ASEAN Trade in Goods Agreement (ATIGA) and Its Implementation

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I. Introduction

The Association of South East Asian Nations (ASEAN) is one of the regional (economic) organizations, which has been gaining wider attention recently.[1] One of the cooperation ASEAN has created is the establishment of the ASEAN is in the economic field which they call it the ASEAN Economic Community (AEC).

The AEC was officially launched on 31 December 2015. The AEC is the product of the agreements or decisions of the ASEAN leaders to create ASEAN as a region where the goods, services, investment and skilled labour may flow freely among the ASEAN members.

When the AEC was announced, there was a rather surprise response from the people. Most of the response was, among others, whether they were ready to face liberalisation of goods, services and skilled labour in the region, in particular in their national market. The readiness of the people include whether they could compete with the business coming from other ASEAN members in the sectors of goods, services, investment and labour.

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1 *See* for example, Kishore Mahbubani and Jeffery Sng, The ASEAN Miracle: A Catalyst for Peace?, Singapore: Ridge Books, 2017, pp. 1 and 2; Sanchita Basu Das and Masahiro Kawai (eds.), Trade Regionalism in the Asia-Pacific, Singapore: ISEAS-Yusof Ishak Institute, 2016, p. 3.

There was also a discussion, study or report concerning the performance of the AEC. The discussion, study or report for example, focuses on what economic potential AEC would create, what AEC may have achieved and what challenge ASEAN may face in the economic perspective in the future.[2]

This short paper will try to see the AEC from its legal perspective. This paper will analyze the implication of the AEC agreements and its legal binding nature in particular the ASEAN Agreement on Trade in Goods (ATIGA). This approach is worth analyzing because agreement on trade in goods is the earliest trade agreement signed by the ASEAN Members with little attention.[3]

Before analyzing the ATIGA Agreement, it is worth noting a concise historical background of the AEC, and the trade agreements concluded before the conclusion of the ATIGA Agreement.

A short overview on Indonesian legislation implementing the ATIGA Agreement in Indonesia would also be made. This approach is quite significant to add the evidence with regard to the implication of the ATIGA Agreement in the member states of ASEAN in particular Indonesia.

a) ASEAN(Bangkok) Declaration

The Association of Southeast Asian Nations (ASEAN) was established on 8 August 1967. The founding states of ASEAN were Indonesia, Malaysia, Philippines, Singapore and Thailand. The other 5 nations joined ASEAN: Brunei Darussalam on 7 January 1984, Viet Nam on 28 July 1995, Lao PDR and Myanmar on 23 July 1995, and Cambodia on 30 April 1999.

The ten member states have different economic development. Some are either developed or developing countries. And others are least developing countries. The latter includes, what the ASEAN leaders called it CLMV referring to Cambodia, Lao PDR, Myanmar and Vietnam.[4]

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[2] *See* for example, CARI, AEC Blueprint 2025 Analysis: Liberalisation of the Trade in Goods, CIMB ASEAN Research Institute, vol 1, paper 2, 28 January 2016, p. 2; Chia Siow Yue, "AEC and ASEAN + 1 FTAs: Progress, Challenges and Future," in: Sanchita Basu Das and Masahiro Kawai (eds.), Op.cit., p. 185 etc.

[3] The only comprehensive analysis on ASEAN Economic Community from legal view so far, is among others, Stefano Inama and Edmund W. Sim, The Foundation of the ASEAN Economic Community: An Institutional and Legal Profile, Cambridge: Cambridge U.P., 2015; a concise but straight analysis on the legal issues of ASEAN, see: Community and the rule of law, 15.12.2014, (manuscript).

[4] Article 19 : 1 ATIGA.

They also have different legal systems. Some are common law countries such as Brunei Darussalam, Malaysia and Singapore. The others are civil law countries such as Cambodia, Indonesia, Lao or Vietnam. And the others are countries with special legal systems such as the Philippines.

The legal basis establishing ASEAN was the Declaration of ASEAN (Bangkok Declaration). The Declaration however was a relatively short document. It consisted of a preamble and five paragraphs. The preamble contains broad aims and purposes of ASEAN. They include cooperation in the economic, social, cultural, education, scientific, agriculture, industries and others.

