

# How Does the AEC Matter?

Dialogue on Trade and Investment Coherence:

Enabling Thai SMEs for AEC 2015

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“ ASEAN’s cooperation in political development aims to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN. ”

ASEAN Political-Security Community Blueprint

“ The AEC Blueprint will transform ASEAN into a single market and production base, a highly competitive economic region, a region of equitable economic development, and a region fully integrated into the global economy. ”

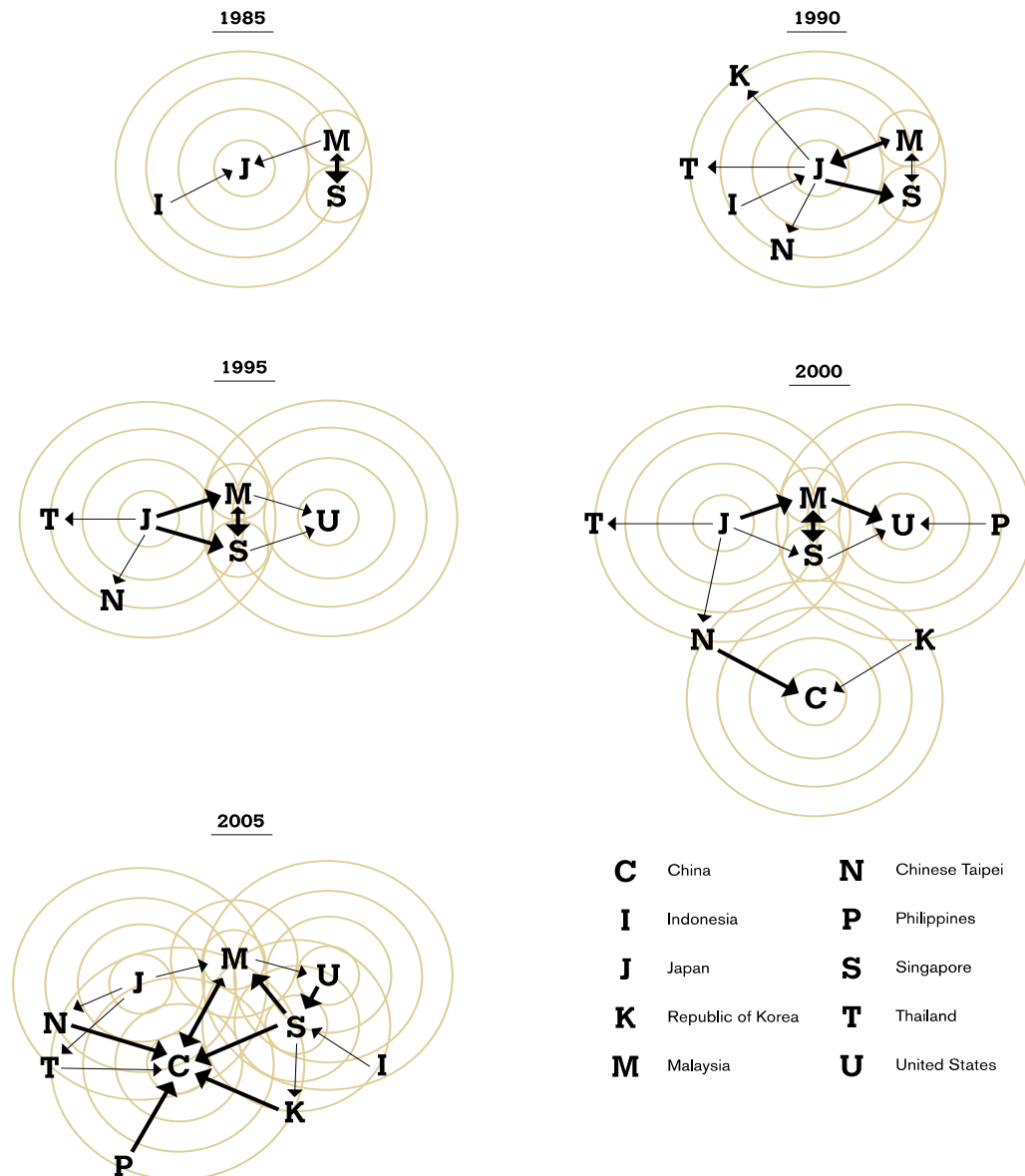
ASEAN Economic Community Blueprint

“ ASEAN is committed to enhancing the well-being and the livelihood of the peoples of ASEAN through alleviating poverty, ensuring social welfare and protection, building a safe, secure and drug free environment, enhancing disaster resilience and addressing health development concerns. ”

ASEAN Socio-Cultural Community Blueprint

# Asian not just ASEAN

- Regional Production Networks have since the 1980s been centered around a **hub-spoke model**.
- In the 1980s it was Japan that was the hub because of its vast MNC network.
- By 2000s, the gravity had shifted to China as the final assembly operation.



