ASEAN AS A REGIONAL ECONOMIC GROUP — A COMPARATIVE LAWYER'S PERSPECTIVE

ASEAN, the Association of Southeast Asian Nations, has quietly promoted political, social and economic cooperation in Southeast Asia since 1967. To date, scholarly attention to ASEAN has centered primarily on the work of social scientists and on the external relations of ASEAN.[1] The purpose of this article is to evaluate ASEAN from a comparative lawyer's perspective, focusing primarily on internal ASEAN economic relations. After comparatively reviewing ASEAN preferential trading arrangements, industrial projects, industrial complementation schemes, and joint venture projects, and noting the absence of a regional approach to foreign investment and technology transfer, this article explores the following questions. What are the legal processes associated with ASEAN economic cooperation? From a lawyer's perspective, how does ASEAN compare with the European Free Trade Association (EFTA), the European Common Market (EEC), the Latin American Free Trade Association (LAFTA) and the Andean Group? Are there courses of action suggested by these comparisons which might be useful to ASEAN? After examining these questions, the author suggests that greater internal economic cooperation through ASEAN may become increasingly dependent upon the development of ASEAN law and ASEAN dispute settlement mechanisms. In light of the notably dissimilar legal traditions of the ASEAN member states, the creation of an ASEAN mediation or conciliation board is proposed. A regional arbitration board, or incorporation of mediation, conciliation or arbitration provisions in ASEAN economic agreements, provide useful alternative approaches.

PART I: COMPARATIVE PERSPECTIVE ON ASEAN ECONOMIC COOPERATION AND RELATED LEGAL PROCESSES

Regional cooperation in Southeast Asia after World War II has a checkered history.[2] ASEAN emerged from the Association of Southeast Asia (ASA) in 1967. The closest thing to a formal "charter" of ASEAN is the Declaration of August 8, 1967, commonly known as the Bangkok or ASEAN Declaration. The Declaration was signed

[1] Readers who are unfamiliar with the history of ASEAN, its external relations, and basic characteristics of ASEAN member states will find summaries of such information in footnotes 2, 6, 8 and 9.

[2] As independence from colonial status swept the region, the Association of Southeast Asia (ASA), formed in 1961, brought together Malaya, the Philippines and Thailand in a regional grouping marked by political dissension and occasionally armed warfare. In 1963, the Federation of Malaya and Singapore signed a "Common Market" agreement. In 1965, with the normalization of relations, ASA expanded to include Indonesia and the Republic of Singapore, which had just become an independent country. *See* generally, Irvine, R., "The Formative Years of ASEAN: 1967-75" in Broinowski, A. (ed.), *Understanding ASEAN* (MacMillan Press, 1982) (hereinafter "Broinowski"); Wionczek, M., *Economic Cooperation in Latin America, Africa and Asia* (M.I.T. Press, 1969).

by the foreign ministers of Indonesia, Malaysia, the Philippines, Singapore and Thailand. It speaks broadly of the desire for equality, partnership, and cooperation to achieve the mutual benefits necessary to build peace, stability and prosperity in the world and in ASEAN, and may be considered the founding legal document of the group.

Little reality was given to the Bangkok Declaration aspirations until 1976.[3] At a summit held in Bali in February of 1976, a number of documented decisions were taken which significantly expanded the possibility of internal ASEAN economic cooperation. First, a Treaty of Amity and Cooperation in Southeast Asia was adopted. This tready, *inter alia,* calls for regional cooperation in the fields of agriculture, trade and industry. Secondly, the Declaration of ASEAN Concord was promulgated. This Declaration committed members to cooperate in the supply and purchase of food, energy and other commodities, to establish regional industrial projects and preferential trading arrangements, and to stabilize prices and increase export earnings of regional commodities. Finally, a small ASEAN Secretariat was established in Jakarta, but given very limited coordinating powers over regional economic activities. A joint communique[4] issued after the Bali summit detailed an agenda for economic cooperation not unlike that proposed in a comprehensive 1972 United Nations report on ASEAN.[5] The Bali Summit thus made internal economic growth and development a central ASEAN objective and provided some means to accomplish this objective.

In a meeting of ASEAN economic ministers held shortly after the Bali Summit, the first concrete steps were taken towards ASEAN economic cooperation. One year later, on the occasion of the Kuala Lumpur Summit, progress was slow. The five ASEAN industrial projects agreed to in principle at Bali were still the subject of debate, and only 71 items were scheduled for preferential trading. Nevertheless, an agreement was signed at the Kuala Lumpur Summit by the ASEAN central bank governors creating the first standby credit facility, known as the SWAP arrangement. Members facing temporary international liquidity problems can swap their currency for U.S. dollars up to a credit limit double their contribution. From modest beginnings, this limit has risen to $80 million U.S. dollars. It appears, however, that no ASEAN member has ever utilized the SWAP arrangement.[6]

[3] By 1976 the withdrawal of the United States from Indonesia, subsequently followed by the invasion of Kampuchea, forced ASEAN leaders to try to come to grips with their dissensions. *See* Indorf, H., "ASEAN Problems and Prospects" (ISEAS Occasional Paper No. 38, 1975).

[4] Joint Press Communique, Meeting of ASEAN Heads of Government (Bali, February 23-24, 1976).

[5] *See* Economic Cooperation Among Member Countries of the Association of Southeast Asian Nations (United Nations, 1973), also known as the "Robinson Report": "The markets of individual ASEAN countries are at present, and are likely to remain for some decades, too small to permit efficient and competitive production. This obstacle to further industrialization can only be diminished by some measure of industrial cooperation between the various ASEAN countries in planning larger scale enterprises in suitably selected industries, with the opportunity to sell the resulting output in all ASEAN markets."

[6] *See* Skully, M.T., "ASEAN Regional Financial Cooperation" (ISEAS Occasional Paper No. 56, 1979). Disputes over SWAP are to be settled by consultation. *See* Article 9, ASEAN Memorandum on SWAP Arrangement (1977). At Kuala Lumpur, also, the Philippines indicated it would renounce its claim

After much deliberation, a new ASEAN organizational structure was adopted in late 1977.[7] This structure is fundamentally decentralized, with considerable powers of decision vested in meetings of the economic or foreign Ministers of ASEAN states. The workings of this structure are illustrated in the ASEAN economic cooperation projects discussed below.

By 1978, then, ASEAN was truly launched and the parameters of possible regional economic cooperation were to some degree set. Rarely have such economically and culturally disparate, geographically and linguistically separated nations attempted regional economic cooperation.[8] Yet, despite dramatic socio-economic differences, ASEAN

to Sabah, a state in the Federation of Malaysia. Thus a longstanding threat to ASEAN cohesion was tempered. Furthermore, ASEAN leaders were able to negotiate commitments of cooperation in the fields of trade, investment and finance with the Prime Ministers of Australia, Japan and New Zealand in meetings held shortly after the Summit. This was the first significant effort at employing ASEAN as vehicle for improved external economic relations. Many have suggested that the greatest benefits derived from ASEAN are diplomatic or geo-political. *See* particularly Gyngell, A. "Looking Outwards: ASEAN's External Relations", in Broinowski, A., *supra, op. cit*., note 2. Arndt, H., and Garnaut, R., "ASEAN and the Industrialization of East Asia", 17 J. of Common Market Studies 191 (1979). While ASEAN external relations are not intended to replace bilateral relations, the benefits of a united front have been considerable. The 1971 Declaration of Peace, Freedom and Neutrality for Southeast Asia served as an early catalyst. There has since been an allocation of external relations' responsibilities among ASEAN members as follows:

Indonesia — Japan, European Economic Community;
Malaysia — Australia, Middle East countries;
Philippines — United States, Canada;
Singapore — New Zealand;
Thailand — United Nations Development Program, Economic and Social Commission for Asia and the Pacific.