The 5 paragraphs of the Declaration contained the will of the founding states about the cooperation between them, the machinery for the holding of meetings and the status of ASEAN as an open organization (to the states located in the south-east Asia).

The Declaration was silent for example, about the organizational structure (as a regional organization), its legal status, the voting procedure, rights and immunities, etc.

b) ASEAN Charter

An important development affecting ASEAN status as regional organization took place in 2007 when ASEAN head of states signed the ASEAN Charter. The Charter came into force on 15 December 2008. The Charter "serves as the foundation for ASEAN's new legal framework and the establishment of new organs and mechanisms to intensify ASEAN's community-building process."[5]

The Charter establishes the legal and institutional framework of ASEAN. The Charter states that it is an organization with legal personality,[6] which adheres to the principles of democracy, rule of law and good governance.[7] It

[5] Preamble of the Charter; ASEAN Secretariat, ASEAN Economic Community: Handbook for Business, Jakarta: The ASEAN Secretariat, 2011, p. vii.
[6] Article 3 of the Charter.
[7] Preamble and Article 2 of the Charter.

has its institutional organs,[8] immunities and privileges,[9] budget and finance of the organization,[10] working language,[11] decision-making,[12] assets,[13] etc.

In its scope of cooperation, the ASEAN members have confined their broad area of cooperation into three distinctive cooperation. They are the economic cooperation, social and cultural cooperation and security cooperation.[14] Among the three, the economic cooperation has made a rather significant progress.

c) AFTA - CEPT

The cooperation on economic matters have taken place long before the ASEAN Charter was signed. The first formal "economic cooperation" began practically in 1977. The cooperation covered the so-called Preferential Trading Arrangement and a number of industrial cooperation schemes.[15]

An important economic cooperation which eventually became the foundation leading to the establishment of the AEC was the creation of the ASEAN Free Trade Area (AFTA) in 1992.

The main purpose of AFTA was to increase the ASEAN competitiveness as a production base. The mechanism was mainly to eliminate tariffs and non-tariff barriers. The step to eliminate the tariff and non-tariff barriers was through the application of the Common Effective Preferential Tariff (CEPT) Scheme implemented in 1993. It required all members to apply tariff rate of 0–5 % for goods originating within ASEAN members.

In August 2007, the ASEAN Economic Ministers agreed to enhance the CEPT-AFTA into a more comprehensive legal instrument. This led to the signing of the ASEAN Trade in Goods Agreement (ATIGA) in February 2009.

d) ASEAN Economic Community (AEC)

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8 Chapter IV of the Charter (Article 7 etc).
9 Chapter VI of the Charter.
10 Article 29 of the Chapter.
11 Article 34 of the Chapter.
12 Chapter VII of the Chapter (Art 20).
13 Article 55 of the Chapter.
14 Preamble of the Charter.
15 Siow Yue Chia, "The ASEAN Economic Community: Progress, Challenges and Prospects," ADBI Working Paper series No. 440, October 2013, Tokyo: ASEAN Bank Institute, 2013, p. 4.

In 2003, the leaders of ASEAN agreed to raise the status of AFTA to become the ASEAN Economic Community (AEC), in addition to the Socio-cultural and security.[16] The establishment of AEC was to be realized in 2020.

The main purpose of the establishment of AEC was to "achieve higher levels of economic dynamism, sustained prosperity, inclusive growth and integrated development of ASEAN."[17] In 2007, however, the ASEAN Leaders agreed to step up the establishment of the ASEAN Community from 2020 to 2015.[18]

In pursuing the goal of establishing a single market and production base with free flow of goods by 2015, the ASEAN leaders agreed to the integration and inclusion of existing measures relevant to the trade in goods initiative under single undertaking.