# But if “Factory Asia” already exists, why bother with ASEAN Integration?

- Theory 1:
- The bicycle theory of trade:
- Activity just to keep things going to avoid falling back to protectionism



Life is like a bicycle, to keep your balance you must keep moving – Albert Einstein

# Theory 2: Legalization

- Dieter: “without the creation of a single regulatory sphere [in the EC], the integration processes could not have taken place.”
- Baldwin: East Asian regionalism is “a mess” in that while there is a high level of regional division of labour in the production process, there has been limited legalisation of the process.
- This has resulted in a business environment which is less transparent and less certain than that of Europe but one which is no less productive.
- However, Dieter suggests that the production of automobiles and electronics in East Asia is relatively integrated in practice but is faces protectionism and inconsistent governmental policies.

# Elements of Legalization

Goldstein, Kahler, Keohane, and Slaughter:

**1.Obligation** refers to international actors being legally bound by legal rules and procedures, whether international or domestic.

**2.Precision** means that these rules and procedures define rights and obligations in unambiguous ways.

**3.Delegation** relates to the grant of authority to third parties, such as courts, arbitrators, and administrative bodies, to interpret and apply rules during dispute settlement.

# Transparency International's Corruption Perception Index (CPI)

Ranking in ASEAN	Country	Country Ranking		CPI Score	
		2010 (178 countries)	2011 (183 countries)	2010	2011
1	Singapore	1	5	9.3	9.2
2	Brunei Darussalam	38	44	5.5	5.2
<b>3</b>	<b>Malaysia</b>	<b>56</b>	<b>60</b>	<b>4.4</b>	<b>4.3</b>
4	Thailand	78	80	3.5	3.4
5	Indonesia	110	100	2.8	3.0
6	Vietnam	116	112	2.7	2.9
7	Philippines	134	129	2.4	2.6
8	Laos	154	154	2.1	2.2
8	Cambodia	154	164	2.1	2.1
9	Myanmar	176	180	1.4	1.5

# Weak Domestic Legal Institutions

- AEC provides:
- State to State dispute settlement (difficult because of need to get states to espouse investor's concern).
- Investor to State claims (much easier).



# ASEAN Charter 2007

“We, the Peoples of the member states of the Association of South East Asian Nations ... [h]ereby decide to establish, through this Charter, the legal and institutional framework for ASEAN.”

- With the entry into force of the ASEAN Charter, ASEAN will henceforth operate under a **new legal framework** and establish a number of **new organs** to boost its community-building process. It also **codifies ASEAN norms, rules and values**; sets clear **targets** for ASEAN; and presents **accountability and compliance**.

# ASEAN Dispute Settlement Mechanisms

- 1976 Treaty of Amity and Cooperation (TAC)
- 2004 Protocol on the Enhanced Dispute Settlement Mechanism (EDSM)
- 2007 ASEAN Charter (read with 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms – “2010 Protocol”)

## **2010 Protocol on the Enhanced Dispute Settlement Mechanism (EDSM)**

- Supersedes 2 prior agreements (1996 Protocol on Dispute Settlement Mechanism and 1987 Agreement for the Promotion and Protection of Investments)
- Applies to disputes arising under the 1992 Framework Agreement on Enhancing ASEAN Economic Cooperation, as well as all retroactively to earlier key economic agreements and to future ASEAN economic agreements
- Mandatory dispute settlement process before panel established by Senior Economic Officials
- Mandatory adoption of the panel report and obligation to implement

# Intra ASEAN IIAs

- 1987 Agreement for the Promotion and Protection of Investments (IGA)
- 1996 Protocol to Amend the 1987 Agreement
- 1997 Accession Agreements of Laos & Myanmar
- 1998 Framework Agreement on the AIA (no ISD)
- 1999 Accession Agreement of Cambodia
- 2009 ASEAN Comprehensive Investment Agreement
  - 1987 and 1998 superceded by 2009 ACIA

