefore, although they are entitled to do so, they have never used such means. But a political means is often time-consuming and may cause an undue delay in AFTA implementation as previously expounded under the rubric of the mechanism for the settlement of disputes. It is important to stress, however, that any adjustments and flexibility are adopted according to established ASEAN rules and international norms, as reiterated by the Secretary General of ASEAN at the AFTA 2002 Symposium, Jakarta, January 31<sup>st</sup>, 2002.<sup>87</sup>

**b) *Lacunae and imprecision in the redaction of relevant basic documents on AFTA.***

As remarked throughout this study, there exist a number of *lacunae* and imprecisions in the texts of AFTA in many areas,<sup>88</sup> which have the potential to cause difficulties in their implementation; for instance:

- 1) the NTBs are referred to without any definition.
- 2) the lack of precision in the procedures for application of the exceptions and safeguard clauses makes it impossible for ASEAN

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<sup>87</sup> *Op.cit.*, *supra* note 62.

<sup>88</sup> Peter Kenevan and Andrew Winden, *op.cit.*, pp.235-236.

member countries to properly implement the CEPT. This frustrating situation has created inconsistencies in the practice of member states.

3) the terms “Sensitive” and “Highly Sensitive” (agricultural) products are still not clearly defined.

### **Analysis and Solution**

As a matter of fact, the vagueness and imprecision in the texts of AFTA are sometimes more or less deliberately allowed by ASEAN member countries to subsist, on account of their usual preference for flexibility over rigidity. In actuality, the texts of AFTA are normally the result of a compromise that is designed to accommodate the concerns of member countries, hence their acceptability to all member countries. Consequently, only general principles are formulated in the texts, leaving the details to be filled in at a later stage when the time comes for them to be negotiated and agreed upon. This process accommodates the particular concerns and needs of each member country but at the expense of accuracy in the implementation of AFTA.

Finally, the *lacunae* and imprecision lately cited have been more or less remedied: on the one hand, by referring to the relevant rules of international trade law as enshrined in the WTO for the case of NTBs and safeguard clauses. This solution will surely improve the work of AFTA organs to a considerable extent.

On the other hand, the classification of agricultural products and their legal regime will be subject to a newly elaborated special arrangement in their connection to be finalized by the next AFTA Council Meeting. These moves mark a firm political will to solve the problem and reveal a certain improvement in the process of AFTA implementation.

### **c) Differences in legal obligations and their execution between original and new member countries.**

1) “Grace Period” allowance for new member countries at the moment of their admission.

The admission of the Indochinese countries and Myanmar into ASEAN confirms the solidarity of the countries in this hemisphere of the globe, in which, for a very long time, territorial and ideological differences have politically separated countries from each other. The admission of these new arrivals has entailed not only positive impacts, but also difficulties inherent to the large disparity in their levels of economic and technological development. Such difficulties resulted in a décallage in the performance of obligations under CEPT on the part of new members, while all of them still need to keep pace with the advancing schedule of the CEPT Agreement. Hence, the same deadline for the AFTA scheme's completion would certainly be unjust for new members and contrary to the sacred principle of sovereign equality among members. Therefore, all of the new members are granted the allowance of a "Grace Period," which requires them to complete their transition to AFTA within ten years from the year of their admission. Vietnam became a member of ASEAN in 1995; consequently, it is required to complete AFTA implementation only in 2006, while both Laos and Myanmar, becoming members in 1997, must complete AFTA implementation in 2008. The last and latest member, Kampuchea, having been admitted to ASEAN on the 30<sup>th</sup> of April 1999, will probably achieve the goal of AFTA in 2010. And recently, at the 6<sup>th</sup> ASEAN Summit, the new members agreed to maximize the number of tariff lines between 0-5% by the year 2003 for Vietnam and by 2005 for the Lao PDR and Myanmar. From the legal point of view, although such a special allowance is pertinent, the differences in the obligations of each member will inevitably affect the uniformity of the implementation of AFTA and complicate its initial plan.<sup>89</sup> But this constitutes a sort of undesirable necessity, in view of the potential political and economic advantages accruing from the completion of the AFTA Scheme with the admission of these new members.

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<sup>89</sup> Mohamed Ariff, From ASEAN-Six to ASEAN-Ten: Issues and Prospects. *AFTA in the changing international economy*, *op.cit.*, pp.69-70.

2) Difficult tasks for new members in the amendment of existing legislation and the enactment of new implementing legislation (especially for a conversion from state trading to a free market system).

In order to adapt themselves to the free market economic system, the Indochinese countries and Myanmar will be compelled to enact or amend several relevant pieces of economic legislation, such as new banking, financial, investment, fiscal, and customs laws. They must also modernize their commercial law with regard to international business transactions.