The establishment of the AEC 2015 is pursued under four pillars.[19] The first pillar determines ASEAN as a single market and production base. Under this scheme, goods, services, investments or capital, and skilled labour are able to flow freely within the region. It is also enhanced by cooperation in the areas of, among others, customs, standards and conformity assessment, priority integration sectors, and in food, agriculture and forestry.[20]

The AEC, through its second pillar, aims to form an economic region that is highly competitive. This is done by fostering a fair competition; consumer protection; stimulating and promoting innovation; and providing regional public infrastructure through multimodal transport infrastructure linkages, connectivity and energy cooperation.[21]

The third pillar builds on the region's dream for an AEC that is inclusive and equitable. It focuses on efforts to support small and medium enterprises, as well as the newer ASEAN member states, to participate effectively and gainfully in the integration process.[22]

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[16] Made in the Declaration of ASEAN Concord II on 7 October 2003 in Bali, Indonesia.
[17] Declaration of the ASEAN Economic Community Blueprint, Preamble, para 2.
[18] The decision to set up and accelerate the AEC was also due to the rise of economic power of PRC and India. (Cf., Siow Yue Chia, Op.cit., p. 7).
[19] http://www.asean.org/communities/asean-economic-community
[20] http://www.asean.org/communities/asean-economic-community
[21] http://www.asean.org/communities/asean-economic-community
[22] http://www.asean.org/communities/asean-economic-community

Finally, the fourth pillar focuses on developing and adopting a sound approach towards external economic relations, and enhancing participation in global supply networks.[23]

In the light of its economic integration, it may be seen that the level of economic integration of AEC cannot be compared, for example, with the European Union. It may be right to conclude that AEC is no more than a free trade area.[24] This may be seen from the intention of the leaders of ASEAN who merely want to make sure that the flow of goods, services and investment including the skilled labour are realized.

This level of integration is also influenced by the intention of the ASEAN Members as contained in the ASEAN Charter. These include the desire of the ASEAN members to maintain their sovereignty and the principle not to interfere with the other members' internal affairs. The intentions of the members may be seen from the principles of ASEAN as embodied in Article 2 of the ASEAN Charter. Article 2 para. 2 of the Charter among others provides:

> "2. ASEAN and its Member States shall act in accordance with the following Principles:
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> (a) respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States;
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> (b) shared commitment and collective responsibility in enhancing regional peace, security and prosperity;
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> (c) renunciation of aggression and of the threat or use of force or other actions in any manner inconsistent with international law;
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> (d) reliance on peaceful settlement of disputes;
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> (e) non-interference in the internal affairs of ASEAN Member States;
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> (f) respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion;

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[23] http://www.asean.org/communities/asean-economic-community

[24] Cf., IDEALS Org., The ASEAN Trade in Goods Agreement at https://ideals.org.ph/programs/international-trade/56-the-asean-trade-in-goods-agreement (stating that "ATIGA is akin to a trade in goods Chapter of an FTA which comprises with tariff and non-tariff elements…"). See also Inama and Sim. They argued that AEC is "something nearer to a single production base." (Inama and Sim, op.cit., note 3, p. 3).

(g) enhanced consultations on matters seriously affecting the common interest of ASEAN; ...."

The principle of non-interference for example, is the intent of the ASEAN members not to intervene in the internal policies of other members' internal affairs, including economic or trade policies. This principle seems to affect the attitude or policy of a member towards others.[25] This principle also means that a member would try to avoid dispute or direct confrontation when a trade policy of a member impairs or nullifies the benefits of other members.

(1) The AEC Blueprint

The Declaration of the AEC Blueprint was signed by ASEAN Leaders on 20 November 2007 in Singapore. It is the guide or master plan for the establishment of the AEC 2015. The Blueprint underlines a strategic schedule of priority actions the ASEAN Member States would undertake.[26]

At the end of 2015 when the target date of Blueprint of 2015 ended, there was a quite significant progress had been achieved.[27] However, there are some homework to be done, in particular there were still lacks of progress in several sectors. They include non-tariff barriers measures, rules of origin, and custom/regulatory harmonization.[28]

The second AEC Blueprint of 2025 was concluded to continue the aim of the AEC Blueprint of 2015.[29] The Blueprint of 2025 contains strategic measures in many sectors. On trade in goods, the Blueprint of 2025 focuses on:

(i) strengthening ATIGA;

(ii) simplifying and strengthening Rules of origin;

(iii) accelerating Trade facilitation measures.