Note: ASEAN-China, ASEAN-Korea, ASEAN-ANZ

# Value of Legalization for IPNs

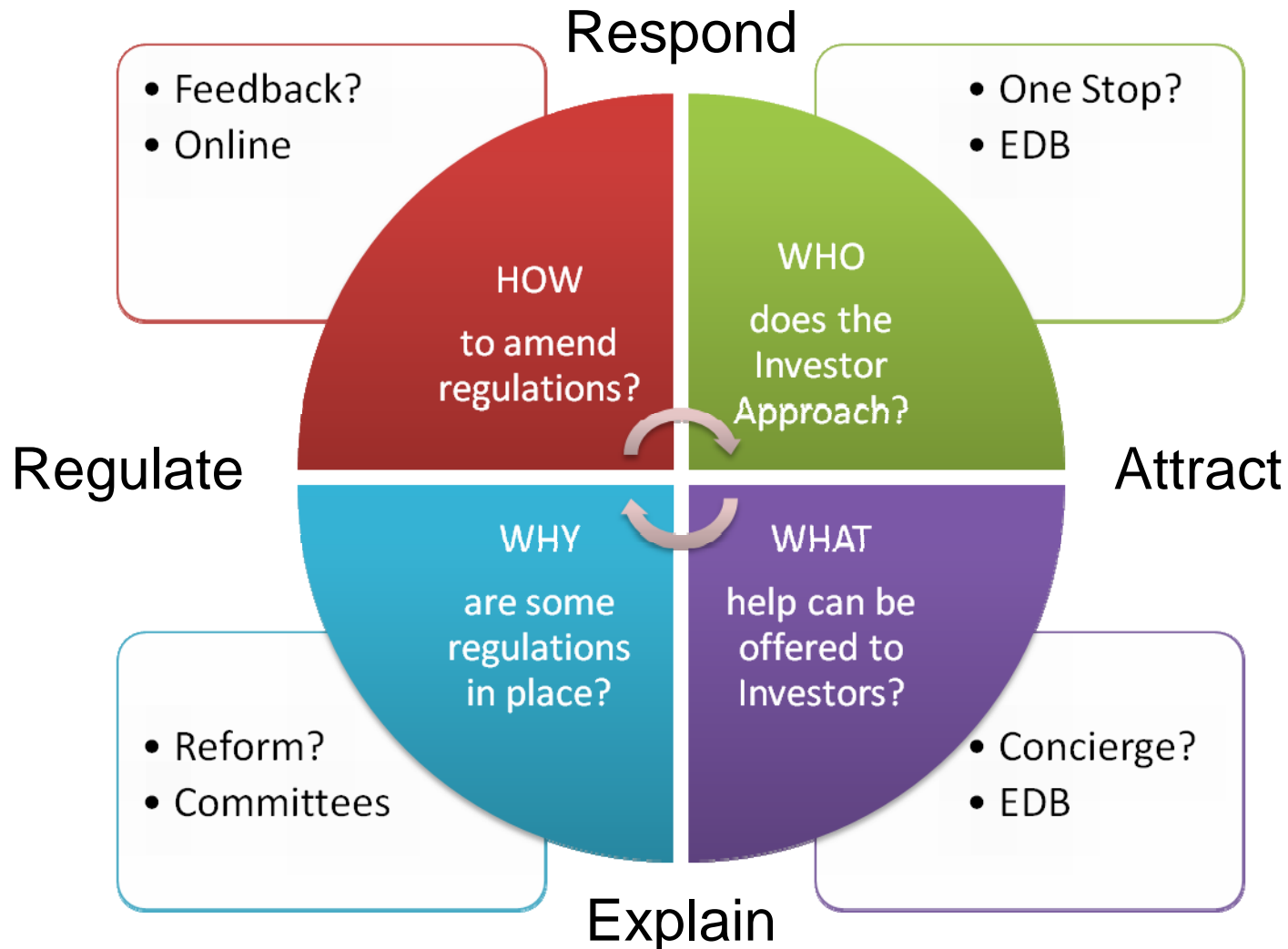
- Less use of “non-transparent discretion” by governments
- Less need to “pick and choose” industries by governments – Porter suggests that they are not suited to make such choices
- AEC Blueprint: free movement of goods, services, **skilled** labour, and **freer** movement of capital
- Liberal macro economic policies with some regulatory carve outs
- More attractive environment for FDI and therefore growth and political stability

# When Elephants Fight, the Mouse is Trampled



- The rise of China and India attracts away FDI from ASEAN
- The Economic Crises – Asian (1998-2000) and now Western
- ASEAN is very dependent on extra-ASEAN trade
- Legalization to create a competitive advantage.

# Investor Centric Process



# Conclusion

- ASEAN trade and investment agreements seem to be creating a “lex mercatoria” for investments in Asia because of the ASEAN hub.
- These provisions guard the sovereign’s right to regulate while circumscribing the parameters within which the host State may regulate.
- They allow for State to State and Investor to State claims and dispute resolution.
- Rule of Law or Rule by Law?