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Navigating the Political Economy Trilemma in the ASEAN Economic Community: A Legal Perspective

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Abstract

This article examines the challenges impeding effective regional economic integration in ASEAN through the ASEAN Economic Community (AEC). It does so by using Dani Rodrik's political economy trilemma theory as a conceptual framework. This analysis shows that ASEAN is currently stuck in the trilemma between hyperglobalization, nation-state, and democratic politics, leading to ineffective regional economic integration. Rodrik proposes that the solution to the political economy trilemma is not maximum globalization or economic integration but, instead, a smart form of globalization or of economic integration. This "smart form" contains a thin layer of international law that facilitates flexibility towards a country to maintain its national sovereignty. However, this article hypothesizes that this solution is underdeveloped as it lacks the legal details required to implement the smart form of globalization or economic integration. Specifically, the political economy trilemma framework

does not provide the necessary legal mechanisms required to implement safeguard measures effectively and to navigate the principle of non-interference in intergovernmental contexts like ASEAN. This article aims to fill the legal gap by analyzing the legal dimension of the AEC through the lens of Rodrik's political economy trilemma. Thus, by applying Rodrik's political economy trilemma, this article provides legal insights as thought directions for operationalizing the smart legal framework required to address the political economy trilemma, such as moving beyond the principle of non-interference, reforming the AEC institutional framework, and establishing safeguard measures within the AEC legal framework.

KEYWORDS *Political Economy Trilemma, Regional Organization, ASEAN Economic Community, ASEAN Charter, Legal Insights*

Introduction

The ASEAN Member States have explicitly expressed their intention to establish an ASEAN Economic Community (AEC) with the objective of strengthening regional economic cooperation among them. Yet despite this clear ambition, the realization of the AEC has been limited. This is not only due to a mismatch between political aspirations and practical implementation, but also to the rather limited legal framework governing the integration of the ASEAN regional economy.[1]

This gap reflects a fundamental structural issue within ASEAN's legal and political framework, which requires a theoretical exploration of how regional economic integration, sovereignty, and political legitimacy interact. On the one hand, the ASEAN Member States want to have a single market in the region through regional economic integration. On the other hand, the application of the principles of non-interference and consensus decision-making, as stated in Article 1 paragraph (5) of the ASEAN Charter, restrain ASEAN Members in creating a sufficiently functional regional legal order to support economic integration. This situation fits with the globalization paradox that leads to a political economy trilemma as postulated by Dani Rodrik.[2] In this political economy trilemma, the ASEAN Member States can only choose two out of the

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[1] Rodolfo Severino, the former Secretary General of ASEAN, criticised the economic integration project in ASEAN, which is stuck in framework agreements, work programs, and master plans. *See* Rodolfo Severino, *Southeast Asia in Search of an ASEAN Community*. Singapore: Institute of Southeast Asian Studies, 2006.

[2] Dani Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy*. New York: W. W. Norton, 2011.

following three options: deep regional economic integration (hyperglobalization), safeguarding national interests (nation state sovereignty), or upholding democratic politics.

Rodrik proposes that in order to escape the political economy trilemma, one requires smart globalization or economic integration,[3] not maximum economic integration.[4] Rodrik indicates that a smart form of globalization or economic integration consists of a thin layer of (international) law that provides considerable room for manoeuvre by the member states to preserve their national economic benefits. Nevertheless, Rodrik does not define in sufficient detail what he means by a smart form of economic integration with a thin layer of international law. This leaves a legal gap in Rodrik's theory, which primarily focuses on political economy. Hence, Rodrik's theory on the political economy trilemma must be complemented by a legal viewpoint on creating a smart form of globalization that entails a thin layer of international legal order.

Thus, this article will analyse the legal dimension of the AEC in ASEAN through the lens of the political economy trilemma. Rodrik's theory will constitute a key conceptual framework for evaluating the legal challenges that ASEAN and its member states face in their effort to develop the AEC in ASEAN. Specifically, this article will fill the legal gap in Dani Rodrik's theory designing the legal framework of his smart form of globalization, especially in the AEC case. By building on Rodrik's political economy trilemma, this article will propose legal insights that will serve as thought directions to manage the complexity of the political economy trilemma in the ASEAN Economic Community.

The proposed thought orientations in this article are expected to facilitate the operationalization of Rodrik's smart globalization concept into prescriptive legal institutional design, as well as to offer a novel theoretical lens for the analysis of systemic constraints within the ASEAN legal framework. In addition, this article also address gap in the current ASEAN legal scholarship, where the majority of analyses focus on specific sectors, (such as trade in goods, services, investment, etc.) while neglecting to explore the overarching structural tensions between market integration, sovereignty, and legitimacy that form the foundation of the AEC's legal framework. To address this gap, this article

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[3] Rodrik used the phrase "*smart globalization*" in lieu of "*smart economic integration.*" Nevertheless, Rodrik consistently clarifies throughout his work that the term "*globalization" he uses is synonymous with "economic integration.*" Rodrik exemplifies that European countries have achieved an extraordinary level of economic integration among themselves. He claims that the European Union (EU) is an instance of deep economic integration or hyperglobalization, albeit at a regional level. *See,* Rodrik, p. 200.

[4] Rodrik, p. xix.

adopts a doctrinal and conceptual approach that examines ASEAN's legal instruments through the analytical lens of Dani Rodrik's political economy trilemma.

The structure of this article is as follows: Section II presents the theoretical basis of the political economy trilemma by Dani Rodrik. Subsequently, Section III explores the legal dimension of the AEC and the political economy trilemma in the AEC. Following that, Section IV examines legal insights as thought directions to address the political economy trilemma in the AEC. Lastly, Section V finishes by providing a summary of the primary findings and presenting suggestions concerning future examinations on how to tackle the political economics trilemma in the AEC.

The Political Economy Trilemma: A Conceptual Approach

A. The Foundation of the Political Economy Trilemma

The political economy trilemma was introduced by Dani Rodrik in his book the Globalization Paradox. The basic framework of Rodrik's trilemma is that a country faces a trade-off between three key elements of the political economy trilemma: hyperglobalization, nation-state, and democratic politics.[5] Rodrik postulates that it is impossible to have all these three key variables simultaneously. Only two options out of three are available to decision-makers. They cannot have hyperglobalization, nation-state, and democratic politics all at once. A country must surrender its nation-state agenda if it wishes to embrace hyperglobalization further while upholding democratic politics. Then, if a country maintains its nation-state sovereignty and wants hyperglobalization, it must forget democratic politics. Additionally, if a country wants to have a combination of nation-state and democratic politics, then it is goodbye to hyperglobalization. The Figure 1 below depicts these choices.[6]

[5] Rodrik, p. 200.
[6] Rodrik, p. 201.

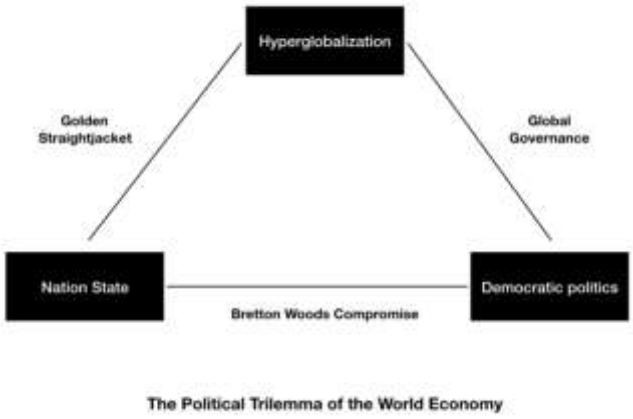

FIGURE 1. The Political Trilemma of the World Economy

In the Figure 1, it shows that a country strives to navigate the tension between preserving their national economic priorities (nation state) and their obligation to adhere to international legal norms as consequences of international trade agreements (hyperglobalization). On the one hand, to protect their national economic interests, they need to ensure that their domestic legal systems are strong enough to protect their citizens. On the other hand, as parties in international trade agreements, national governments must also comply with international standards. Failure to find the right solution can erode democratic legitimacy (democratic politics), impair national economic growth, and even lead to social problems.