(2) The ASEAN Framework Agreement on Services (AFAS)

The ASEAN Framework Agreement on Services (AFAS), signed on 15 December 1995 in Bangkok, Thailand. The main purpose of the AFAS is to:

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[25] Cf., Thomas Schmitz, Op.cit, note 3, p. 1.
[26] http://www.asean.org/communities/asean-economic-community
[27] CARI, op.cit., hlm. 2.
[28] CARI, op.cit., hlm. 2.
[29] ASEAN, ASEAN Economic Community Blueprint 2025, Jakarta: ASEAN Secretariat, 2015, p. 1.

(a) enhance cooperation in services among ASEAN member states in order to improve the efficiency and competitiveness of ASEAN services industries, diversity production capacity and supply and distribution of services;

(b) eliminate substantial barriers to trade in services; and

(c) liberalize trade in services by expanding the depth and scope of liberalization beyond those undertaken under the General Agreement on Trade in services of the World Trade Organization.[30]

(3) The ASEAN Comprehensive Investment Agreement (ACIA)

The ASEAN members signed the ASEAN Comprehensive Investment Agreement (ACIA) on 26 February 2009. ACIA came into effect in March 2012. ACIA contains member states' commitments in terms of liberalising and protecting cross-border investment activities.

ACIA is the product of a consolidated and revision of two ASEAN investment agreements already concluded. They include: (1) the 1987 ASEAN Agreement for the Promotion and Protection of Investment; and (2) the 1998 Framework Agreement on the ASEAN Investment Area.[31]

(4) The ASEAN Trade in Goods Agreement (ATIGA)

The ASEAN Trade in Goods Agreement (ATIGA) was signed in Thailand at the meeting of the economic ministers of ASEAN Members countries on 27 February 2009. It came into force since May 2010. ATIGA is aimed at eliminating tariff and non-tariff barriers among ASEAN countries.[32]

II. CONTENT OF THE ATIGA[33]

1. INTRODUCTION

The ATIGA is an improvement over the current ASEAN Free Trade Area-Common Effective Preferential Tariff (AFTA CEPT) Scheme. The AFTA

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[30] http://www.asean.org/communities/asean-economic-community

[31] A discussion on the content of ACIA in particular its dispute settlement mechanism, see: Huala Adolf and An-An Chandrawulan, Mekanisme Penyelesaian Sengketa Penanaman Modal (Mechanism for the Dispute Settlement), Bandung: Keni Media, 2015) (written in Indonesian language).

[32] http://www.asean.org/communities/asean-economic-community

[33] Just like other ASEAN agreements, there was no travaux preparatoire which recorded the historical background of the individual provisions under a certain agreement (negotiation).

CEPT Scheme was focused on the reduction or elimination of tariffs for trade in goods in ASEAN.

The ATIGA covers many trade-in-goods related sectors in addition to the tariff as a subject to AFTA CEPT.[34] They include rules of origin, trade facilitation, customs, standards (SPS and TBT), ASEAN Single Window (ASW), etc.

As stated above, the objective of ATIGA is to streamline and achieve free flow of goods in ASEAN. For that purpose, ATIGA merges all the provisions in the AFTA CEPT. The ATIGA also formalizes several ministerial decisions. Thus, ATIGA becomes a single legal instrument for members to implement the agreement on trade in goods.[35]

ATIGA consists of a preamble, 11 chapters 98 articles, and 10 annexes.[36] The 11 chapters include:

Chapter 1- General Provisions (Articles 1-18)

Chapter 2 - Tariff Liberalisation (Articles 19-24)

Chapter 3 - Rules of Origin (Articles 25-39)

Chapter 4 - Non-Tariff Measures (Articles 40-44)

Chapter 5 - Trade Facilitation (Articles 45-50).

Chapter 6 - Customs (Articles 51-70)

Chapter 7 - Standards, Technical Regulations And Conformity Assessment Procedures (Articles 71-78)

Chapter 8 - Sanitary And Phytosanitary Measures (Articles 79-85).

Chapter 9 - Trade Remedy Measures (Articles 86-87).

Chapter 10 - Institutional Provisions (Articles 88-90).

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[34] It has been reported that as of 2015, "95,99% of intra-regional tariff lines have been liberalised, 99,2 % in the ASEAN 6 and 90,8 % for CMLV nations." (CARI, Op.cit., p. 2).