ASEAN finds itself in the enviable, strategic position of being supported by all the major powers, save the Soviet Union. The political and diplomatic visibility of ASEAN has clearly enhanced the bargaining strength of its members. Just bringing the likes of the EEC, Japan, China and the U.S. to the negotiating table is a significant accomplishment, and Japan has limited artificial rubber production at ASEAN urging, the EEC and Japan now apply cumulative rules of origin to ASEAN products and the U.S. has increased lending and investment in the ASEAN area. In 1979, ASEAN and the EEC signed an historic "Cooperation Agreement", the first between regional groups, which provides for trade, economic and developmnet collaboration. *See* "ASEAN and the European Community" (EC Information Service, 1981). Ongoing forums and dialogues with Australia, New Zealand, Canada, India and others also exist. Common ASEAN policies on the Vietnamese invasion of Kampuchea, Australian civil aviation rules, and Indochinese refugees have emerged and been influential. Progress has also been made within international organizations dealing with commodity agreements and in presenting a common front within GATT and Multi-Fibre Arrangement negotiations.

7 *See* Irvine, D., "Making Haste Slowly: ASEAN from 1975" in Broinowski, *op. cit., supra,* note 2.

8 Indonesia, spread over thousands of islands, is the largest, most populated member of ASEAN with the lowest per capita GNP. Its people are mainly Malay, predominantly followers of Islam and possess a Dutch colonial experience. Indonesia is oil rich and a member of OPEC, but generally viewed as the least industrially developed member of ASEAN. Consequently, Indonesia's posture within ASEAN has often been one of cautious, slow-growth support for the regional entity while it has been pursuing a national policy of rapid industrialization.

Malaysia possesses roughly one-sixth the land area of Indonesia, but only one-tenth of its population. Its per capita GNP is 3½ times that of Indonesia and a distant second within ASEAN to Singapore. Malaysia is a racially and religiously mixed society of Malays, Chinese and Indians. Its colonial experience was British. Malaysia also possesses substantial energy reserves and is relatively more industrialized than Indonesia or Thailand. The Philippines are pre-

members (excepting Singapore) are struggling with familiar problems of the developing world.[9] These problems have led ASEAN states to focus initially upon four approaches to regional economic cooperation: preferential trading arrangements, industrial projects, industrial complementation schemes, and joint venture projects.

Preferential Trading Arrangements: ASEAN's preferential trading arrangements do not fit neatly into the familiar hierarchy of economic integration among regional groups. ASEAN is not (yet) a free trade area, a customs union, a common market, an economic community, or an economic union.[10] Indeed, if it were, some interesting legal problems might arise for ASEAN members under Article 24 of the General Agreement on Tariffs and Trade (GATT).[11] ASEAN's preferential trading arrangements are rather more selective and ad hoc

dominantly a Malay people, with significant Chinese and Spanish strains. Christianity is the official religion in the Philippines, with Islam strong in the South. The colonial experience of the Philippines was Spanish for many years, followed by a brief period of American rule. The Philippines are oil poor though relatively industrialized in the ASEAN context.

Singapore, perhaps like Chile was in the Andean Group, is the wild card within ASEAN. Lacking land, its small, largely Chinese population has, by a wide margin, the highest per capita GNP within ASEAN. A financial, trading and light industry centre with a British heritage, Singapore's "free enterprise" economy is more worldly than any of its ASEAN counterparts. Singapore's advanced economic state and desire to remain an active participant in world markets has frequently caused it to be a nominal partner in ASEAN regional economic cooperation. Singapore's regional entrepot history suggests that its role in ASEAN may become that of a services center.

Thailand is the second largest ASEAN member, though still dwarfed by Indonesia's land area, with a population roughly that of the Philippines. Its per capita GNP is the second lowest in ASEAN, though still H times that of Indonesia. Thailand is a racially mixed society composed of Thais, Chinese, Indians and various tribes, with Buddhism dominating as a religion. Thailand is unique in the absence of any recent colonial experience. Thailand, like the Philippines, is basically an energy importer, but it is the chief rice producer within ASEAN and the only country which is not grain deficient. *See* generally, Allen, T.W., *The ASEAN Report — Volume One*: *A Comparative Assessment of the ASEAN Countries,* (Asian Wall Street Journal, Hong Kong, 1979) and Garnaut, R. (ed.) *ASEAN in a Changing Pacific and World Economy,* (A.N.U. Press, Canberra, 1980) (hereinafter "Garnaut"); Ho Kwon Ping, "ASEAN; The Five Countries" in Broinowski, *op.cit*., *supra,* note 2.

[9] ASEAN states are significantly dependent on natural resources and commodities for export earnings, suffer from inadequate economic infrastructures, face substantial rural poverty and mushrooming populations, and have experienced governmental corruption. They possess mixed market economies dependent chiefly upon western and Japanese dominated trade and capital inflows for development projects. To the extent that ASEAN countries can be said to be influential in any part of world trade their exports of natural rubber, palm oil, tin metal, abaca fibres, tropical hardwoods, coconut oil, copra and spices play leading roles. All but Singapore have traditionally pursued strong trade protectionist policies aimed at import substitution. These policies have frequently fostered local employment and saved hard currency reserves; they have also generated substantial inefficiencies in industry, higher consumer prices with less consumer choice, and competitive handicaps in world markets. More recently, ASEAN governments have turned to export enhancement strategies promoting labor intensive and semi-processed manufactures. *See* Castro, A., "ASEAN Economic Cooperation", in Broinowski, *op. cit*., *supra,* note 2.

[10] *See* generally Folsom R., *Corporate Competition Law in the European Communities,* (D.C. Heath, 1978), Chapter One (hereinafter "Folsom").

[11] GATT, Article 24, establishes international criteria for "approval" of free trade areas and customs unions. *See* generally Folsom, *ibid*., Chapter Two.

than anything to be found in the European Free Trade Association,[12] the European Economic Community [13] or the Andean Group.[14] Indeed the closest parallel among viable regional groups lies with the Latin American Free Trade Association,[15] now known as the Latin American Integration Association ("LAIA"). LAFTA employs two lists of commodities subject to trade preferences: a National List and a Common List. The National List covers preferences granted by each country to all other members, negotiated annually with a target of an 8% reduction in the average rate of respective annual tariffs. Each National List need not include the same goods, and preferences given one year can be removed the next if replaced by others. The Common List includes products on which all countries agree to eliminate trade restrictions completely, without a power of withdrawal. A target of coverage of 25% of the value of reciprocal trade was set for the first three years, to progress over a total of twelve years to virtually 100%. After three years of success (1962 to 1964), LAFTA trade preference negotiations have ceased to be consequential except for liberalization associated with LAFTA complementation schemes, expansion of LAFTA in 1968 to include Venezuela and Bolivia, and intra-Andean trade. In 1980, with the substitution of LAIA for LAFTA, it was agreed that no deadline would be set for the achievement of a Latin American free trade area and that future tariff concessions need not be granted to all LAIA states.[16]

The Agreement on ASEAN Preferential Trading Arrangements was adopted at the Kuala Lumpur Summit in 1977. This Agreement applies to basic commodities (notably rice and crude oil), products of ASEAN industrial projects or complementation schemes, and other designated products. It provides for internal trade expansion through a variety of means. These include: (1) three to five year preferential ASEAN commodities contracts; (2) import or export finance subsidies at preferential interest rates for ASEAN originating products; (3) a "buy-ASEAN" government procurement preference margin of 2.5%, not to exceed $40,000 U.S.; (4) negotiated tariff preferences for ASEAN originating goods; and (5) preferential liberalization of nontariff trade barriers to intra-ASEAN trade. Unlike the EEC or the Andean Group, ASEAN does not have a common external tariff and has not adopted common trade protection policies for the region. ASEAN states have specifically agreed not to nullify any preferential

[12] EFTA members are Portugal, Sweden, Norway, Iceland, Australia and Switzerland. Free industrial trading relations exist with Finland and EEC states. *See* generally, Curzon, V., *The Essentials of Economic Integration* (MacMillan, 1974).