Rodrik refers to "hyperglobalization" as a hypothetical condition where the world economy is fully globalized, all transaction costs have been eliminated, and national borders do not interfere with exchanging goods, services, and capital. Nation states then focus exclusively on economic globalization and becoming attractive to foreign investors and traders. The national economic, legal orders and fiscal policies are structured so that they pose the least hindrance to international economic integration. In this scenario, the only services provided by the national governments are those that reinforce the smooth functioning of international markets.[7] In Rodrik's theory, hyperglobalization may not only refer to the global level of economic integration but also to the regional level of economic integration. Rodrik mentions the European Union (EU) as an approximation of hyperglobalization even though at the regional level.[8]

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[7] Rodrik, p. 200.

[8] Rodrik.

For the nation state variable, Rodrik does not explicitly define or discuss the conceptual underpinning of a nation state. However, based on his view, nation state variable refers to the actions or characteristics of a nation-state as a political entity. This variable includes factors such as national sovereignty, border control, economic policy, and regulatory frameworks. Additionally, this variable also refers to the capacity of a country to independently determine its national economic policies, economic partnerships, and its own legal system.[9]

With regard to the variable of democratic politics or democracy, Dani Rodrik also does not provide a clear conceptual explanation of what he means by this notion. While democracy is a very broad concept, Rodrik contends that it is never perfect in practice. Even when there are well designed standards or rules from international influence on a country, it would enhance the quality of democratic decision-making process. Democracy does not simply aim to optimize popular participation in a country. Even when external rules restrict participation at the national level, it may compensate for other democratic benefits, such as facilitating deliberation, minimizing factions, and ensuring minority representation.[10]

Dani Rodrik's exploration of the political economy trilemma suggests that only two out of three options can coexist. Logically, there are only three possible combinations: hyperglobalization and nation state (the Golden Straitjacket), the nation state and democratic politics (the Bretton Woods compromise model), and the hyperglobalization and democratic politics (the global governance model). The Golden Straitjacket involves nations adopting restrictive economic policies to gain global market confidence, limiting their control over monetary policy and suppressing democratic politics. This concept was coined by Thomas Friedmann and refers to the global market policies and free trade that cover national governments.[11]

Subsequently, the Bretton Woods compromise, which arose after World War II, combined democratic politics with nation state variable. This paradigm allowed countries to retain sovereignty over their borders regarding international trade while engaging in the global economy. It created a global financial system that was linked to the US dollar, making it easier to manage international commerce and investment movements. Although the Bretton Woods compromise model initially achieved success, it was abandoned in the late 1980s due to economic crises in the US. Lastly, the global governance model consolidates hyperglobalization and democratic politics, with models like

[9] Rodrik, p. 212.
[10] Rodrik, p. 206.
[11] Rodrik, p. 201.

the expanded US federalism model and the European Union (EU) regional model. But Rodrik is skeptical of the global governance model due to its historical and legitimacy issues, as well as the world's diversity and lack of a common global rule.

The idea of political economy trilemma from Dani Rodrik also faces criticism. Palley believes Dani Rodrik's conception of the political economy trilemma is misled. He argues that instead of the trilemma, globalization faces a dilemma between either globalization or national policy. According to him, democracy is just a side issue in globalization as it refers to the political decision-making process, which is not merely impacted by globalization *per se*. He believes that a country can be democratic whether it is involved in globalization or not. Therefore, once democracy is interpreted as a process of policy-making, the trilemma disappears, and then it becomes a dilemma between globalization and national policy.[12] In contrast, Aizenman and Ito believe a continuous version of the political economy trilemma theory exists. As they explored the empirical validity of Rodrik's political economy trilemma, they believe that if a country increases the intensity of its globalization level, it has to give up either some degree of national sovereignty or some democracy.[13] Therefore, in the situation when a country does not completely implement the two variables, and if there is substitutability between the trilemma variables, a country may choose to trade off the decrease in the two variables with partial attainment of the third variable. In other words, Aizenman and Ito believe that the political economy trilemma is escapable by adjusting the three variables of the political economy trilemma.[14]

Ultimately, despite the ongoing discourse surrounding the political economy trilemma continuing to be a topic of discussion, scholars continue to utilize this concept as their tool to analyze the dynamic of globalization in many cases. For instance, Snell uses Dani Rodrik's political economy trilemma to analyze the Euro crisis in the EU. By using Rodrik's trilemma, he believes it is impossible to simultaneously have a fully operational Economic and Monetary

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[12] Thomas Palley, "The Fallacy of the Globalization Trilemma: Reframing the Political Economy of Globalization and Implications for Democracy." *Düsseldorf: FMM Working Paper*, No. 8, Hans-Böckler-Stiftung, Macroeconomic Policy Institute (IMK), Forum for Macroeconomics and Macroeconomic Policies, 2017. http://hdl.handle.net/10419/181466

[13] Joshua Aizenman, and Hiro Ito. "The Political-Economy Trilemma." *Open Economies Review* 31, no. 5 (2020): 945-975. https://doi.org/10.1007/s11079-020-09588-1

[14] Aizenman and Ito, p. 959.

Union (EMU), democratic politics, and nation-states.[15] Furthermore, Pascha applies the concept of political economy trilemma to explore his idea on regional policy space beyond national spaces.[16] Additionally, Novy employs Dani Rodrik's trilemma to examine various understandings of the ongoing significant social-ecological changes, particularly the climate crisis.[17]

Notwithstanding the wide range of implementations of the political economy trilemma, its core message of this concept remains important: managing the tensions between globalization, national sovereignty, and democratic politics presents an obvious challenge for countries and regional organizations.

B. Rodrik's Solution on the Political Economy Trilemma

As a solution to the political economy trilemma, Rodrik proposes the idea of smart economic integration with a thin layer of international law designed to preserve flexibility to national governments. Recognizing the complexity of establishing a comprehensive global legal framework, Rodrik suggests a more pragmatic legal approach to address the political trilemma. Unlike maximum globalization or hyperglobalization, which seeks to remove barriers and harmonize standards across national borders, Rodrik's smart economic integration acknowledges that a certain level of discretion must be maintained for national governments to implement their national economic policies while still sufficiently aligning with international economic agreements.

Rodrik delineates several solutions for his smart economic integration proposal. First, reforming the international trade regime to allow member states greater flexibility through an opt-out mechanism as a safeguard mechanism with legitimate grounds such as distributional concerns, conflict with national norms and social policies, prevention of the erosion of national legal orders, sustainability reasons and priorities on national economic development. Allowing flexibility to diverge from specific provisions in international

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[15] Jukka Snell, "The Trilemma of European Economic and Monetary Integration, and Its Consequences." *European Law Journal* 22, no. 2 (2016): 157-179. https://doi.org/10.1111/eulj.12165

[16] Werner Pascha, "The Globalization Trilemma and Regional Policy Space: Opportunities and Challenges for the EU and East Asia." *East Asian Community Review* 2, no. 1 (2019): 3-20. https://doi.org/10.1057/s42215-019-00018-0

[17] Andreas Novy, "The political trilemma of contemporary social-ecological transformation–lessons from Karl Polanyi's The Great Transformation." *Globalizations* 19, no. 1 (2022): 59-80. https://doi.org/10.1080/14747731.2020.1850073

economic agreements would enable member states to align their national legislation with international standards without compromising their national interests. Reforming the international trade agreement, as Rodrik desired, would involve the development of an international trade agreement that includes provisions or mechanisms that provide flexibility for national governments. The legal setting of the agreement should entail opt-out provisions for the national governments with legitimate justifications such as protecting their social concerns, priorities on national growth, and preservation of national legal orders.[18]

While the World Trade Organization (WTO) has the Agreement on Safeguards to protect domestic industries, Rodrik considers this arrangement inadequate. As mentioned previously, the definition of "safeguards" needs to be expanded to a wider range of legitimate grounds. Thus, an institutional framework is required to support this arrangement. Rodrik expects the WTO dispute settlement mechanism would still have jurisdiction over cases regarding opt-out action from countries. The WTO panel would only examine the procedural aspect, not the substantive aspect. The panel would primarily assess whether domestic democratic requirements were met before a country invoked the opt-out mechanism.