[35] http://www.miti.gov.my/miti/resources/fileupload/Write-up%20on%20ASEAN%20Trade%20-in%20Goods%20Agreement%20(ATIGA).pdf.

[36] The Annexes contain the full tariff reduction schedule (TRS) of each member states and spells out the tariff rates to be applied on each product for each year up to 2015. (ASEAN Secretariat, ASEAN Economic Community Factbook, Jakarta: ASEAN Secretariat, 2011, p. 5).

Chapter 11- Final Provisions (Articles 91-98).

The preamble contains, firstly, the agreement of the ASEAN Member States to establish the ASEAN Community, comprising of three pillars: namely the ASEAN Political-Security Community (APSC); the ASEAN Economic Community (AEC), and the ASEAN Socio-Cultural Community (ASCC).

Secondly, the ASEAN Member States agree that the foundation to move forward in developing a comprehensive ASEAN Trade in Goods Agreement is built upon the commitments of all Members under the existing ASEAN economic agreements to provide a legal framework to realise the free flow of goods in the region.[37]

The provisions under the ATIGA to a large extent reflect the provisions of the WTO. There are some provisions that directly refer to the provisions of the WTO. As shown below, they include provisions or the agreement on the standards which include Technical Barriers to Trade (TBT) and Sanitary and Phytosanitary Measures (SPS) of the WTO Agreement; the Agreement on implementation of Article VI ("Anti-dumping & Countervailing Duties") of GATT 1994, etc.

The reference to some agreements or provisions of the WTO is plausible since all members of the ASEAN are parties to the Agreement Establishing the World Trade Organization (WTO).[38]

Below is a short description concerning the content of ATIGA seen from the following features:

1. Principles of Trade Rules which include: a. the Principle of Non-Discrimination; b. Principle of Transparency; c. Principle of Market Access; d. principle of Non-Technical Barriers: Standard Regulations and e. principle of Unfair trade.
2. The Compliance Mechanism;
3. The Special Provisions of Least Developing Countries (Developing Countries); and

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[37] Preamble of the ATIGA, para 5.

[38] Indonesia ratified the WTO Agreement Establishing the World Trade Organizaiton on 1 January 1995; Malaysia on 1 January 1995; Philippines on 1 January 1995; Singapore on 1 January 1995; Thailand on 1 January 1995; Brunei Darussalam on 1 January 1995; Vietnam on 11 January 2007; Lao People's Democratic Republic on 2 February 2013; Myanmar on 1 January 1995; and Cambodia on 13 October 2004. (See: https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm).

4. The Settlement of Disputes.

Ad. 1 The Principles of Trade Rules

a. The principle of Non-Discrimination;

The principle of non-discrimination is perhaps the most important principles under most of the multilateral as well as the regional organizations. This principle requires all members to treat others including their products without any discrimination. The principle of non-discrimination includes the principles of most-favoured nation (MFN) treatment and the national treatment.[39]

According to the principle of MFN, "if a Member State enters into any agreement with a non-Member State where commitments are more favourable than that accorded under an Agreement, the other Member States have the right to call for negotiations with that Member State to request for the incorporation herein of treatment no less favourable than that provided under the aforesaid agreement."[40]

According to the principle of national treatment, a member states shall accord non-discrimination treatment to the goods of any other member states coming into its market (according to article III GATT).[41]

b. The Principle of Transparency

The principle of transparency is the principle that requires all members to publish their trade-related policies or regulations. This principle is embodied in a number of articles under the ATIGA. Article 7 para. 2 for example, obliges each member state to promptly publish details of the fees and charges in connection with importation and exportation of goods.

This principle is also found in article 12 under the title "Publication and Administration of Trade Regulations." This article obliges each member to publish laws, regulations, decisions and rulings on the internet.

Another important article with regard to the principle of transparency is article 65. Article 65 concerns with the transparency of the laws, decisions and rulings on customs matters. Article 65 para 2 requires each Member State to publish on the internet and/or in print form all statutory and

[39] Cf., Articles I and III of the GATT (1947).
[40] Article 5 of the ATIGA.
[41] Article 6 of the ATIGA.

regulatory provisions and any customs administrative procedures applicable or enforceable by its customs administration.