[13] EEC members are Great Britain, Denmark, France, West Germany, Italy, Greece, Belgium, the Netherlands, Luxembourg and Ireland. Free industrial trading relations exist with EFTA states. Spain and Portugal are presently negotiating for admission to the EEC.

[14] Andean Group members are Bolivia, Columbia, Ecuador, Peru and Venezuela. Chile withdrew from the Group in 1977. AH Andean Group nations are members of LAFTA.

[15] LAFTA members are Argentina, Brazil, Chile, Mexico, Paraguay, Peru, Uruguay, Columbia, Ecuador, Venezuela, and Bolivia. See French-Davis, R., "Comparative Experience With Economic Integration in Developing Countries", in Garnaut, *op. cit*., *supra,* note 8, Chapter Six. General comparative reference should be made to the Treaty of Economic Community of West African States (ECOWAS, 1975).

[16] *See* Montivideo Treaty, 1960, Chapter II. *See* also, Tussie, "Latin American Integration: From LAFTA to LAIA," (1982) 16 J.W.T.L. 399.

trade concession through the application of any new charge or measure restricting trade.

ASEAN "rules of origin", a familiar free trade area technique, demarcate which goods are eligible for its preferential trading arrangements. In order to qualify, the products must: (1) be wholly produced or obtained in the exporting ASEAN state; or (2) have had at least 50% value added in the exporting ASEAN state (60% if exported to Indonesia); or (3) have an ASEAN content of at least 60%. Waivers may be obtained for the products of ASEAN industrial projects or complementation schemes, and such waivers may be granted on a bilateral basis.

The institutional structure through which ASEAN trade preferences are formulated is presently the subject of scrutiny. Since 1976, trade preferences have originated with the national governments of ASEAN, and have been negotiated under the auspices of the ASEAN Council on Trade and Tourism (COTT). Intermediate steps involve intergovernmental negotiations in the ASEAN "Trade Preferences Negotiating Group" (TPNG) and private negotiations in the "Working Group on Preferential Trade Arrangements" (WGPTA), a sub-group of the ASEAN Chambers of Commerce and Industry (ASEAN-CCI). The procedures for arriving at lists of possible preferences are diverse and cumbersome, often involving public hearings conducted by local officials. In tune with increasing private sector participation in all aspects of ASEAN cooperation, a proposal has been made to increase WGPTA influence in the trade preference selection process.[17]

On paper, at least, a number of liberalizing ASEAN trade preferences have resulted. Rice is the subject of preferential contracting arrangements. Bilateral agreements between Singapore and the Philippines and Singapore and Thailand have cut tariffs across the board by 10% on all goods traded between them. Trade preferences for ASEAN industrial projects and complementation schemes are contemplated or just starting to be realized. All ASEAN tariff preferences are extended to member states on an ASEAN most-favored-nation basis.

A total of 8,529 ASEAN products have been given preferential tariff treatment.[18] These preferences resulted from product-by-product negotiations, employing tedious seven digit Customs Cooperation Council Nomenclature (CCN) classification levels. Member states are obliged to propose several hundred items at negotiating sessions held every three months. Many trade preference items have been "volunteered", some have been negotiated within a multilateral matrix. At a recent meeting of the ASEAN Economic Ministers it was decided to replace the matrix approach with bilateral negotiations and to explore sectoral negotiation approaches.

Food products covered by ASEAN tariffs enjoy a margin of preference of 25%, with non-food items preferentially traded up to a maximum of 50%. Since Singapore is mainly a tariff free state, its

[17] *See* "ASEAN's Latest Round of Tariff Negotiations", Business Asia (Jan. 12, 1979), p. 12.

[18] *See* Report of the Twelfth Meeting of the ASEAN Economic Ministers, (Kuala Lumpur, January 14-15, 1982); Thirteenth Meeting (Jakarta, May, 1982); Fourteenth Meeting (Singapore, November 11-13, 1982).

contribution has been to "bind" zero tariff treatment of goods. Other ASEAN states have also volunteered such bindings.[19]

Except for sensitive items, all products of import values equal to or less than $10,000,000 U.S. as recorded in the 1978 import statistics of ASEAN member states also enjoy a margin of preference of 20-25%.[20] This "across-the-board" technique of tariff negotiations, commenced in 1980 at the level $50,000 U.S., has recently been the preferred ASEAN approach to preferential tariff arrangements.[21] This is a most significant development because negotiations will now focus on exclusions from preferential trade, not inclusions as under the product-by-product negotiations.[22] It is, however, still a long way from the automatic tariff reduction schedules employed by the EEC and the Andean Group.

While initial ASEAN trade preferences have been mostly token gestures without substantial impact,[23] this may be less true in the future. A small amount of internal trade creation appears to have taken place,[24] no doubt with some external trade diversion.[25] The results, through economically "second-best" when measured against first-best international trade liberalization, are clearly superior to third-best isolation of national ASEAN economies.[26] Careful study has suggested that there is great potential for expanded intra-ASEAN trade once import substitution strategies and colonial trade ties are given less emphasis and freer trade in intermediate and medium-technology goods is facilitated.[27] One incentive to such results is the cumulative origin treatment now accorded ASEAN products under the generalized systems of tariff preferences maintained by Japan and the EEC.[28] One disincentive is the growth of ASEAN non-tariff trade barriers.[29] Other studies are less optimistic about the possibilities of increased intra-ASEAN trade.[30]

Dispute settlement is the subject of specific provisions in the ASEAN Agreement on Preferential Trade Arrangements. Article 14

19 *Ibid.*

20 *Ibid.*

21 *See* Rieger, H.C., "Southeast Asian Economic Developments 1981" (ISEAS, *Southeast Asian Affairs,* Heinemann Asia, 1982) (hereinafter "Rieger").

22 *Ibid.*

23 For example, snow ploughs into the Philippines, waste of boar's bristles or hair into Thailand. *See* Rieger, *ibid.*

24 *See* Castro, A., "ASEAN Economic Cooperation" in Garnaut, *supra,* Chapter Three. *See generally,* Wong, J., *ASEAN Economies in Perspective* (MacMillan,

25 *See* Yasuba, Y., "The Impact of ASEAN on the Asia-Pacific Region" in Garnaut, *supra,* Chapter Four; Ooi Guat Tin, "The ASEAN Preferential Trading Arrangements" (ISEAS Occasional Paper No. 26, 1981).

26 *See* Krueger, A., "Regional and Global Appreaches to Trade and Development Strategy" in Garnaut *op. cit.*, *supra,* note 8, Chapter One.

27 *See* Hong, H., and Ng, V., *Growth and Direction of ASEAN Trade* (Singapore University Press, 1982); *Selection of Technological Families for Complementary Industrial Cooperation in ASEAN Countries* (UN Development Program, 1978).