Second, according to Rodrik, the global finance restrictions must be restructured with a commitment to national regulatory diversity. These restrictions aim to regulate cross-border transactions to prevent regulatory arbitrage, while simultaneously preserving national legal orders. This arrangement intends to prevent national regulatory standards from being undermined by foreign competition from more lax jurisdictions. The national government should be able to manage capital flows, not for financial protectionism, but to protect national legal orders. The restrictions from national governments would be justified as long as they also have legitimate grounds similar to those in the previous solution.[19]

A minimal set of international legal standard with limited coordination at the international level should back this new arrangement of global financial order. An international charter or treaty is needed to regulate this arrangement. Such a legal framework would provide common principles and understanding from countries and set the rule for cooperation while preserving the diversity of national legal orders. Most importantly, the rule should clearly give rights to national governments to limit cross-border financial transactions to avoid

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[18] Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy*, p. 252.

[19] Rodrik, p. 260.

regulatory arbitrage practices undermining national legal orders. As for the institutional setting, the International Monetary Fund (IMF) will be involved under the conditions that it should increase its resources and facilitate developing countries.

Third, a temporary mobility scheme for workers from developing countries to developed countries could be established for a limited period. In this scheme, a combination of skilled and non-skilled workers from poor or developing countries would be allowed to fill jobs in developed countries for a maximum of five years. A new influx of temporary workers from the same countries would replace the initial workers when they return home. This rotation system would create a continuous cycle of employment opportunities in unfortunate countries. Rodrik believes that the benefits of this scheme would directly affect the citizens of poor developing countries. Rodrik claims that such a program would generate considerable money and give more benefits than establishing an economic agreement on goods.[20]

Indeed, this program should be carefully arranged within a comprehensive legal framework to avoid overstays and ensure the workers return to their home countries. The scheme should include incentives and sanctions, jointly implemented by home and host countries, to ensure the workers return home at the end of their contracts. The legal framework should also ensure the rights of workers during their non-permanent stay in the host countries. This would include rights to fair wages, a safe and secure working environment, access to social services, and any other relevant rights. In addition, a dispute settlement mechanism should also be provided to settle any legal issues arising between workers and employers, especially to protect workers' rights.

These solutions, reforming the international trade regime, restructuring global finance restrictions, and establishing a temporary labour mobility scheme, require a comprehensive legal framework that sets clear rules, mechanisms, principles, and institutional arrangements to regulate these initiatives.[21]

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[20] Rodrik, p. 266.

[21] Rodrik also introduces the fourth solution, which involves accommodating China in the World Economy. While this solution may have indirect connections to the overall discussion, it has not been included in this article as this article is focusing on regional economic integration in ASEAN.

The Legal Dimension of the ASEAN Economic Community

A. The History of ASEAN Regional Economic Integration

In its early days, the initial objective of the establishment of ASEAN was to ease political tension in the region rather than economic cooperation. This is reflected in the 1967 ASEAN Declaration, which comprises five articles. These articles outlined the establishment of ASEAN, its aims and purposes, the institutional setting, the principle of openness for other Southeast Asian countries to join ASEAN, and the proclamation of ASEAN as an association that represents the collective will of the nations in Southeast Asia to bind themselves together in friendship and cooperation and, through joint efforts and sacrifices, secure for their peoples and for posterity the blessings of peace, freedom and prosperity.[22] However, recognizing the need for further regional economic collaboration, the ASEAN Member States established the ASEAN Preferential Trading Agreement (PTA) in 1977 as a follow-up agreement after Bali Concord I.[23]

The ASEAN PTA was designed to gradually reduce tariffs on specific products in intra-ASEAN trade. However, this initiative failed due to its limited coverage of products, high Most Favoured Nation (MFN) rates, and inability to complete industrial projects.[24] In 1992, the ASEAN Member States established the ASEAN Free Trade Area (AFTA) through the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme to create a free trade area within the Southeast Asian region.

Therefore, in 1992, the ASEAN Member States established the ASEAN Free Trade Area (AFTA) through the Agreement on the Common Effective Preferential Tariff (CEPT) Scheme, establishing a free trade area within the Southeast Asia region. According to Bowles and MacLean, the formation of AFTA in ASEAN was related to three interrelated factors: global economic realignment, shifting business interests, and the need to reaffirm ASEAN's post-Cold War identity. The first factor is ASEAN's response to the international political economy at that time, which was characterised by economic slowdown in the early 1980s, realignment of major currencies in the world, the collapse of Soviet bloc and the formation of many trade blocs in the world. The second

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[22] The ASEAN Declaration (Bangkok Declaration) 1967, (1967).

[23] ASEAN Preferential Trading Agreement, 1977.

[24] Stefano Inama & Edmund W. Sim, *The Foundation of the ASEAN Economic Community: An Institutional and Legal Profile*. Cambridge: Cambridge University Press, 2015.

factor concerns the shifting of private business interest to extend their outreach into regional market. And the third and last factor relates to concerns from the ASEAN Member States to maintain ASEAN's identity after the end of Cold War.[25] These interrelated factors have triggered ASEAN to initiate its own regional economic bloc through the implementation of AFTA.

Inama and Sim believed that the creation of AFTA provided an opportunity for ASEAN Member States to learn how to operate a regional trading bloc, which represented what was achievable at that time.[26] Article 2 paragraph (1) of the CEPT agreement mandated all ASEAN member states to engage in tariff reduction in accordance with all provisions in this agreement. Additionally, Article 2 paragraph (5) of the CEPT agreement mandated that all ASEAN member states apply preferential tariffs to all ASEAN origin products, except for agricultural products.

Subsequently, in the Declaration of ASEAN Concord II (Bali Concord II) in 2003 at the 9th ASEAN Summit in Bali, the ASEAN Economic Community (AEC) was established together with ASEAN Security Community (ASC), and ASEAN Socio-Cultural Community (ASCC). The AEC was established as the realisation of regional economic integration vision in ASEAN Vision 2020, to create a stable, prosperous and highly competitive ASEAN economic region. In the declaration of Bali Concord II, the ASEAN Member States believed that the AEC was seen as a means to strengthen the implementation of existing economic cooperations in ASEAN at that time, especially AFTA. Its primary objectives were to facilitate the free flow of goods, services, investment and a freer flow of capital in ASEAN by the year 2020.

As the regional economic collaboration in ASEAN deepened, the ASEAN member states recognised the necessity of establishing a sufficient legal framework. Thus, in 2007, the ASEAN Charter was agreed as a binding legal

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[25] Paul Bowles & Brian Maclean, "Understanding trade bloc formation: the case of the ASEAN Free Trade Area." *Review of International Political Economy* 3, no. 2 (1996): 319-348. https://doi.org/10.1080/09692299608434358

[26] Inama and Sim, *The Foundation of the ASEAN Economic Community: An Institutional and Legal Profile*, p. 59. *See also* Jörn Dosch, "The ASEAN Economic Community: Deep Integration or Just Political Window Dressing?." *TRaNS: Trans-Regional and-National Studies of Southeast Asia* 5, no. 1 (2017): 25-47; Koichi Ishikawa, "The ASEAN Economic Community and ASEAN Economic Integration." *Journal of Contemporary East Asia Studies* 10, no. 1 (2021): 24-41; Lee Jones, "Explaining the Failure of the ASEAN Economic Community: The Primacy of Domestic Political Economy." *The Pacific Review* 29, no. 5 (2016): 647-670

document to provide an institutional framework for the ASEAN community project, especially the AEC. The ASEAN Charter entered into force in 2008, setting the ASEAN's institutional framework.