Article 81 para. 5 of ATIGA requires member States to publish their national laws, regulations and procedures on their SPS. The publication must be "readily available and accessible to any interested member States."

Similar with this obligation is found in article 87 para 5 which states that member states agree that their national laws, regulations and procedures on SPS measures are readily available and accessible to any interested member states.[42]

c. The Principle of Market Access

Under international trade law, the principle of market access, in Peter Van den Bossche's words, "is of the highest importance for countries, traders and service suppliers."[43] This principle of market access also has its main provision under the ATIGA.

The principle of market access under the ATIGA may be classified into three forms:

(1). Tariffs rate quota as regulated by article 20 of the ATIGA;

(2). Duties and Formal Charges as regulated by articles 7 and 19 of the ATIGA. The most important provision is Article 20 para. 1. This article prohibits member states to introduce tariffs rate quota (TRQ) on the importation or exportation of any goods in or to any member states.

(3). Prohibition of Quantitative Restrictions, as regulated by articles 40, 41, 42 and 45 of the ATIGA.[44] Article 40 for example is titled "Application of non-tariff measures.' Article 40 para. 1 provides:

> "Each Member State shall not adopt or maintain any non-tariff measure on the importation of any good of any other Member State or on the exportation of any good destined for the territory of any other

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[42] Article 81 para 5 of the ATIGA.

[43] Peter Van den Bossche, The Law and Policy of the World Trade Organization: Text, Cases and Materials, Cambridge: Cambridge UP, 2006, p. 375. (Bossche however does not classify the market access as the principle of international trade law, but as the Rules of international trade law).

[44] Peter Van den Bossche classified market access into two main categories, namely (1) tariff barriers and (2) non-tariff barriers. (Bossche, Op.cit., p. 376).

Member State, except in accordance with its WTO rights and obligation or in accordance with this Agreement."

d. Principle of Non-Technical Barriers: Standard Regulations

The basic rule or principle concerning non-technical barriers especially the technical regulations is quite extensive. They include among others the regulation on customs (Articles 51), standards, technical regulation and conformity assessment procedures (article 71) or sanitary and phytosanitary measures (article 79 etc.).[45]

On the provision on TBT, for example, ATIGA underlines that the standards, technical regulations or conformity assessment procedures do not became obstacles to trade in ASEAN.[46]

The main reason for the inclusion of the extensive provisions on this issue is because ATIGA tried to put all the provisions into a single instrument. In WTO for example, the SPS and TBT measures are regulated under two (separate) agreements, namely: (1) the Technical Barriers to Trade Agreement (TBT) and the Sanitary and Phytosanitary Measures Agreement (SPS) is placed under the SPS Agreement (of the WTO).

e. The Principle of Unfair Trade

The other important principle under the ATIGA is the principle of unfair trade. The provisions of this principle are rather short. It is found especially in article 87 concerning anti-dumping and countervailing duties. The ATIGA however only refers the (detail) of the unfair trade (in this respect the anti dumping and the (prohibited) subsidies is relatively short. ATIGA merely refers this issue to the WTO, namely article VI of GATT 1994 and Agreement on Implementation of Article VI ("Anti-dumping and Countervailing Duties") of GATT 1994 (as contained in Annex 1A of the WTO Agreement).[47]

Ad. 2. The Compliance Mechanism

It is also worth noting the compliance provisions under ATIGA. In this respect, ASEAN leaders agreed to create a mechanism to ensure Member

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[45] Bossche opined there are 4 main of non-tariff barriers to trade in goods. They are: quantitative restrictions; (2) rules on quantitative restrictions; (3) the administration of quantitative restrictions; and (4) other non-tariff barriers. (Peter Van den Bossche, Op.cit., p. 441).

[46] Article 71 of the ATIGA.

[47] Article 87 para 2 of the ATIGA.

States to abide by their commitment in implementing the ATIGA in their national legislation.[48]

ATIGA provides two mechanisms. They include trade repository and issuance of legal enactments.