This is an uneasy and extremely complicated task, which may call for assistance from some original members as well as from developed countries. Otherwise, it might be very hard for the new members to comply with their obligations under the CEPT Scheme within the prescribed timeframe.

### **3.2 Problems of a political nature**

The main reason why ASEAN leaders are reluctant to firmly commit their countries to push economic cooperation further resides in the apprehension that the costs of cooperation, caused by losses associated with the displacement of labor and capital, may risk being amplified in developing countries, whereby the political stability of these countries might be seriously threatened. Given that the original *raison d'être* of ASEAN was to contain and counteract communist insurgency by maintaining stability within the region, the risk, in the short run, of market disruptions for long-term gains was much too great for these countries to cope with; in such cases, national egoism might then supersede political consideration and thereby become detrimental to the AFTA project.

In effect, the first and foremost hindrance that may obstruct the achievement of ASEAN's goal in this endeavor is the conflict of interest among its member States arising from the lack of complementarity in the

nature of their exports, which most of the time compete with each other.<sup>90</sup> For instance, both Thailand and Malaysia are principal producers and exporters of rubber, tin, palm oil, etc., which are of crucial importance for a multitude of their respective peoples. The disparity in the export prices of these commodities is so outrageously great that the free flow of their trade without import duties will inevitably ruin the producers of those commodities in the country that will consequentially suffer an influx of much cheaper goods of the same kind. The acuteness of the detrimental impacts arising therefrom will surely be aggravated by the fact that the economic life of hundreds of thousands of peasants in ASEAN countries is dependent on the income deriving from such agricultural products. They are normally poor and unqualified for any more sophisticated economic activities. Consequently, they will be doomed to unemployment and even deeper poverty if their only profession is destroyed on account of the free trade of such commodities following the establishment of AFTA. Under such circumstances, it is to be feared that an outburst of anger and vandalism might erupt, such as the one that took place in France as a protest against the French government for having conceded to the United States' demand to substantially reduce subsidies for agricultural products. This is only one example of what can eventually transpire when a fully-fledged AFTA is effectively established. Of course, the governments concerned may resort to compensating the affected persons for their loss, but such a solution may be valid only on a short term or *ad hoc* basis and can never last forever. Furthermore, if ever the demand of the United States prevails in the outcome of the Uruguay Round,<sup>91</sup> the practice of subsidizing agricultural products may be subject to a penalty.

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<sup>90</sup> This negative factor has, to a certain extent, already been mitigated by the diversification of ASEAN products in the contemporary era. (Cf. Dr. Visoot Tuvayanond (2002) *Opportunities for the economic rebound in ASEAN countries with the advent of AFTA*. Paper presented at the Bangkok session of the International Bar Association APF Conference, 24-26 January 2002, p.10.) (The next session of the IBA APF Conference is scheduled to be held in China.)

<sup>91</sup> At present, this predicted risk seems to have become a "fait accompli".

Another factor that may impede ASEAN's efforts in this matter is national egoism or the inadequacy of the political will of ASEAN countries in their endeavors to achieve the common goal in this project where it may cause detrimental effects on their national interests in certain areas. Unless ASEAN countries pitch together to overcome these pitfalls in *bona fide*, AFTA risks being doomed to be dead letters *ab initio* like LAFTA.<sup>92</sup>

The disproportionate levels of development among ASEAN countries, especially after the inclusion of the four new members, *viz*, Cambodia, Laos, Myanmar and Vietnam, are apt to end up entailing an astounding inequity with regard to the sharing of the benefits that may be derived from the establishment of AFTA.<sup>93</sup> It should be stressed at this juncture that the mere disparity in the degrees of preparedness of individual ASEAN countries for AFTA project has led quite a few people to jump to the conclusion that the creation of AFTA would be particularly beneficial to Singapore but detrimental to the rest of ASEAN countries due to the fact that Singapore is already a quasi-free port-hence its undeniable preparedness to fulfill the *criteria* for membership in AFTA without having to make any substantial concessions. In consequence, Singapore has nothing to lose and will only gain from the creation of AFTA, whereas other ASEAN countries will be obliged to make many more sacrifices in order to realize such an ambitious project. Furthermore, the role of Singapore as a broker and the regional business center, rather than as a manufacturer, puts this economic giant dwarf at a vantage point from which it can manipulate the trade flows in the region better than any other ASEAN country-hence the apprehension of other ASEAN countries that their balance of trade and balance of payment will become even more in favor of Singapore, to their own detriment. This apprehension is aggravated

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<sup>92</sup> Latin America Free Trade Area.

<sup>93</sup> It was predictable even at the outset, when the possibility of the eventual inclusion of these four countries was envisaged, that a special regime such as a "grace period" allowance, might be an appropriate area to be seriously probed.

by the misgivings of less developed member countries that their markets will, under the free trade regime, be flooded by an influx of commodities from more developed ASEAN countries.