B. The Current Legal Reality of ASEAN Regional Economic Integration

The establishment of the ASEAN Charter in 2007 is an essential milestone for the regional integration process in ASEAN. Before the ASEAN Charter entered into force in 2008, ASEAN was well known as an international organization with a loose intergovernmental system. After the enactment of the ASEAN Charter, it became the basic legal framework for ASEAN as it sets the legal and institutional framework for ASEAN. In addition to providing a legal foundation for ASEAN, the ASEAN charter also outlines the principles, purposes, structure, and institutionalization of the ASEAN Community. Nonetheless, the Charter maintains as its core principles respect for national sovereignty, national identity and non-interference. Article 2 Paragraph (2) (a) and (e) state that:

> ASEAN and its Member States shall act in accordance with the following Principles:
> (a) respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States;
> …
> (e) non-interference in the internal affairs of ASEAN Member States;

In the context of economic integration, the ASEAN Member States reaffirm their commitment to establish a regional economic integration by creating a single market and production base as one of ASEAN's purposes in the ASEAN Charter.[27] This commitment is stated in Article 1 paragraph (5) of the ASEAN Charter, as follows:

> The Purpose of ASEAN is:

[27] Before the AEC's recognition in the ASEAN Charter, the AEC was first introduced in the Declaration of ASEAN Concord II (Bali Concord II) in 2003 at the 9th ASEAN Summit in Bali as an integral part of the ASEAN Community, together with the ASC and the ASCC.

> (5) To create a single market and production base which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is free flow of goods, services and investment; facilitated movement of business persons, professionals, talents and labour; and freer flow of capital.

Moreover, the ASEAN Charter also institutionalizes the AEC in Article 9 of this charter by establishing the AEC Council as part of the ASEAN Community Council, responsible for ensuring the implementation of decisions from the ASEAN Summit. Each ASEAN Community Council, including the AEC Council, should have at least twice a year meetings and be chaired by the minister from the ASEAN Member State holding the ASEAN Chairmanship.

Article 22 of the ASEAN Charter sets the general principles for dispute settlement in ASEAN. In this article, the ASEAN Member States shall resolve any dispute within ASEAN in a timely manner through dialogue, consultation and negotiation. Article 24 paragraph (3) of the ASEAN Charter provides that, unless otherwise specified, disputes concerning the interpretation or implementation of ASEAN Economic Agreements, including the AEC, should be settled in accordance with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM).

The EDSM would apply in all disputes relating to all economic commitments in ASEAN, as well as retroactively to earlier economic agreements. The EDSM process involves panels and an appellate body to review disputes that cannot be resolved through good offices, conciliation, or mediation between parties.[28] In EDSM, the panel is formed by the Senior Economic Official Meeting (SEOM), and the disputing parties cannot invoke other dispute processes. The SEOM is the one who administers the compliance with the EDSM panel's decision. Furthermore, in the event that the dispute remains unresolved after going through the EDSM, Article 26 of the ASEAN Charter mentions that it would be referred to the ASEAN Summit for its decision.[29] Walter Woon nonetheless believes that, since the ASEAN Summit is not a judicial institution, the most pragmatic way for the ASEAN Member States to settle unresolved disputes would be by referring to a dispute settlement mechanism outside ASEAN's legal framework, specifically the dispute

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[28] Walter Woon, "Dispute Settlement in ASEAN", in Korean Society of International Law (2011), https://cil.nus.edu.sg/wp-content/uploads/2010/08/DISPUTE-SETTLEMENT-IN-ASEAN-KSIL-ProfWalterWoon.pdf.

[29] The ASEAN Charter, (2007).

settlement mechanism in the UN Charter, as referenced in Article 28 of the ASEAN Charter.[30]

As the ASEAN Charter only regulates the institutional foundation of ASEAN, it does not terminate ASEAN agreements that were still valid before the enactment of the ASEAN Charter in 2008, including substantive economic agreements among the ASEAN Member States. Article 52 of the ASEAN Charter assures the continuity of all treaties, conventions, agreements, concords, declarations, protocols and other ASEAN instruments which have been in effect before the ASEAN Charter entered into force. Instead, the presence of the ASEAN Charter has intrigued the ASEAN Member States to enhance the substantive economic agreements in ASEAN. For trade in goods, the ASEAN Trade in Goods Agreement (ATIGA), which was introduced in 2009 to replace the AFTA, was part of this initiative. Article 1 of ATIGA states that ATIGA aims to achieve a free flow of goods in ASEAN as a means to create a single market and production base in ASEAN. To achieve the free flow of goods in ASEAN, ATIGA regulates some crucial elements, such as gradual tariff liberalisation, rules of origin, elimination on non-tariff barriers trade facilitation, customs, standards and conformance, and sanitary and phytosanitary measures.

For investments, the ASEAN Comprehensive Investment Agreement (ACIA) was introduced in 2009 as a replacement for the ASEAN Investment Area (AIA) Agreement. In line with the ultimate objective of economic integration under the AEC, ACIA seeks to establish a free and open investment system within ASEAN. As stated in Article 1 of the ACIA, ACIA uses a number of tactics to accomplish this goal. These include promoting the region as an integrated investment area, fostering an environment conducive to increased investment among Member States, improving transparency and predictability of investment rules and regulations, providing enhanced protection to investors and their investments, and facilitating cooperation to create favourable conditions for investments by investors.

As for the area of services, the ASEAN Framework Agreement on Services (AFAS), which remained in effect since 1995, was supplanted by the ASEAN Trade in Service Agreement (ATISA) in 2020. ATISA adopts the "negative" listing approach, as outlined in Article 2 ATISA, which implies that all service sectors are liberalized unless otherwise indicated. According to Yean, this

[30] Walter Woon, The ASEAN Charter Dispute Settlement Mechanisms, in The Making of the ASEAN Charter 69, 75 (Tommy Koh, Rosario G Manalo, & Walter Woon eds., 2009).

approach is expected to accelerate services liberalization and, ultimately, facilitate closer regional economic integration.[31]

Furthermore, because of the more informal nature of its organizational practice, ASEAN typically employs non-legal instruments – soft law? - to carry out its agendas. In the AEC frameworks, the ASEAN Member States also rely on political commitment documents, notably the AEC Blueprints. Although the ASEAN legal framework lacks a formal hierarchy of legal instruments, Aziz and Dehousse classify the "blueprint" as forms of soft law because of their political significance, including the AEC Blueprints.[32] This is because the AEC Blueprints are considered to have political significance due to their high-level and very detailed policy directions intended to further achieve the AEC.

There are two blueprints in the AEC: the AEC Blueprint 2015 and the AEC Blueprint 2025. The former is the initial blueprint which was launched by the ASEAN Member States in 2007, together with the signing of the ASEAN Charter. In the declaration of the AEC Blueprint 2015, the ASEAN Member States recognized the need to strengthen the institutional framework and unified legal identity as outlined in the ASEAN Charter by implementing rule-based systems in order to realise the AEC by 2015. The AEC Blueprint 2015 was then continued by the AEC Blueprint 2025. The AEC Blueprint 2025 has a notable difference from the 2015 version. The terminology "single market" no longer dominates the document. In the 2015 version, the "Single Market and Production Base" was the first characteristic of the ASEAN Economic Community. In the 2025 version, this term is changed to "A Highly Integrated and Cohesive Economy". Another notable change is that the term "free flow" in goods, services, investments, skilled labour, and capital is also changed into "a seamless movement" of those same elements.

Jerusalem believes that the change of terminologies in the AEC Blueprints 2025 has important meanings/ramifications. He believes that this change can be considered a "Single Market" form of integration and is an unfeasible goal for the AEC. The 2025 version uses "A Highly Integrated and Cohesive

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[31] Tham Siew Yean, "ASEAN Trade in Services Agreement (ATISA): Advancing Services Liberalization for ASEAN?" *ISEAS Perspective* No. 54 (2019). Singapore: ISEAS - Yusof Ishak Institute. 2019.