(1) Trade Repository

An ASEAN Trade Repository contains trade and customs laws and procedures of all Member States.[49] Trade Repository shall be established and made accessible to the public through the internet. The ASEAN Trade Repository contains trade related information such as (i) tariff nomenclature; (ii) MFN tariffs; (iii) Rules of Origin; (iv) non-tariff measures; (v) customs laws and rules; (vi) procedures and documentary requirements; (vii) administrative rulings; (viii) trade facilitation; and (ix) list of authorized traders of Member States.

(2) Issuance of Legal Enactments

ATIGA provides for the issuance of a single legal enactment for the whole tariff reduction schedule. No later than 90 days for ASEAN 6 and 6 months after entry into force for CLMV. It would have retroactive effect from 1 January of the year of entry into force.

In case where single legal enactment cannot be issued, legal enactment would be issued 3 months before tariff reduction takes into effect.

Ad. 3. The Special Provisions of Least Developing Countries

The preamble of ATIGA "recognized the different stages of economic development between and among Member States and the need to address the development gaps and facilitate increasing participation of the Member States, especially Cambodia, Lao PDR, Myanmar and Vietnam, in the AEC through the provision of flexibility and technical and development cooperation.[50]

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[48] Emphasis added. This measure is important since ASEAN does not have a specific or strong legal mechanism of the dispute settlement mechanisms (as shown below) to enforce other members commitment to live up to the ATIGA.

[49] As of 2015, only 4 Members who have conducted live ATR test. They are Malaysia, India, Laos, and Thailand (CARI, op cit., p. 4).

[50] Preamble of the ATIGA, para 7.

The provisions that specifically provide this special treatment is the flexibility for CLMV to meet certain obligations required under the ATIGA.[51] For example, Article 19 para 1 of the ATIGA gives flexibility to CLMV to eliminate import duties on all products until 2018.

Another flexibility provision is the obligation to issue a legal enactment to give effect to the implementation of the tariff liberalization schedules. Under Article 21 (a) of the ATIGA, all members are given 90 days to issue legal enactment except CLMV is given 6 (six) months (180 days) period.

The ATIGA provisions however do not provide specific provisions to address the development gaps and to facilitate increasing participation of the least developing countries members. The two articles above merely give flexibility or longer time for these countries to meet their obligation to reduce or eliminate import duties.

Ad. 4. The Settlement of Disputes

Generally, the settlement of dispute provisions under the ATIGA Agreement encourages, as seen below, the dispute prevention. This principle is among others the practice of ASEAN leaders to solve their differences since ASEAN was established, namely the "ASEAN way." The "ASEAN way" promotes the solution through consultation. Every differences or conflicts are to be solved through consultation.

This practice was later embodied into the principles of ASEAN as embodied in Article 2 of the ASEAN Charter. Article 2 contains 2 principles in the settlement of disputes. They are: (i) the principle of the reliance on peaceful settlement of disputes; and (ii) the principle of enhanced consultation on matters seriously affecting the common interests of ASEAN.[52]

Under the ATIGA, the settlement of dispute generally follows the above principle. The dispute prevention may be found in a number of articles. For example, article 67, article 82: 2c, article 88 and article 89 with regard to the customs issue. Article 67 encourage the customs authorities of Member States to hold consultation with each other regarding customs issues that affect goods traded between and among Member States.

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[51] CLMV refers to Cambodia, Lao PDR, Myanmar and Vietnam (Article 19 : 1 ATIGA).

[52] Articles 2 (d) and (g) of the ASEAN Charter. Thomas Schmitz is of the opinion that "the ASEAN Charter does not provide for legal remedies of the citizen." (Thomas Schmitz, op.cit., note 2, p. 2).

Another important provision is the Implementation and Institutional Arrangements. Article 82 establishes the ASEAN Committee on Sanitary and Phytosanitary Measures (AC-SPS) for effective implementation of this Chapter. This committee conducts meetings at least once a year among Member States.

The functions of the AC-SPS shall be to, among others, "endeavour to resolve sanitary and phytosanitary matters with a view to facilitate trade between and among Member States. The AC-SPS may establish ad hoc task force to undertake science-based consultations to identify and address specific issues that may arise from the application of sanitary or phytosanitary measures."

As far as the dispute is concerned, it seems that ATIGA is reluctant to address directly the dispute. There is for example no provision with regard to the causes of disputes namely the nullification of impairment as specifically found or regulated in article XXIII of the GATT.