The areas that are susceptible to generating practical problems that could hinder the realization of ASEAN's project to establish AFTA are much too numerous to be exhaustively identified within the limited scope of this study. Let it suffice, therefore, to make a final remark in this respect that another factor that is of considerable importance, which the founders of AFTA seem to have overlooked, is that the great disparity in the costs of living and in the purchasing power of the national currencies in different ASEAN countries may end up by excessively favoring some member countries to the detriment of others in the event that AFTA finally becomes effectively operative, rendering it hardly palatable for the latter.

Another political problem, stemming from external political pressures on other member countries, resulted from the admission of Myanmar. In effect, the integration into ASEAN of Myanmar, which is accused of human rights violations, attracts protest and hostility from the outside against ASEAN itself. These pressures can be illustrated by the difficulty encountered in ASEAN's efforts to organize the ASEAN-EUROPE Meeting (ASEM) in terms of the threat of non-participation of some European countries.<sup>94</sup> This Myanmar problem is, however, not an insurmountable one, because the May 2002 release of Aung San Suu Kyi from her 19 months of house arrest has already softened the hostile attitude of the Western world.<sup>95</sup>

At first glance, these numerous negative factors may hardly appear

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<sup>94</sup> Very probably at the instigation of the UK, which is very strongly supportive of Aung San Suu Kyi.

<sup>95</sup> As may be seen by the potential lifting of the US economic sanction against Myanmar, provided only that the subsequent treatment of Aung San Suu Kyi by the Myanmar government satisfies the norm required by Western countries.

surmountable, but in reality, things are not as sombre as they may seem to be, because there are quite a few positive factors that could eventually help ASEAN overcome these obstacles. For instance, to parry the detrimental impacts on the economic life of the multitude of peasants who are engaged in agriculture, the prime movers of AFTA have not forgotten to provide a leeway or escape clause in the CEPT Scheme, by providing a safety valve whereby member States may forestall the adverse effects of the establishment of AFTA on "sensitive products" that are of vital importance to them by temporarily suspending their inclusion in the CEPT Scheme.

As to the problems of national egoism, lack of vision and inadequacy of the political will of some member countries to attain the goal of the creation of AFTA, under normal circumstances, this factor would have induced great concerns for member countries that are determined to materialize an effective implementation of AFTA, but the threat to the economic survival of ASEAN countries ensuing from the diversion of international trade and investment flows from ASEAN by the creation of NAFTA and the EU has compelled even the hard-liner ASEAN member countries to go along with this project.

Faced with this crucial external compelling factor, everyone of the ASEAN countries, old and new, will have to make a serious effort to make the necessary concessions and sacrifices in order for AFTA, and *in extenso* ASEAN itself, to survive the ordeal of this on-going undeclared economic world war. This paradox somehow, to a certain extent, strangely resembles the one that once compelled ASEAN, which was composed of the non-communist countries in the region, to stick together in spite of so many political conflicts and territorial disputes among themselves, which were swept aside into a dormant state in order to put a halt to the communist expansion in this hemisphere of the globe.

## Conclusion

Even in the face of the monetary crisis<sup>96</sup> that has devastated and ravaged Southeast Asian countries for the past two straight years, instead of dropping the AFTA project, ASEAN countries have become even more determined to pitch themselves forward at an even more accelerated speed to bring about the achievement of their common objectives, whereby all of them hope to resuscitate the past booming of their economies. Although the slumbering world economy<sup>97</sup> is not conducive to facilitating such a recovery in the immediate future,<sup>98</sup> it is not utopian to expect an acceleration of the process of a full-fledged AFTA to facilitate the accomplishment of ASEAN's plan to revive its former economic growth rate in the future, considering that the positive factors of AFTA are still very much present nowadays, as they have been in the past three decades. The fact that the lowering of tariffs to minimal levels was accompanied by a massive expansion of intra-regional trade, from US\$ 44.2 billion in 1993 to US\$ 97.8 billion in 2000, is undeniable proof of this.<sup>99</sup> Moreover, the above-mentioned political will has been translated into action in terms of the promulgation of ASEAN Vision 2020, which envisages the further development of ASEAN toward more advanced economic integration by fully implementing the ASEAN Free Trade Area and accelerating liberalization of trade in services; realizing the ASEAN Investment Area by 2010 and free flow of investments by

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<sup>96</sup> Which is aggravated by political unrest in two principal member countries, namely Indonesia and Malaysia.

<sup>97</sup> With the exception of the economy in the United States, which prospered under President Clinton's administration; although the American economy began to experience a recession not very long after President Bush took office, this recession was only temporary and the American economy is already in the process of recovery.