[32] Davinia Abdul Aziz and Renaud Dehousse, "The Instruments of Governance of ASEAN: An Inventory and Critical Analysis, in ASEAN Integration Through Law", *The 2nd Plenary of the ASEAN Integration Through Law Project Centre of International Law National University of Singapore,* July 19, 2013. Available online at https://cil.nus.edu.sg/wp-content/uploads/2016/08/SD_Executive-Summary-Aziz-and-Dehousse-formatted.pdf

Economy" to adjust the AEC goal to not narrowly focus on a single market but aim for a more general form of regional economic integration, or open regionalism, which tends to have a more outward-looking economic policy.[33]

Although there may be strategic reasons behind this change in terminology, it also raises a legal concern. The ASEAN Charter clearly mentions the term "Single Market and Production Base" as the purpose of ASEAN in Article 1. Meanwhile, the modification to "A Highly Integrated and Cohesive Economy" appeared within the blueprint document. Although the ASEAN legal framework lacks a formal hierarchy of legal instruments, it is important to emphasize that a political document such as blueprints should not contradict the authority of the ASEAN Charter. Thus, a thorough examination and consideration of the legal implications are crucial within the broader context of the regional economic integration in ASEAN.

C. The Political Economy Trilemma Challenges in the AEC

Normatively, the legal framework of the AEC in the ASEAN Charter looks promising. Many official publications from the ASEAN Secretariat, moreover, claim that significant progress has been achieved for the AEC in 2015. As of 31 October 2015, the implemented rate of the measures in the AEC Blueprint 2015 by all ASEAN Member States was 92.7%, or 469 out of 506 measures, including 54 high priority measures. Out of the total of 611 measures, 486 were implemented for whole measures, including those not identified as high priority measures, with an implementation rate of 79.5%.[34]

However, according to Basu Das, the reality contradicts these claims. Although the ASEAN Secretariat reported in 2015 that many measures in the AEC Blueprint were reported as "implemented", Das's findings indicate that most remained inapplicable to businesses engaging in cross-border activities

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[33] Moh Firstananto Jerusalem, "The ASEAN Without a Customs Union or a Single Market Consequences of the ASEAN Economic Community Blueprint 2025." *Customs Research and Applications Journal* 2, no. 1 (2020): 101-127. https://doi.org/10.31092/craj.v2i1.20. *See also* Diane Desierto, and David Cohen (eds). *ASEAN Law and Regional Integration: Governance and the Rule of Law in Southeast Asia's Single Market.* London: Routledge, 2020.

[34] The ASEAN Secretariat, *ASEAN Economic Community 2015: Progress and Key Achievements*, Jakarta: ASEAN Secretariat, 2015, p. 9

within ASEAN.[35] It indicates that despite some progress being made, there are still gaps in the implementation, which highlights the need for a more robust institutional reform and a streamlined result-oriented agenda.[36] In other words, even though ASEAN and its member states have politically proclaimed that the AEC has achieved significant achievements, this implementation has not provided substantial legal enforcement and direct effect on the ASEAN people.

When viewed from the perspective of the political economy trilemma, several factors contribute to this situation in ASEAN. First, while the principle of non-interference in the internal affairs of the ASEAN Member States, as mentioned in Article 2 paragraph (2) of the ASEAN Charter, has contributed to the stability of ASEAN, it has also hindered more integrated and effective regional economic integration. The reluctance to interfere in the domestic policies of the ASEAN member states can, for example, be a roadblock when it comes to harmonizing regulatory frameworks, standards, and practices to facilitate regional economic integration in ASEAN and ensuring that existing norms are applied and enforced (lack of legal certainty). In light of Rodrik's political economy trilemma, ASEAN pursues non-interference and regional economic integration to protect the national sovereignties of its member states. In this situation, ASEAN faces the difficult interplay between the AEC's objectives, national sovereignty and political stability through the non-interference principle.

Second, the institutional setting of the AEC, as outlined in the ASEAN Charter, currently limits direct participation from the ASEAN Citizens in the decision-making process. This constraint comes from the preamble of the ASEAN Charter, which states that the peoples of the ASEAN member states are represented by their national governments. This is also articulated in Article 3 of the ASEAN Charter, which mentions that ASEAN has a legal personality as an intergovernmental organization. The consequence of this organizational nature is that no centralised institutions can have the legitimate authority to make final decisions over the Member States. A final decision can only be achieved if all contracting parties in that organization enjoy unanimous approval.[37] This characteristic is mirrored in the institutional framework of the ASEAN Charter. As stated in Chapter IV of the Charter, no particular

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[35] Sanchita Basu Das, "Mind the Gap: Explaining Implementation Shortfalls in the ASEAN Economic Community." *ISEAS Economics Working Paper* No. 2017-7. Singapore: ISEAS – Yusof Ishak Institute, 2017.

[36] Julia Tijaja, Simon Tay, and Sanchita Basu Das. *ASEAN Post-2025: Reimagining the ASEAN Economic Community*. Singapore: ISEAS-Yusof Ishak Institute, 2024.

[37] Henry G. Schermers, and Niels M. Blokker. *International Institutional Law*. Leiden: Brill Nijjoff, 2018.

institutions in ASEAN were created specifically to represent ASEAN Citizens, such as parliament at the ASEAN level or comparable institutions. From Article 7 to Article 15 of the ASEAN Charter, every institution under the framework of the ASEAN Charter is a representative of the national governments of the ASEAN member states.

While this approach may have been reasonable during the early establishment of ASEAN, it appears less suitable for the AEC's present stage of development. Even though the national governments of the ASEAN Member States represent their citizens indirectly, in view of the political economy trilemma, recognizing the importance of involvement and representation of ASEAN citizens in decision-making processes is crucial for fostering a more democratic and inclusive regional economic integration. Given the AEC's objective of deepening regional integration and strengthening economic cooperation, a broader range of stakeholders should be involved in the process. This includes the participation of not just national governments but also business enterprises, civil societies, and other relevant stakeholders through dialogues, consultation, and inclusive decision-making processes.

Third, in terms of enforcement, the main criticism of the ASEAN Charter has been the lack of enforcement and non-consensus decision-making. The dispute settlement mechanism in the ASEAN Charter starts with the general principles in Article 22 (1) that "Member States shall endeavour to resolve all disputes peacefully in a timely manner through dialogue, consultation and negotiation". Article 23 of the ASEAN Charter explains the mechanism of a peaceful dispute mechanism, such as good offices, conciliation or mediation. Although the ASEAN Charter provides for peaceful dispute settlement, critics argue that its heavy reliance on voluntary cooperation causes delay and weak enforcement. Moreover, the EDSM is exclusively intergovernmental, providing no opportunity for private entities to possess legal standing. This institutional design highlights the political characteristics of ASEAN's dispute settlement and illustrates how its legal framework intentionally emphasizes state sovereignty over enforceability. This approach, when viewed through the perspective of Rodrik's trilemma, demonstrates a challenge in reconciling the necessity of establishing a robust enforcement mechanism to support the objectives of the AEC without sacrificing the national sovereignty and the political stability of the ASEAN member states, resulting in less effective regional economic integration.

After analyzing ASEAN's approach to its regional economic integration using the political economy trilemma framework, it is evident that ASEAN places greater importance on nation-state sovereignty and the political stability of its internal member states. Evidence of this is the limited involvement of

ASEAN's citizens in the decision-making process, which is related to democratic politics. Additionally, it encounters difficulties in implementing effective enforcement mechanisms within its institutional structure. Furthermore, the challenge in enforcing regulations in the AEC legal framework is also not suitable for the requirements of the hyperglobalization variable, which requires strong regulatory frameworks to efficiently control cross-border economic activities across the borders of its member states. Hence, ASEAN seems to have failed to adopt any certain political economy trilemma model (the global governance model, the golden straitjacket model, or the Bretton Woods compromise model), as it primarily focuses on protecting national sovereignty or the nation-state variable. This discrepancy highlights the disparity between the goals that ASEAN and its member states have for the AEC and the way in which they are actually implemented.

However, if Rodrik's approach is tweaked with the continuous version of the political economy trilemma theory, as suggested by Ito and Azeinman, ASEAN's situation could be viewed differently. In their perspective, Rodrik's political economy trilemma is escapable by modifying one or more of its variables. This modification suggests that a country or regional organization, such as ASEAN, may have the option to escape the political economy trilemma by adjusting one or more of the political economy trilemma variables. In light of this, the next section will explore possible legal insights as thought directions that could assist ASEAN in navigating its political economy trilemma, including the possible modification of the political economy trilemma variables.