28 *See* note 6, *supra.*

29 *See* Report of the Fourteenth Meeting of the ASEAN Economic Ministers (Singapore, November 11-13, 1982).

30 *See* Ooi Guat Tin, "The ASEAN Preferential Trading Arrangements" (ISEAS Occasional Paper No. 26, 1981); Tan, G., "Intra-ASEAN Trade Liberalization", 20 J. of Common Market Studies 321 (1982).

first requires direct consultation between the parties, and then incorporates a "nullification and impairment" clause giving the ASEAN Council on Industry, Minerals and Energy (COIME) the charge of "arriving at mutually acceptable solutions." There is a unilateral right of suspension of a trade preference "where circumstances are serious enough." There is also a general unilateral escape clause in Article 12 for instances when ASEAN imports cause "serious injury" to sectors "producing like or similar" products, a "serious decline in monetary reserves" exists or there is a "serious decline in supplies".[31]

Industrial Projects: ASEAN industrial projects, called "package deal agreements, involve efforts to allocate industrial activities to member states. Such allocations are to be matched with internal trade liberalization measures but not external trade protection measures designed to allow realization of ASEAN scale economies. However, internal trade protection measures, known as "exclusivity rights", may give some freedom for a limited time period from internal competition. Apart from the absence of protective use of a common external tariff, ASEAN industrial projects resemble the industrial sector development programs of the Andean Group. Comparable efforts cannot be found in EFTA or the EEC. Andean Sectoral Programs for Industrial Development involve the allocation of new product-families among member-states with guarantees of free entry for such products in other states who agree not to permit the development of similar products for a period of years. Andean allocated products enjoy international protection under the common external tariff. Early allocation programs have involved certain metals and machinery, petro-chemicals and automobiles.[32]

The five "showcase" ASEAN industrial projects initially agreed upon at the Kuala Lumpur Summit were ammonia-urea for Indonesia and Malaysia, phosphatic fertilizer for the Philippines, diesel engines for Singapore and rock salt-soda ash for Thailand. The Council on Industry, Minerals and Energy is responsible for ASEAN industrial projects. The private sector has had relatively little influence to date on such package deals. General guidelines for the ownership and control of ASEAN industrial projects have been promulgated. These require that the host country should have a 60% equity share in the project with the balance to be shared (not necessarily equally) among other ASEAN members. Each ASEAN government nominates a shareholding agency or company to the board of an industrial project with the government retaining at least a one-third share of that agency or company. Non-ASEAN nationals may participate in an industrial project through finance, supply, managerial, technical or equity (in the shareholding company) relationships. Each individual project is supplemented by separate agreements apart from the Basic Agreement on Industrial Projects. Article 14 of the Basic Agreement provides only for intergovernmental consultation in the event of disputes. One astute observer has suggested that these agreements comprise the charter of the first "ASEAN corporations."[33] If so, ASEAN would seem to have

[31] Similar provisions are found in LAFTA's Montivideo Treaty of 1960, Chapter VI.

[32] *See* Ffrench-Davis, R., "Comparative Experience With Economic Integration in Developing Countries", in Garnaut, *op. cit.*, *supra,* note 8, Chapter Six.

[33] *See* Quisumbing, P.V., "Problems and Prospects of ASEAN Law" in Anand, R., and Quisumbing, P., eds., *ASEAN — Identity, Development and Culture* (East-West Center, 1981) (hereinafter "Quisumbing").

moved beyond the EEC, where various "Euro-Company" proposals remain on the drafting boards.

The ammonia-urea project for Indonesia has been the frontrunning project. It is due to come on stream in 1984 with the aid of Japanese financing and feasibility studies. The ammonia-urea project for Malaysia is scheduled to follow shortly thereafter, again with considerable Japanese aid. The phospate fertilizers project for the Philippines was the subject of considerable controversy over capital requirements. The Philippines will apparently proceed with this as a national, not an ASEAN industrial project. After some discussion of a paper mill project, an ASEAN copper fabrication proposal has been substituted for the Philippines. The rock salt-soda ash project for Thailand, after extensive evaluation by Japanese and other experts, will apparently proceed. Japan has exercised a guiding hand in all of these initial ASEAN projects through its willingness to substantially "tie-finance" them.

The diesel engines project for Singapore failed for lack of support from Indonesia which was anxious to protect its own producers. Singapore is proceeding with diesel engines as a national industrial project. Singapore effectively opted out of ASEAN industrial projects for itself in 1979 while continuing to nominally support the projects of other members. It is now agreed that ASEAN industrial projects need not require the participation of all members provided the non-participating members are fully informed to ensure that their national interests are not adversely affected.[34]

In 1981 the ASEAN Economic Ministers agreed to allow each country to consider up to three industrial projects at any one time.[35] They may also proceed with a project through the feasibility study stage (prior to tenders) before submitting the project for ASEAN approval. It is hoped that this agreement, combined with the ability to source funds for projects on an internationally competitive basis, will significantly accelerate the number of ASEAN industrial projects undertaken in the future. It may also allow for greater private sector involvement in the industrial project selection process.

Industrial Complementation: Industrial complementation within ASEAN was originally thought to be the main vehicle for the accomplishment of economic cooperation. There is precedent for such efforts in LAFTA, though not in EFTA or the EEC. LAFTA complementation agreements involve trade liberalization agreements between two or more countries for groups of existing commodities. These preferences are available to Bolivia, Ecuador and Paraguay, the least developed LAFTA states, as well as participating states. Private sector initiative is strong and subsidiaries of foreign enterprises have effectively collaborated to promote a number of such agreements in manufacturing sectors.[36]

[34] Report of the ASEAN Economic Ministers on Industry, First Meeting, (Denpassar, September 29-30, 1980).

[35] Report of the Eleventh Meeting of ASEAN Economic Ministers (Jakarta, May 29-30, 1981).

[36] *See* Ffrench-Davis, R., "Comparative Experience with Economic Integration in Developing Countries", in Garnaut, *op. cit.*, *supra,* note 8, Chapter Six. *See also.* Treaty of Montivideo, 1965, Chapter III.

In ASEAN, it is hoped that industrial complementation will produce scale economies through a division of labour rationalization of existing *or* new industries accompanied by trade preference measures. The private sector is seen as the major source of complementation "schemes" which must be approved by the ASEAN Economic Ministers. General guidelines on ASEAN industrial complementation schemes were ratified in 1980 and the Basic Agreement on such schemes was completed in 1981. These contain no specific dispute settlement mechanisms, though at Singapore's suggestion, the Basic Agreement requires only four states to participate in a scheme. Complementation schemes can enjoy up to four years of ASEAN "exclusivity" in production for new products and two years "exclusivity" for existing products. Exclusivity means that other participating countries cannot set up new facilities or expand existing facilities to make the allocated product unless 75% of the production is for export outside the ASEAN region. Exclusivity does not mean that ASEAN buyers cannot look to world markets for complemented products, internal trade preferences notwithstanding.

The ASEAN Chambers of Commerce and Industry (ASEAN-CCI) were delegated primary responsibility for the drafting of proposed complementation schemes which should provide for an equitable division of benefits. ASEAN-CCI industry "clubs" are charged with the mandate of identifying and implementing complementation projects for their industry. Some thirty-odd clubs have been formed and they will no doubt have considerable input in any ASEAN complementation schemes of the future, thus affecting trade and investment opportunities in the region. These include, for example, "clubs" for cement, glass, pulp and paper, automobiles, agricultural machinery, textiles, furniture, rubber products, food processing, iron and steel and electrical and electronic products. Proposed complementation schemes ascend from national "clubs" (NICs) to regional clubs (RICs) to the "Working Group on Industrial Complementation" (WGIC) which recommends schemes to ASEAN-CCI which in turn seeks final approval from the ASEAN Council of Economic Ministers, acting on the consensus recommendations of COIME.