<sup>98</sup> Because no matter how enticing and promising the political and economic ambiance is in this part of the world, the receding potential of the traditionally major investment exporting countries will not, under the prevailing circumstances, permit international trade and investment flows to regain their past glorious rhythm in the near future.

<sup>99</sup> *Op.cit.*, *supra* note 62.

2020; intensifying and expanding sub-regional cooperation in existing and new sub-regional growth areas; further consolidating and expanding extra-ASEAN regional linkages for mutual benefit; co-operating to strengthen the multilateral trading system; and reinforcing the role of the business sector as the engine of growth. The adoption of the Hanoi Plan of Action, which aims at operationalizing the vision by laying down specific steps and measures to be taken during the years 1999-2004 in order to strengthen macro-economic and financial cooperation, advance economic integration, and promote the social sciences, technology, and the information technology infrastructure as well as human resources development, is also a reconfirmation of the said political will.

This concluding remark consolidates the view of the ASEAN Secretary General at the January 2002 symposium in Jakarta that "ASEAN responded to the 1997-1998 financial crisis not by backtracking on AFTA, as some commentators hastily predicted, but by accelerating it."<sup>100</sup>

## References

R.P. Anand (1984) The role of Asian states in the development of international law. *The Development of International Law in the Future of International Law in a Multicultural World Workshop*, Martinus Nijhoff Publishers, The Hague.

ASEAN Secretariat (1999) *Review of the CEPT Scheme for AFTA*, presented to the AEM Retreat, Phuket, Thailand.

ASEAN Secretariat (1995) Non-tariff barriers. *AFTA Reader*, vol.3, September.

Mohamed Ariff (1996) From ASEAN -Six to ASEAN -Ten: Issues and Prospects. In: Joseph L. H. Tan (ed) *AFTA in the changing international economy*. Institute of Southeast Asian Studies, Singapore, p.66-75.

Narongchai Akrasanee and David Stifel (1992) The political economy of the ASEAN free

<sup>100</sup> *Ibid.*

trade area. In: Pearl Imada and Seiji Naya (eds) *AFTA. The Way Ahead*, Institute of Southeast Asian Studies, Singapore, p.27-47.

Suthiphand Chirathivat ASEAN economic integration with the world through AFTA. *AFTA in the Changing International Economy*, p.21-41.

Paul J. Davidson (1997) *The legal framework for international economic relations*. ASEAN and Canada, Institute of Southeast Asian Studies, Singapore.

B. Hoekman (1993) Rules of origin for goods and services: conceptual issues and economic considerations. *Journal of World Trade*, 27(4), pp.81-99.

John H. Jackson, William J. Davey (1986) *Legal problems on international economic relations*, 2<sup>nd</sup> edition, West Publishing Co., St. Paul, Minnesota.

John H. Jackson (1989) The world trading system. *Law and Policy of International Economic Relations*, the M.I.T., Cambridge, Massachusetts.

Rolf J. Langhammer, Shaping factor and business conditions in the post-fourth ASEAN summit period. *AFTA. The Way Ahead*, p.1-22.

Peter Kenevan, Andrew Winden (1993) Flexible free trade: the ASEAN free trade area. *Harvard International Law Journal*, vol. 34.

Sree Kumar, Policy issues and the formation of the ASEAN free trade area. *AFTA. The Way Ahead*, p.71-94.

Seiji Naya and Pearl Imada (1992) The long and winding road ahead for AFTA. In: Pearl Imada and Seiji Naya (eds) *AFTA. The Way Ahead*, Institute of Southeast Asian Studies, Singapore, 1992, p.53-66.

Kathryn L. McCall (1995) What is Asia afraid of? The diversionary effect of NAFTA's rules of origin on trade between the United States and Asia. *California Western International Law Journal*, vol.25, p.389-423.

Nimnuan Puethongngam (1999) *ASEAN Free Trade Area*, Thesis of LL.M, Faculty of Law, Thammasat University.

Martin Rudner (1992) ASEAN, Asia Pacific economic co-operation, and hemispheric free trade for the Americas. *World Competition Law and Economics Review*, 16(2), p.131-146.

Sompong Sucharitkul (1991) ASEAN partnership and cooperation with non-ASEAN partners. *Singapore Journal of Legal Studies*, p.562-594.

Jaturon Thirawat (1993) Some observations on AFTA. *Thammasat Law Review*, no.1, pp.55-64, translated into Japanese and published by Nihon Keizai Shimbun (1993) *Global*

*thinkers, challenge orthodox: Japanese views of the world's economy and political situations, pp.229-248.*

Visoot Tuvayanond (2002) Opportunities for economic rebound in ASEAN countries with the advent of AFTA. *In-House Briefing Asia-Pacific*, Pacific Business Press.