In addition, the legal framework of the AEC clearly illustrates the manifestation of being positioned in the political economy trilemma situation. Through the principle of non-interference, consensus-based decision-making, and the Enhanced Dispute Settlement Mechanism's dependency on the ASEAN Summit, ASEAN legally prioritizes the Nation-State and Democratic Politics over Hyperglobalization. It indicates that regional economic integration in ASEAN remains structurally constrained by its preference for sovereignty and political legitimacy rather than deeper economic integration.

Thought Directions to Navigate the Political Economy Trilemma in the AEC

As Rodrik does not clearly define his smart form of globalization or economic integration, a complementary legal perspective is needed to design the "*smart thin layer of international legal order*". However, this article does not aim to directly apply Rodrik's economic proposals on smart economic integration, such as his proposal on trade safeguards, rearranging global

financial restrictions, and the temporary mobility scheme, to the AEC context. Instead, it employs Rodrik's political economy trilemma as the analytical framework for developing legal and institutional insights relevant to ASEAN. Therefore, this section will build upon, rather than mirror, Rodrik's framework by exploring how legal and institutional approaches may provide alternative pathways for ASEAN to navigate the political economy trilemma.

Although a comprehensive design of such a framework lies beyond the scope of this article, it offers legal insights as thought directions to guide further exploration of this complexity. Therefore, this section discusses three legal insights. First, following Ito and Aizenman's discussion of modifying Rodrik's political economy trilemma variables, ASEAN could reconsider how the principle of non-interference is applied in the AEC. Second, ASEAN and its member states need to realise that reforming their institutional framework is inevitable for the development of the AEC. Third, the establishment of smart and flexible safeguard measures could balance the achievement of the AEC objectives and the protection of the national sovereignty of the ASEAN Member States.

A. Moving Beyond the Principle of Non-Interference

The principle of non-interference has been a central factor underpinning ASEAN's political resilience and institutional acceptability. The longstanding existence of ASEAN serves as evidence of its ability to endure within a challenging socio-political context. While the principle of non-interference has contributed to political stability within the ASEAN region, its application and interpretation in the context of economic integration may require a different approach. The alignment between the principle of non-interference and the objectives of the AEC can be examined through the lens of the political economy trilemma. In the context of ASEAN, the principle of non-interference emphasizes national sovereignty and independence, reflecting one aspect of Rodrik's trilemma, which is the nation-state variable. One possible way to overcome this complex situation is for ASEAN and its member states to explore alternative approaches to, or an evolution of, the principle of non-interference. This aligns with Ito and Aizenman's perspective on Rodrik's political economy trilemma, which proposes that adjusting certain variables can alleviate its constraints. In this case, that would be the modification of the variable of the nation-state in ASEAN, specifically in the implementation of the principle of non-interference in the AEC.

Arguably, the principle of non-interference, which rooted in ASEAN's political security origins, has hindered efforts to develop stronger regional economic cooperation.[38] This approach is problematic when it comes to the context of regional economic integration, particularly in the case of the AEC. Through the AEC, ASEAN Member States have agreed to establish effective regional economic integration, including the establishment of an ASEAN single market and production base. In order to support the establishment of the ASEAN single market, a certain level of harmonization, or at least legally guaranteed interoperability, of national laws, standards, and operational procedures is required. Unfortunately, the formation of a single market within ASEAN lacks the necessary regulatory and institutional support to do so.[39]

This is evident from Basu Das's findings, which show that almost all achieved measures in the official report of the AEC in 2015 are impractical for businesses engaging in intra-ASEAN trade.[40] Therefore, despite the efforts of ASEAN and its member states' national governments to achieve the AEC, it is evident that the broader public, notably businesses, are not reaping the benefits the AEC. As the AEC has been driven by public officials rather than business interests, the procedural norm of elite-based diplomacy exacerbates the obstacles to its notable objectives.[41]

Ginsburg believes that the application of the principle of non-interference in ASEAN is a perfect example of a classic Westphalian view of sovereignty.[42] The Westphalian concept of sovereignty prioritizes sovereign equality, territorial inviolability, and the right to exclude external factors from internal

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[38] Vinod K. Aggarwal, and Jonathan T. Chow. "The Perils of Consensus: How ASEAN's Meta-Regime Undermines Economic and Environmental Cooperation." *Review of International Political Economy* 17, no. 2 (2010): 262-290.

[39] Simon S. C. Tay, "The ASEAN Charter Between National Sovereignty and Regional Constitutionalism." *Singapore Year Book of International Law* 12 (2008). *See also* Richard Stubbs, "ASEAN Sceptics versus ASEAN Proponents: Evaluating Regional Institutions." *The Pacific Review* 32, no. 6 (2019): 923-950.

[40] Basu Das, "Mind the Gap: Explaining Implementation Shortfalls in the ASEAN Economic Community", p. 1.

[41] Aggarwal and Chow, The Perils of Consensus: How ASEAN's Meta-Regime Undermines Economic and Environmental Cooperation", p. 276.

[42] Tom Ginsburg, "Eastphalia as the Perfection of Westphalia." *Indiana Journal of Global Legal Studies* 17, no. 1 (2010): 27-46. https://doi.org/10.2979/gls.2010.17.1.27. *See also* Harald Bauder, and Rebecca Mueller. "Westphalian vs. indigenous sovereignty: Challenging colonial territorial governance." *Geopolitics* 28, no. 1 (2023): 156-173. https://doi.org/10.1080/14650045.2021.1920577

state affairs.[43] This perspective is reflected in Article 2, Paragraph (2) of the ASEAN Charter, which outlines the fundamental principles of ASEAN. This article emphasizes the significance of the non-interference principle and respect for the independence, sovereignty, equality, territorial integrity, and national identity of all ASEAN member states. This approach to sovereignty in ASEAN is closely tied to the social and political concerns of its member states. The case of the political crisis between the civilian government and military government in Myanmar circa 2021 is one example of the application of the principle of non-interference in ASEAN. Even though there was an agreement to ease the political tension in Myanmar, the Myanmar military leaders ignored the consensus due to the principle of non-interference in ASEAN.[44]

Reconceptualizing sovereignty in ASEAN and among its member states should not be perceived as undermining its core principles, as articulated in Article 2 Paragraph (2) of the ASEAN Charter. Instead, it should be interpreted as an adaptation of this principle to correspond with the evolving needs and realities in ASEAN and the interdependent and increasingly hostile global reality it finds itself in. Therefore, the Westphalian notion of sovereignty requires a reinterpretation within the ASEAN context, particularly in relation to the AEC framework. One way is to recognize that the regional economic integration process in ASEAN requires a different approach to rules and practices than political and security matters. A flexible approach to sovereignty in an economic context in ASEAN may benefit its member states significantly while protecting political autonomy in ASEAN.

In this perspective, accepting the consequences as a result of binding commitments in international economic agreements would not be perceived as a loss of sovereignty or an infringement of the principle of non-interference. Instead, it should be considered as an exercise of sovereignty. The EU, for example, represents a regional organization where member states have willingly pooled certain competences of their economic sovereignty to facilitate regional economic integration in Europe, but have not lost their sovereignty.[45] Similarly,

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[43] Alex J. Bellamy, and Catherine Drummond. "The Responsibility to Protect in Southeast Asia: Between Non-interference and Sovereignty as Responsibility." *The Pacific Review* 24, no. 2 (2011): 179-200. https://doi.org/10.1080/09512748.2011.560958

[44] Heru Prayitno, "The Dilemma of Upholding ASEAN's Principle of Non-Interference in the Case of Myanmar Political Crisis." *Technium Social Sciences Journal* 28, no. 1 (2022): 870-878.

[45] Even though EU law claims supremacy over national law as the consequence of the judgement of COSTA v ENEL Case, most of the national courts of the EU member states claim that they accept the primacy of EU Law because their constitution said so. *See* Paul

most of the ASEAN member states also actively participate in multiple international economic agreements, such as the World Trade Organization (WTO) and other free trade agreements beyond the ASEAN area, which usually require the establishment of dispute resolution mechanisms within economic agreements, some with supranational elements. By allowing for arbitration on economic matters, member states can resolve disputes in a way that fosters mutual benefit without compromising their political sovereignty. This highlights the acknowledgement that international economic cooperation frequently necessitates a level of commitment that goes beyond traditional notions of absolute sovereignty.