The ASEAN Automotive Federation has taken the lead in complementation proposals, some of which are now bearing fruit. The first and second packages for automotive complementation of *existing* ASEAN products have been approved, and they enjoy a 50% across the board tariff cut.[37] Singapore, concerned that exclusivity might amount to grants of local monopolies, has secured a change in the complementation guidelines. Tariff preferences granted in conjunction with these schemes will be extended on an ASEAN most-favoured-

[37] *See* Report of the Twelfth Meeting of ASEAN Economic Ministers (Kuala Lumpur, January 14-15, 1982). These complementation packages are composed of the following:

Indonesia	—	Diesel engines (80-135 HP); motorcycle axles; wheel rims for motorcycles; steering systems
Malaysia	—	Spokes and nipples; drive chains and timing chains; crown wheels and pinions; seat belts; headlights for motor vehicles
Philippines	—	Body panels for passengers cars; transmissions; rear axles (LCV and below); Rear axles (heavy duty)
Singapore	—	Universal joints; V belts; fuel injection pumps
Thailand	—	Body panels for commercial vehicles of one ton and above; brake drums for trucks; heavy duty shock absorbers; carburetors.

nation basis to similar products produced within ASEAN. It is thought that this provision will effectively preclude monopoly production and export by accredited industries. However, additional preferences, such as in respect of mandatory sourcing or recognition of local content, may be granted on a country-by-country basis.[38]

The number of foreign investors involved in the automotive complementation scheme is already quite heavy.[39] Many of the complemented products have a foreign company participating in or bidding on construction and management of the facility. Among these foreign participants are Food, whose wholly-owned subsidiary Ensite Inc. will operate the Philippines auto body plant, Nissan Ltd. which owns the body panel factory in Thailand, and West Germany's Kloeckner-Humboldt-Deutz which is licensor of Indonesia's diesel engine facility. Despite its origins in the private sector, it is not yet clear that the auto scheme will be profitable to its constituents and foster the desired intra-ASEAN trade and scale economies.[40] Differences in quality among complemented ASEAN auto parts and the desire to produce "national cars" may frustrate the auto scheme. Further complementation proposals are not immediately apparent in the auto industry or elsewhere, though some attention has been given to various possibilities.[41] The major problems appear to be two-fold: achieving an equitable division of benefits, and coordination of ASEAN complementation schemes with national investment decisions.[42]

Joint Venture Projects: Partly out of a sense of discouragement with the potential for complementation schemes, ASEAN-CCI presented a proposal in 1980 to establish ASEAN Joint Venture Projects.[43] Such projects are thought to be the private sector equivalents of ASEAN industrial projects, combined with exclusivity privileges and preferential trading arrangements stronger than those granted under ASEAN complementation schemes.[44] Guidelines and a Basic Agreement on such joint venture projects have recently been formulated.[45] These provide that equity participation need only involve nationals from two participating countries, with non-ASEAN nationals allowed to own up to 49% of the joint venture, though higher percentages are allowed in certain circumstances. Joint venture products may be new or existing products. Approved joint ventures are guaranteed a *minimum* 50% tariff preference by participating countries. Non-participating countries waive their rights to such tariff preferences for three years from the actual date of commercial production. For new

38 *See* Report of the Eleventh Meeting of ASEAN Economic Ministers (Jakarta, May 29-30, 1981).

39 *See* "Profile of the AAF Scheme", Business Asia, November 2, 1979, pp. 348-349.

40 *See* Paterno, V., "ASEAN Industrial Complementation" (UNIDO, January 25, 1982). See also "Dead End for ASEAN Car?" Straits Times (March 3, 1983), p. 15.

41 *Ibid,* (discussion of complementation of electrical and electronics products, light machinery, steel and metals, pulp and paper, chemicals, glass, and rubber products).

42 *Ibid.*

43 *See* Report of the Twelfth Meeting of the ASEAN Committee on Industry, Minerals and Energy (Bali, September 25-27, 1980).

44 *See* Lee Sheng Yi, "ASEAN Industrial Joint Ventures in the Private Sector" (UNIDO, April 21, 1982).

45 *See* Report of the Fourteenth Meeting of Economic Ministers (Singapore, November 11-13, 1982).

products, participating countries also grant exclusivity privileges (defined in the same manner as for complementation schemes) for three years from production or two and a half years from the date of approval by ASEAN Economic Ministers, whichever comes earlier. Exclusivity privileges are not granted if there is more than one approved project for a given joint venture product. For existing products, no exclusivity privileges are to be granted.[46] The institutional arrangements leading to ASEAN joint venture projects are the same as for complementation schemes.

No other regional group has previously undertaken anything comparable to ASEAN joint venture projects which will mark a unique contribution to regional development. A variety of such projects have been suggested by several ASEAN industry "clubs"[47] and may shortly be proposed for adoption. It is hoped that the ASEAN Finance Corporation may assist in the development of joint venture projects.

Foreign Investment and Technology Transfer

ASEAN, unlike the Andean Group and more like EFTA and the EEC, has not yet attempted a regional approach to foreign investment or licensing. There is no ASEAN equivalent of Decision No. 24 of the Andean Group[48] and it is hard to see anything similar emerging in the near future. It should be noted that a regional approach to foreign investment and technology transfer within ASEAN is not impossible under the Bangkok Declaration. Practically speaking, however, a study of current national legislation suggests the absence of a consensus on what form such an approach would take.[49] Rather, a divergent range of national foreign investment incentive and control laws, which exhibit a preference for foreign-local joint ventures, continue to govern this area.[50] Nevertheless, technology transfer regulation at least, has been identified for study and consideration with a view to formulating a regional approach.[51] It may be that diversity in this area allows multi-nationals to play one ASEAN member off another, and study of the Andean Group suggests that a co-ordinated approach to foreign investment is needed to maintain an equitable division of regional economic costs and benefits.[52]

46 *Ibid.*

47 *Ibid*. (the ASEAN Iron and Steel Federation has proposed magnesium clinker, graphite electrode, and ferro-alloy projects; the Agricultural Machinery Federation has proposed a mini-tractor project; the Pulp and Paper Industry Club has proposed a security paper project; the Chemical Industries Club has proposed five projects).

48 Decision No. 24 creates minimum restrictions to be applied by each government to foreign investment activities. These restrictions cover use of internal and external credit, export franchises, reinvestment of profits, mergers, and strategic sector barriers to investment and divestment. Initial experience under Decision No. 24 reveals a less than uniform level of accomplishment of its restrictive objectives. *See* Ffrench-Davis, R., "Comparative Experience With Economic Integration in Developing Countries", in Garnaut, *op. cit*., *supra,* note 8, Chapter Six.

49 *See The ASEAN Report — Volume One*: *Comparative Assessment of the ASEAN Countries,* (Asian Wall Street Journal, Hong Kong, 1979), Section 5.

50 *Ibid.*

51 *See* Reports of the Thirteenth and Fourteen Meetings of the ASEAN Committee on Industry, Minerals and Energy (Kuala Lumpur, January 15-17, 1981 and Manila, April 8-11, 1981). *See also* ASEAN Law Association Conference Materials, 1982, Workshop V (Protection of Intellectual Property).

52 *See* Mytelka, L., *Regional Development in Global Economy* (Yale University Press, 1979).

Considerable effort has been made within the EEC at liberalizing capital flows. Comparatively little such effort, excepting ASEAN industrial projects, has been undertaken in ASEAN. As capital formation accelerates within the region, it would not be surprising to see intra-ASEAN investment incentives emerge. Indeed, an ASEAN investment guarantee agreement is now being considered which would grant national treatment, among other benefits, to ASEAN investors in ASEAN countries.[53] Some progress has also been made through the ASEAN Finance Corporation and the ASEAN Banking Council towards regional financial and support services and cooperative facilitation of credit mechanisms underlying ASEAN trade.[54] Coordination of ASEAN monetary exchange rates, an effort that has met with intermittent success in the EEC, has not been seriously considered.[55]

Legal Processes Related to ASEAN Economic Cooperation

The ASEAN Treaty of Amity and Cooperation and the various ASEAN declarations, concords, guidelines, agreements, minutes and communiques referenced above are the main sources of ASEAN law relevant to this study. It is through these documents that ASEAN organizes itself and promotes regional economic cooperation.

In formulating the preferential trading arrangements, industrial projects, industrial complementation schemes, and joint venture projects, ASEAN and ASEAN-CCI have utilized committee and council systems for regional liaison. These systems have on consensus or unanimous voting (though not always unanimous participation) principles. This structure for regional decision-making is like that of Councils of Ministers of EFTA or LAFTA, though in neither is there a close parallel to the role played by the ASEAN-CCI, whose initiative powers surpass that of the Consultative Assembly of the EEC. The ASEAN Secretariat is a far cry from the EEC Commission, the Andean Group Junta or even the LAFTA Standing Executive Committee, and there is no regional Court of Justice. It is more like the LAFTA Secretariat. In short, very little, if any, sovereignty has been transferred to regional ASEAN institutions. Instead, ASEAN continues

53 *See* Reports of the Thirteenth and Fourteenth Meetings of the ASEAN Committee on Industry, Minerals and Energy (Kuala Lumpur, January 15-17, 1981 and Manila, April 8-11, 1981).

54 *See* Skully, M.T., "ASEAN Regional Financial Cooperation" (ISEAS Occasional Paper No. 56, 1979).

55 *See* Yenko, A., "Exchange Rate Regimes of ASEAN Countries (ISEAS Occasional Paper No. 30, 1982). It should be noted that ASEAN has been the source of other regional economic study and cooperation. For example, ASEAN is conducting a variety of joint studies on the region's food and forestry needs. It is actively trying to rationalize regional shipping, telecommunications, aviation and other transport and communications sectors. A massive ASEAN submarine cable system is already partly in operation. In 1982, the integrated work program in shipping for 1982-86 was adopted. Regional research into climate, standards and protein-deficiency is also underway. In 1979, the Agreement on the ASEAN Food Security Reserve was signed. This agreement establishes an ASEAN rice reserve system to which all members contribute and have rights of emergency withdrawal. Meetings are now being held to ascertain the possibilities for greater technical cooperation within ASEAN. An ASEAN minerals cooperation plan is in the process of being negotiated. Cooperation in the energy field has already materialized with regard to coal and electric power development, and further programs are contemplated. An emergency oil sharing plan has existed since 1975. *See generally,* Castro, A., "ASEAN Economic Cooperation," in Garnaut, *op. cit*., *supra,* note 8, Chapter Three.

to function on an intergovernmental rather than supra-national or federal basis. Such an institutional structure, as EFTA illustrates, is not necessarily a handicap given ASEAN's limited goals of economic cooperation. But as ASEAN grows and its internal programmes become more economically and politically consequential, the time may arrive when further progress requires a more structured system within which private and public parties may settle disputes. It should be recalled that the Andean Group waited a number of years before establishing its regional Court of Justice, which is still vested with limited jurisdiction.

Looking to the EEC example, one must wonder whether ASEAN governments are prepared to create a regional legal system which could facilitate private and public challenges to national economic policies at odds with regional "law". Could a corporation or another government, for example, challenge a governmental failure to carry out an ASEAN preferential trading arrangement or complementation scheme? Comparable challenges are now frequent in the Common Market (in national courts and at the EEC level) and the operation of the jurisdiction of the Court of Justice of the European Communities has done much to hold member states to the path of integration. Indeed, without this "rule of law", the "rule of politics" might have dismembered the EEC long ago, as it has threatened to do in the Andean Group, and arguably has done within LAFTA.

Such regional comparisons are, however, dangerous. ASEAN has emerged in its own context, one which is far removed from industrial, law-oriented Europe. LAFTA and the Andean Group seem a more natural parallel though the common bonds of language and civil law within these groups suggest a stronger basis for economic and legal cooperation. There are, of course, numerous examples of regional economic groups that have failed for reasons of divergent socio-political economies,[56] and these examples suggest a cautious optimism about ASEAN economic cooperation programmes and their related legal processes.

This sense of caution is heightened by the remarkable dissimilarity of legal traditions of ASEAN states.[57] This dissimilarity, it has been suggested, is a reason why ASEAN operates on a decentralized institutional structure.[58] Furthermore, an overview of these traditions suggests that ASEAN societies do not share the level of enthusiasm common to western societies for lawyers and courts as a means to

[56] The East African Community and the Central American Common Market provide two notable examples. *See generally* Vaitsos, C. "Crisis in Regional Cooperation (Integration) Among Developing Countries", World Development No. 6 (1978).

[57] Indonesia, alone, follows Islamic, Hindu, Adat, and Dutch law. Malaysia incorporates Islamic and British legal traditions. The Philippines blends Spanish civil law, American common law, Islamic and Adat law. Singapore has perhaps most evidently retained a British legal system, limited accommodations being made for Chinese, Hindu and Islamic law principles. In Thailand it is hard to say that there is a predominant legal tradition, though Khmer, Indian and French law have been most influential. *See generally,* Hooker, M.B., *A Concise Legal History of South-EaSt Asia,* (Oxford University Press, 1978); ASEAN Law Association Conference Materials (Jakarta, 1978; Manila, 1980; Kuala Lumpur, 1982).

[58] *See* Castro, A., "ASEAN Economic Cooperation", in Garnaut, *op. cit*, *supra,* note 8.

settle disputes. Instead, mediation or conciliation, often on an oral basis, have traditionally been popular.[59] These preferences should be accorded considerable weight in designing dispute settlement mechanisms for ASEAN economic cooperation programmes. To do so will take advantage of one of the few common threads among the legal traditions of ASEAN states.

Dissimilar legal traditions aside, all of the ASEAN states have attempted to come to grips with the modern international legal environment common to most developing nations. In this respect, for example, there are similarities of effort, if not results, in their national foreign investment incentive and control laws. Furthermore, each ASEAN member has found it easier to negotiate a common position on external legal relations within GATT, UNCTAD and other institutions than to negotiate a "harmonization" of domestic laws (such as tax, corporate, monetary and commercial laws) affecting ASEAN operations. Indeed, very little time has as yet been devoted to such efforts which can be found in the EEC and have been given some consideration in the Andean Group and LAFTA.[60] Likewise, little attention within ASEAN has been paid to freer movement of labourers, professionals and those operating in the services sector.

In sum, the legal processes related to ASEAN economic cooperation programmes, when comparatively viewed, suggest that insufficient attention has been paid to the formulation of anticipatory dispute settlement procedures. This is understandable in light of the hitherto limited impact of ASEAN's internal economic programmes, the decentralized nature of ASEAN decision-making, and the dissimilar legal traditions of ASEAN states. A comparative perspective also suggests, however, that the increasingly consequential nature of ASEAN's programmes will generate trade and investment disputes. The remainder of this article explores several alternatives for the provision of anticipatory dispute settlement mechanisms in relation to ASEAN's economic cooperation programmes.