Nevertheless, shifting the approach of sovereignty among the ASEAN Member States is undoubtedly a significant challenge. ASEAN necessitates a different approach that can reconcile the protection of its member states national sovereignties and interests with the pursuit of regional economic integration through the establishment of the AEC. Therefore, ASEAN needs a careful and gradual approach to its regional economic integration among the ASEAN Member States. Every member state in ASEAN must identify and implement a solution that aligns with its respective national constitutional framework and historical background. It is essential for ASEAN and its member states to facilitate this process by providing many collaboration forms, such as dialogues, academic research, and policy forums. Hopefully, these actions will accelerate the regional economic integration process in ASEAN.

B. Reforming the AEC Institutional Framework

Many scholars have echoed the call for institutional reform in ASEAN, recognizing that stronger institutions are crucial for advancing the AEC.[46] This resonates with Rodrik's perspective, he believes that every market creation needs to be supported by sufficient political institutions and legal frameworks to function properly. On this basis, he argues that the core problem of the political economy trilemma lies in the imbalance of institutional support for the global market relative to the national one.[47] He argues that, unlike a domestic market, which is usually supported by national legal order and political institutions, the global market or regional economic market faces challenges because of a lack of

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Craig, and Gráinne De Búrca. *EU Law: Text, Cases, and Materials*. Oxford: Oxford University Press, USA, 2011.

[46] Tay, "The ASEAN Charter Between National Sovereignty and Regional Constitutionalism", p. 32.

[47] Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy*, p. xvi.

adequate institutional support.[48] This can be seen in the ASEAN institutional framework, which lacks enforcement due to a relatively powerless institutional structure.

Rodrik proposes establishing a WTO-like institution to legitimize the safeguard measures within a reformed international trade system. This institution would hold the authority to decide whether the safeguard measures used by the member states are legitimate. He believes this dispute settlement institution should only assess the procedural aspect rather than the substantial aspect. It will examine whether the procedural aspect has fulfilled the democratic requirements in reaching the determination that the safeguard measures are in the public interest. The criteria of the requirements should be based on accountability and transparency. It will assess whether all relevant parties' views, such as consumers, public interest groups, business stakeholders, and civil societies, are sufficiently represented.

However, Rodrik's preference for a WTO-like institution does not seem to be an ideal option. The WTO adjudication system itself suffers from crisis because of the demise of its appellate body. This crisis occurred because the United States (US) blocked the appointment of the appellate body judges, in part because of the accusation of judicial activism of the WTO appellate body in the cases relating to subsidies, anti-dumping measures, countervailing measures, technical barriers to trade, and safeguard measures.[49] Taking lessons from the WTO adjudication crisis, Van den Bossche believes that any international tribunal or adjudicative body must meet three essential conditions. First, it must have sufficient adjudicator mandates and be allowed to act based on its mandate. Second, it needs to be impartial, and its independence and impartiality be respected by all parties. Third, it is equipped with the financial and human resources necessary to resolve any case in a timely manner and consistent with the process requirement.[50]

In the context of ASEAN, it is essential to acknowledge that ASEAN has its own challenges in the implementation of such institutional frameworks, primarily due to its intergovernmental nature, as articulated in Article 3 of the ASEAN Charter. However, it is inevitable for ASEAN and its member states to realise that, sooner or later, institutional reform within ASEAN will become

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[48] Rodrik, p. xviii.

[49] Peter Van Den Bossche, "The Demise of the WTO Appellate Body: Lessons for Governance of International Adjudication?". *WTI Working Paper Universität Bern*, No. 2 (2021). *See also* Peter Van den Bossche, "Can the WTO Dispute Settlement System Be Revived?." In Ernst-Ulrich Petersmann and Armin Steinbach (Eds). *Constitutionalism and Transnational Governance Failures*. Leiden: Brill, 2024, pp. 308-335.

[50] Van Den Bossche.

necessary, especially if it is to achieve sufficiently effective regional economic integration through the AEC.

Accordingly, several key aspects merit consideration by ASEAN and its member states. First, in order to address the issue of less public participation, ASEAN and its member states need to enhance participation from their citizens to have access in the decision-making process to policy-making in the AEC. The establishment of platforms, dialogues, and collaborations that facilitate the participation of diverse stakeholders in shaping the AEC policies has the potential to increase the legitimacy and responsiveness of regional economic governance. One way to achieve this is by creating systems or processes for holding public hearings and gathering feedback from stakeholders on AEC programs. Within the current ASEAN institutional framework, the ASEAN Secretariat can assist by offering sufficient support and resources to member states for conducting public consultations and involving stakeholders. Furthermore, ASEAN might utilize digital platforms and technology to improve public engagement, facilitating citizens to provide their input and feedback on AEC policies and programs.

Second, ASEAN and its member states should consider establishing an AEC-level tribunal with authority over dispute resolution, consultation, norms interpretation, and enforcement. The establishment of this tribunal will ensure a uniform and unbiased method for not only resolving economic disputes in the AEC but also as a consultation partner for national governments and national courts. Furthermore, this tribunal should also facilitate flexibility for member states to protect their national interests while implementing the AEC measures. This flexibility for member states will be further discussed in the next section which addresses safeguard measures.

Thus, by allowing member states to assert their sovereignty within the AEC framework would not only strengthen the AEC's credibility but also foster a greater sense of ownership among the ASEAN Member States towards achieving the AEC objectives. Additionally, learning from the WTO adjudication crisis, ASEAN and its member states need to consider the three essential elements when establishing a tribunal for the AEC: having a sufficient judicial mandate, being respected for its independence and impartiality, and having adequate institutional capacity to resolve disputes.

Lastly, if the creation of an ASEAN tribunal seems to be an uphill battle, the ASEAN Member States may look into the prospect of launching a collaboration among the national courts of its member states. The establishment of collaborative frameworks among national courts for coordinated action and mutual recognition of judgments might be part of this collaborative strategy,

leading to a more integrated legal order for tackling cross-border economic issues within the ASEAN region.

One potential approach is through the expansion of established forums, such as the Council of ASEAN Chief Justices (CACJ). The CACJ, a formal forum consisting of the chief justices of the supreme courts of all ASEAN Member States, has its aim to facilitate judicial cooperation and capacity building among the national judiciaries across the ASEAN Member States.[51] With its capacity, the CACJ may facilitate the harmonization of legal frameworks, the exchange of best practices, and the promotion of mutual understanding among national judiciaries in ASEAN. Moreover, it could also develop the formulation of procedures to handle cross-border legal issues among the ASEAN Member states and encourage the uniform interpretation and implementation of the AEC measures. Through such initiatives, the CACJ has the potential to develop an integrated legal framework in ASEAN in addressing cross-border economic issues within the ASEAN region. By initiating these measures, it is not impossible that the CACJ may be the predecessor to the establishment of the ASEAN tribunal.

C. Establishing Safeguard Measures within the AEC Legal Framework

In the ASEAN legal framework, even though Article 2 Paragraph (2) of the ASEAN Charter mentions that ASEAN and its member states shall respect the national sovereignty and national identities of each member state, it lacks specific details on how to protect these national sovereignties and what can be categorized as national identities. This lack of clarity is also evident in the implementation of the AEC. Most measures in the AEC Blueprint 2015 are overly generic, leading to challenges in their implementations. Therefore, it became difficult to comply with policies that were broad in nature due to their multiple interpretations.[52]

Even in cases where member states consider the most extreme form of protection for their national sovereignties, such as withdrawal from the ASEAN membership, the ASEAN Charter is mute and blurred. The ASEAN Charter only regulates how to become a member state of ASEAN as outlined in Article 6 of the ASEAN Charter regarding the admission of new members. This is in contrast to the EU, where withdrawal is explicitly regulated in Article 50 of the Lisbon Treaty. The departure of the United Kingdom (UK) from the EU

[51] Article 1, Charter of the Council of ASEAN Chief Justice.