PART II: A PROPOSAL FOR A REGIONAL DISPUTE SETTLEMENT MECHANISM FOR ASEAN ECONOMIC COOPERATION

From a comparative perspective, the processes and documents establishing ASEAN's economic programmes seem unusually devoid of anticipatory dispute settlement mechanisms. While it may be that ASEAN summits and regular ministerial meetings can continue to reach consensus and make progress, Singapore abstaining from much regional economic cooperation, this will certainly become harder in the future. Moreover, such diplomatic decision-making may not afford much relief to private parties upon whom considerable ASEAN economic growth is reliant. A consultative role channelled through ASEAN-CCI industry clubs suffices for drafting cooperative proposals. But will it suffice to carry out those proposals when they are to be implemented by ASEAN national governments? The automotive complementation scheme may provide an interesting "test case" shortly.

[59] *See* Hooker, M.B., *op. cit.*, *supra,* note 57. *See also,* ASEAN Law Association Conference Materials, 1982, Workshop II (Alternative Forum for the Settlement of Disputes of the Common Man).

[60] *See particularly* LAFTA Resolution 75 (Program for Coordination of Economic and Commercial Policies and for Harmonizing Systems for Trade Control), Resolution 77 (Coordination of Agricultural Policies).

There appears to be no need for an ASEAN adjudicatory system like that of the EEC or the Andean Group to resolve disputes. ASEAN seems to be functioning reasonably well (with limited aims) without the full legal superstructure the 1972 United Nations study group thought necessary and comparative analysis would seem to promote.[61] There is always the danger that such a superstructure could become more of a liability than an asset in a regional group which prefers pragmatic, step-by-step, consensual progress.

However, the establishment of a regional economic dispute settlement mechanism within ASEAN should be considered as a preventive measure. The ASEAN Treaty of Amity and Cooperation, the only treaty of the group, makes provision for intergovernmental dispute settlement by a "High Council" of ministerial level persons. Such a Council has never been formed, and it is unclear how far its jurisdiction extends to "pacific dispute settlement" of "matters affecting" the signatories, who must consent to Council jurisdiction in each instance.[62] Even so, terms of the Treaty on the High Council's functions are revealing. The emphasis is clearly on the use of good offices, conciliation, inquiry and mediation as techniques of dispute settlement.[63] These techniques ought to be adapted to ASEAN's regional economic cooperation.

A number of possible models for ASEAN dispute settlement boards present themselves, though ASEAN draftsmanship might well produce jurisdictional, procedural and remedial rules of a unique character. In EFTA, which also relies heavily on diplomatic dispute settlement procedures, an independent "examining committee" is empowered to decide if member-state "violations" of the EFTA treaty have occurred.[64] If so, the EFTA Council of Ministers may authorize redress to the injured member-state. This approach is not unlike that sometimes pursued under GATT for intergovernmental disputes,[65] the governments of course often *de facto* representing interested private parties who may be the source of complaints.

These models, however, may be too legalistic for ASEAN which is not principally based on treaties among its participants. ASEAN's operation is dependent more upon good faith and ongoing compromise than rules and norms. In such a context, which cannot be culturally extracted, mediation and conciliation readily suggest themselves as the first line of dispute settlement procedure.[66] Mediation and conciliation

61 *See* note 4, *supra.*

62 *See* Quisumbing, *op. cit*., *supra,* note 33.

63 *See* note 62, *infra.*

64 *See* Robertson, A.H., *European Institutions* (London 1973), Chapter 7. *See also,* Carribean Free Trade Area Agreement of 1965, Article 26.

65 *See* Dam, K., *The General Agreement on Traffs and Trade* (Chicago Press, 197); Hudec, R., *The GATT Legal System and World Trade Diplomacy* (Praeger, 1975).

66 Mediation and conciliation are often treated as equivalent terms, since both involve efforts to bring the parties together for settlement. Traditionally, however, a conciliator makes no recommendations to the parties, and merely acts as a "go between". A traditional mediator does make recommendations to the parties, but these are not final or binding. An "advisory arbitrator" may also perform functions of this kind, sometimes limited to a fact-finding report. Such a report may generate settlement pressures (through public disclosure, for example), but is not binding on the parties or a court subsequently undertaking judicial review.

procedures are increasingly found in international conventions, which provide various models apart from that of the ASEAN Amity and Cooperation Treaty.[67]. Article 42 of the International Covenant on Civil and Political Rights constitutes a detailed, well designed provision of this kind.[68] Other examples can be found elsewhere[69] and the Conciliation Rules of the United Nations Commission on International Trade Law might also prove useful.[70]

Arbitration is also an increasingly common approach to intergovernmental dispute settlement in the international arena.[71] Arbitration is frequently established *on a ad hoc* basis, with the compromise governing the substantive and procedural rules to be applied. Arbitration has the added attraction of being a technique familiar to many business firms already used to the systems of the Arbitration Institute of the Stockholm Chamber of Commerce, the London Court of Arbitration, the International Centre for the Settlement of Investment Disputes (ISCID), the International Chamber of Commerce, and the UNCITRAL Arbitration Rules.[72]

A "Regional Centre for Commercial Arbitration", set up by the Asian-African Legal Consultative Committee in 1978, is based in Kuala Lumpur.[73] Though the Centre's services have been little used, it could provide an interim arbitration facility for ASEAN. The Centre presently focuses on attracting *ad hoc* arbitration under the UNCITRAL rules and is available for the settlement of investment disputes under ISCID. Recognition and enforcement of Centre arbitral awards could be facilitated by the New York Convention,[74] but only Thailand and the Philippines are parties thereto.

A noteworthy arbitration approach is incorporated in the General Treaty on Central American Economic Integration. Article 26 of that Treaty allows for the creation of an arbitration tribunal composed of magistrates from the Supreme Courts of the contracting states, chosen by drawing lots from nominated candidates. The award of the tribunal is to have *res judicata* effect for all of the states "so far as it contains any ruling concerning the interpretation or application of the provisions" of the Treaty.[75]

An ASEAN arbitration board, as a second-line defence to dispute settlement, would complement any mediation or conciliation board

67 *See* Appendix A.
68 *See* Appendix B.
69 *See* for example, Article *6 of* the Optional Protocal to the Conventions on the Law of the Sea, Article 12 of the International Convention on the Elimination of All Forms of Racial Discrimination, Article 3 of the Optional Protocal to the Vienna Convention on Diplomatic Relations, Article 66 of the Vienna Convention on the Law of Treaties.
70 U.N. Resolution 35/52 (December 10, 1980).
71 *See* Sohn, L., "The Function of International Arbitration Today", (1963) I Academic De Droit International, Recueil des Cours 1, 41.
72 *See* Wetter, J.G., *The International Arbitral Process* (Oceana Press, 1979).
73 *See* "Arbitration Centre at Kuala Lumpur", 13 J. of World Trade Law (1979); "The Asian-African Legal Consultative Committee and International Commercial Arbitration", 1979 Canadian Yearbook of International Law 324.
74 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).
75 *See* Appendix C.

eventually established. While arbitration has the added advantage of being a familiar process to private parties, there is no reason why an ASEAN mediation or conciliation board could not be jurisdictionally adapted to cover purely private and governmental/private disputes relevant to internal ASEAN operations. Such adaptation may be critical to the success of many ASEAN efforts at economic cooperation, especially since it is not clear that governments will adequately represent interested parties if ASEAN dispute settlement is limited to purely intergovernmental remedies.

ASEAN mediation, conciliation or arbitration boards composed of ministerially appointed but functionally independent members should be attuned to ASEAN legal traditions. Such boards could facilitate dispute settlement between ASEAN states, between ASEAN industry clubs, or as between states and clubs. They could also give locally based enterprises and ASEAN nationals a forum to which grievances about club, national government or ASEAN conduct could be taken. The prestige and integrity associated with such a regional board could be an important factor to its success.

A final alternative worthy of consideration would be to incorporate anticipatory conciliation, mediation or arbitration provisions directly into the various guidelines or agreements establishing ASEAN industrial projects, complementation schemes, or joint ventures. This has already been done in a limited way in the Agreement on Preferential Trading Arrangements, which invokes the good offices of COIME to resolve disputes. In LAFTA, Resolution 99 establishing Norms and Procedures for Complementation Agreements provides for conciliatory dispute resolution through the Standing Executive Committee.[76] The problem with this alternative is that ASEAN agreements are intergovernmental in character, and private parties would be dependent upon governmental representation of their interests. The advantage of this alternative is that it avoids institutionalizing ASEAN dispute settlement, an approach more in keeping with ASEAN's decentralized structure and cost conscious outlook.

All of these suggestions are not premised upon an expansion in ASEAN cooperative economic efforts. ASEAN preferential trade arrangements, industrial projects, complementation schemes, joint venture projects, and other cooperative undertakings are poised on the edge of becoming truly consequential. This is to be welcomed, but the smooth harmonious ride of the past may easily become more tortuous. With rising economic stakes, a comparative perspective suggests that disputes of all kinds become more likely. A structured "law-oriented" means of resolving such disputes may avoid freezes in cooperative development, such as have occurred in LAFTA from 1964 to 1968 and more recently.[77] Most importantly, such mechanisms may keep ASEAN from splintering apart in the many different directions suggested by the diversity of the group.

[76] *See* Article 24.

[77] *See* Efrench-Davis, R., "Comparative Experience With Economic Integration in Developing Countries", in Garnaut, *op.cit.*, *supra,* note 8. See also, Tussie, *op. cit.*, *supra,* note 16.

CONCLUSION

ASEAN legal processes are alive and well, though comparative study suggests that inadequate attention has been given to anticipatory dispute settlement mechanisms in relation to ASEAN economic programmes. Given limited objectives, ASEAN's decentralized diplomatic processes have yet to be really put to a hard test. As internal ASEAN economic cooperation moves from the drawing boards to reality, more formalized dispute settlement procedures are likely to be required, particularly as to private parties. A regional conciliation, mediation, or perhaps arbitration board might provide an answer suitable to the legal context in which ASEAN operates. Consideration should also be given to the provision for use of such techniques in the agreements setting up programmes for ASEAN economic cooperation.

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Appendix A

ASEAN Treaty of Amity and Cooperation (1976)

CHAPTER IV

PACIFIC SETTLEMENT OF DISPUTES

Article 13

The high contracting parties shall have the determination and good faith to prevent disputes from arising. In case disputes and matters directly affecting them should arise, especially disputes likely to disturb regional peace and harmony, they shall refrain from the threat of use of force and shall at all times settle such disputes among themselves through friendly negotiations.

Article 14

To settle disputes through regional processes, the high contracting parties shall constitute, as a continuing body, a High Council comprising a representative at ministerial level from each of the high contracting parties, to take cognizance of the existence of disputes or situations likely to disturb regional peace and harmony.

Article 15

In the event no solution is reached through direct negotiations, the High Council shall take cognizance of the dispute or the situation, and shall recommend to the parties in dispute appropriate means of settlement such as good offices, mediation, inquiry or conciliation. The High Council may however offer its good offices, or upon agreement of the parties in dispute, constitute itself into a committee of mediation, inquiry or concilliation. When deemed necessary, the High Council shall recommend appropriate measures for the prevention of a deterioration of the dispute or the situation.

Article 16

The foregoing provisions of this chapter shall not apply to a dispute unless all the parties to the dispute agree to their application to that dispute. However, this shall not preclude the other high contracting parties, not party to the dispute, from offering all possible assistance to settle the said dispute. The parties to the dispute should be well disposed towards such offer.

Article 17

Nothing in this Treaty shall preclude recourse to the modes of peaceful settlements contained in Article 33(1) of the Charter of the United Nations. The high contracting parties which are parties to a dispute should be encouraged to take initiative to solve it by friendly negotiations before resorting to the other procedures provided for in the Charter of the United Nations.

Appendix B

International Covenant on Civil and Political Rights

Article 42

1. *(a)* If a matter referred to the Committee in accordance with article 41 is not resolved to the satisfaction of the States Parties concerned, the Committee may, with the prior consent of the States Parties concerned, appoint an *ad hoc* Conciliation Commission (hereinafter referred to as the Commission). The good offices of the Commission shall be made available to the States Parties concerned with aview to an amicable solution of the matter on the basis of respect for the present Covenant;

(b) The Commission shall consist of five person acceptable to the States Parties concerned. If the States Parties concerned fall to reach agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-thirds majority vote of the Committee from among its members.

2. The members of the Commission shall serve in their personal capacity. They shall not be nationals of the States Parties concerned, or of a State not party to the present Covenant, or of a State Party which has not made a declaration under article 41.

3. The Commission shall elect its own Chairman and adopt its own rules of procedure.

4. The meetings of the Commission shall normally be held at the Headquarters of the United Nations or at the United Nations Office at Geneva. However, they may be held at such other convenient places as the Commission may determine in consultation with the Secretary-General of the United Nations and the States Parties concerned.

5. The secretariat provided in accordance with article 36 shall also service the commissions appointed under this article.

6. The information received and collated by the Committee shall be made available to the Commission and the Commission may call upon the States Parties concerned to supply any other relevant information.

7. When the Commission has fully considered the matter, but in any event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the States Parties concerned:

(a) If the Commission is unable to complete its consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter;

(b) If an amicable solution to the matter on the basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts and of the solution reached;

(c) If a solution within the terms of sub-paragraph (*b*) is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the States Parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the States Parties concerned;

(d) If the Commission's report is submitted under subparagraph (c), the States Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.

8. The provisions of this article are without prejudice to the responsibilities of the Committee under article 41.

9. The States Parties concerned shall share equally all the expenses of the members of the Commission in accordance with estimates to be provided by the Secretary-General of the United Nations.

10. The Secretary-General of the United Nations shall be empowered to pay the expenses of the members of the Commission, if necessary, before reimbursement by the States Parties concerned, in accordance with paragraph 9 of this article.

Appendix C

General Treaty on Central American Economic Integration

Article XXVI

The Signatory States agree to settle amicably, in the spirit of this Treaty, and through the Executive Council or the Central American Economic Council, as the case may be, any differences which may arise regarding the interpretation or application of any of its provisions. If agreement cannot be reached, they shall submit the matter to arbitration. For the purpose of constituting the arbitration tribunal, each Contracting Party shall propose to the General Secretariat of the Organization of Central American States the names of three magistrates from its Supreme Court of Justice. From the complete list of candidates, the Secretary-General of the Organization of Central American States and the Government representatives in the Organization shall select, by drawing lots, one arbitrator for each Contracting Party, no two of whom may be nationals of the same State. The award of the arbitration tribunal shall require the concurring votes of not less than three members, and shall have the effect of *res judicata* for all the Contracting Parties so far as it contains any ruling concerning the interpretation or application of the provisions of this Treaty.