[52] Basu Das, "Mind the Gap: Explaining Implementation Shortfalls in the ASEAN Economic Community", p. 11.

through the Brexit Saga illustrates the activation of the withdrawal clause in Article 50 of the Lisbon Treaty.[53]

Furthermore, it is important to sufficiently ensure the protection of national sovereignty, understood in a more contemporary sense, especially in the context of AEC. In his solution to the political economy trilemma, Rodrik proposes that having safeguard measures with legitimate grounds is one available solution. According to Rodrik, if member states had the option to deviate from specific provisions in an international trade agreement, they would be able to harmonize their domestic laws with international norms without harming their national interests. Rodrik provides examples of these safeguard mechanisms, such as "opt-out" mechanisms for national governments with legitimate justifications, such as safeguarding their social concerns, national development priorities, and national legal orders.[54]

ASEAN does have a flexible participation of economic commitments that can be considered as an example of a safeguard measure through the ASEAN Minus X formula, as articulated in Article 21 paragraph (2) of the ASEAN Charter. It states that,

> *"In the implementation of economic commitments, a formula for flexible participation, including the ASEAN Minus X formula, may be applied where there is a consensus to do so."*

Before being incorporated in the ASEAN Charter, the ASEAN Minus X formula concept was introduced in the ASEAN framework since the establishment of AFTA in 1992. This idea was established in order to accommodate differentiated economic integration due to the diverse economic interests of the ASEAN Member States. In the ASEAN Charter, the ASEAN Minus X formula is known as a flexible mode of participation for economic commitments within ASEAN.[55]

However, this provision is problematic for two reasons. First, the formulation of the provision is too generic. Due to its broad nature, there are no limitations or precise guidance on how to work with this formula. It is thus difficult to determine the precise conditions in which the ASEAN Minus X

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[53] Nur Aziemah Aziz, "Britain & The European Union: The Separation", *ASEAN Focus* 6, (2016).

[54] Rodrik, *The Globalization Paradox: Democracy and the Future of the World Economy*, p. 253.

[55] Usanee Aimsiranun, "Comparative Study on the Legal Framework on General Differentiated Integration Mechanisms in the European Union, APEC, and ASEAN." *ADBI Working Paper* 1107. Tokyo: Asian Development Bank Institute, 2020

formula could be applicable. This lack of detail renders the provision ambiguous in its implementation. Second, the consensus requirement in this provision to trigger the ASEAN Minus X formula may present difficulties. The requirement for unanimous consensus from all member states for flexible participation creates challenges, as reaching consensus among varied member states with varying interests and goals can be difficult. According to Leviter, instead of facilitating a more flexible implementation of economic commitments in ASEAN, the arrangement of the ASEAN Minus X formula in the ASEAN Charter has an uncertain effect on the application of economic agreements within ASEAN. He believes that this formula fails to operate as an instrument of "peer pressure" as it was initially designed, and member states are free to avoid their economic commitments.[56] Proper formulation of this formula, nevertheless, can serve as one means of accelerating regional economic integration within a small group, which will subsequently affect other member states.

Hence, ASEAN should adopt safeguard measures that clearly balance the preservation of national sovereignty with the pursuit of regional economic integration. Some instances of the safeguard measures are as follows. First, a reformulation of differentiated integration through the ASEAN Minus X formula in the ASEAN legal framework is needed. This can be accomplished by developing more comprehensive guidelines that address the present provision's deficiencies. Furthermore, the revision of this formula might further incorporate specific clauses mentioning the legitimate reasons that can justify such choices from member states, including but not limited to national security considerations, sustainability efforts, safeguarding social priorities, and any other rational and lawful goals.

Second, ASEAN could also consider having another form of safeguard measures for its member states, such as an opt-out mechanism for the member states that want to deviate from economic agreements in ASEAN, as proposed by Dani Rodrik. While the ASEAN Minus X formula is aimed to facilitate member states that want to have their own economic commitments but still within the ASEAN framework, this proposed opt-out mechanism serves as a safeguard mechanism for the minority of member states that wish to deviate from the majority consensus. Similar to the previous measure, this opt-out mechanism would necessitate legitimate reasons justifying its application and why the opt-out mechanism is used. This justification is important to ensure

[56] Lee Leviter, The ASEAN Charter: ASEAN Failure or Member Failure?" *New York University Journal of International Law and Politics* 43, no. 1 (2010): 159-210.

the accountability and transparency of such decisions within the ASEAN legal framework.

Third, after establishing safeguard measures in the AEC legal framework, then the next concern is how to prevent the ASEAN member states from abusing these measures in a way that undermines the objectives of the AEC. A conflict could arise between the goals of regional economic integration in ASEAN and the preservation of the national interests of its member states, especially on a case-by-case basis. It is then vital to establish a framework that can address situations where a conflict arises between these two goals. In line with the previous institutional reform solution, the establishment of an adequate institutional setting in the AEC can also be considered as a safeguard measure. Especially, the previously proposed ASEAN tribunal will play an important role in this part. This institution will serve as a counterbalance between the preservation of national sovereignty and upholding the AEC's objectives on a case-by-case basis. In other words, the establishment of an ASEAN tribunal may be seen as a safeguard measure as it could also function as an individual safeguard for member states where AEC measures potentially harm their national interest.

Moreover, since ASEAN's organizational culture is driven more by political than legal considerations, an AEC tribunal could also function as a safeguard for the sovereignty of less politically influential member states. In a case where power dynamics within ASEAN could potentially benefit more influential member states and leave the less politically influenced member states at a disadvantage, the existence of this tribunal would serve as a safeguard for the less influential member states to protect their national sovereignty. Through its role in interpreting legal norms and dispute settlement, this tribunal may provide a legal forum for member states that could challenge any measures, whether from ASEAN institutions or other ASEAN Member States, that could disproportionately undermine their national interests.

This institution should be comprises of legal experts with a deep understanding of ASEAN law as well as the national interest of the ASEAN Member States and their national legal systems. Moreover, this tribunal should hold the responsibility to assess the legitimacy of safeguard measures application from the ASEAN member states. Hence, the rulings made by this tribunal would possess binding authority over the ASEAN member states, establishing a well-defined legal framework that establishes the limits of national sovereignty in relation to the AEC. This method facilitates the alignment of domestic legislation with the AEC measures, as proposed by Rodrik, while also providing member states with a means to protect their own interests and goals.

Conclusion

This study acknowledges that the importance of political stability in the ASEAN region remains a crucial aspect and will remain so for the foreseeable future. It would be inaccurate to disregard ASEAN's progress toward regional economic integration. However, through the lens of the theory of political economy trilemma from Dani Rodrik, the current legal structure within ASEAN is inadequate to support regional economic integration in ASEAN through the AEC. ASEAN and its member states persistently face obstacles in achieving economic cooperation among its member states due to the incompatibility of political ambitions and realities, alongside deficiencies in the legal framework governing ASEAN's regional economic integration.

The analysis in this study demonstrates that the challenges in integrating the regional economy in ASEAN are structural. ASEAN continues to prioritize national sovereignty over binding economic commitments among its member states. Therefore, a genuinely "smart" legal framework should acknowledge this trade-off and find a balance between flexibility and accountability through three thought directions: the different approaches or modifications in the application of the principle of non-interference in ASEAN, the reformation of ASEAN's institutional framework, and the establishment of safeguard measures within the AEC legal framework. Together, these thought directions will become guidance to support the development of regional economic integration within the AEC.

As a recommendation, this study may be regarded as a stepping stone for future studies that aim to examine the political economy issues within the ASEAN region, especially from a legal perspective. One potential option for future study involves conducting sectoral studies that focus on specific issues of the implementation of the AEC in practice, especially in the application of the free flow of goods or highly skilled workers within the AEC. Additionally, a comparative study may also be conducted to compare ASEAN with other regional organizations, such as the European Union (EU), that have regional economic integration efforts in order to further the analysis.

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The ASEAN is located at the center of the Indo-Pacific region and is critical for achieving a Free and Open Indo-Pacific.

— **Yoshihide Suga,** A Japanese Politician

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