Under the ATIGA, there are principally 2 mechanism available. Firstly, the consultation is the first mechanism available under article 88. The ASEAN Consultation to Solve Trade and Investment Issues (ACT) and the ASEAN Compliance Monetary Body (ACB) the parties may invoke to settle disputes that may arise from this Agreement.

Secondly, the parties may also resort to the mechanism under the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (EDSM). The EDSM Protocol was signed on 29 November 2004.

The ESDM Protocol contains 21 articles and 2 annexes. In general, the Protocol follows the normal mechanisms as found in international law on dispute settlement. The Protocol first of all encourages the parties in dispute to settle their dispute by direct consultation.

Secondly, the Protocol also allows the parties to use the good offices, conciliation or mediation right after the consultation fails or during the process of consultation.

Thirdly, the Protocol offers the settlement through the panel if the mechanisms above fail. The use of panel is akin to the panel used in the WTO Dispute Settlement.

Up until now, there is no reported case that the trade disputes between the parties are settled under the EDSM Protocol. One of the main and plausible

reason why the EDSM Protocol has never been invoked is because the first principle of settlement of dispute through consultation is still very dominant in and among the ASEAN leaders.

Stefano Inama and Edmund W. Sim are of the opinion that the dispute mechanism under ASEAN Charter, and in my opinion also as found under other ASEAN instruments including the ATIGA Agreement, does not impose any obligation upon ASEAN Members to resort to the mechanism under the ASEAN Charter (including ATIGA Agreement).[53]

Inama and Sim further opined that the lack of mandatory use of the dispute settlement mechanism show the "ambivalence about ASEAN's own operating rules and procedures."[54] The two authors were right to state the following opinions:

> "ASEAN wished to introduce rules-based system through the creation of the ASEAN Charter yet did not create obligations to use the ASEAN institutions to resolve disputes and other issues related to those rules. This ambivalence reflects some discomfort within AEAN with both the effectiveness of its legal institutions and the nature of a confrontational approach to dispute resolution."[55]

III. Indonesia Implementation of the ATIGA

Indonesia ratified the ATIGA by the President's Regulation (Peraturan President or "Regulation") No. 2 of 2010 on 5 January 2010. The Regulation does not mention much about the content of the regulation or the implementation of the ratification of the ATIGA Agreement. The Regulation only contains 2 articles. Article 1 is a statement of the president that the government ratified the ATIGA Agreement. The instrument of ATIGA Agreement is attached to this Regulation along with its translation into Indonesian language.

Article 2 of the Regulation states that if there is a different meaning or interpretation between the two languages, the English text will prevail.

The further legal enactment of the ATIGA in Indonesia is the Regulation of the Ministry of Trade No. 208/PMK.011/2012 concerning the Decision on the Tariff imports on Imported Goods in the Framework of ATIGA.

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[53] Stefano Inama and Edmund W. Sim, Op,cit., note 5., p. 45.
[54] Stefano Inama and Edmund W. Sim, Op.cit, note 5, p. 45.
[55] Stefano Inama and Edmund W. Sim, Op.cit, note 3, p. 45.

The two national legislations above seem to have been implemented smoothly. There is no reported complaint or concern both from the government (especially Indonesian Ministry of Trade) or the business community in particular the Indonesian chamber of commerce with regard to the implementation of the ATIGA Agreement with other ASEAN Members.

IV. CLOSING REMARKS

The short analysis above described the legal provisions concerning the ATIGA Agreement. Some comments on this agreement are that ATIGA Agreement is an ambitious project but lack of legal enforcement mechanism.[56] It is worth quoting the comment of The Economist concerning ASEAN:

> "Grandiose statements from the Association of South-East Asian Nations (ASEAN) are the region's Christmas crackers: they appear at regular intervals, create a commotion but contain little substance. … Perhaps inevitable, the commitment of such a diverse bunch to regional integration, and the pooling of sovereignty it implies, is not as strong as ASEAN triumphant statement suggest. There is no mechanism to enforce the group's many agreements and treaties. … Tariffs may vanish, but non-tariff barriers pop up in their place. …"[57]

It may also possibly true that the ATIGA agreement is somewhat similar with the soft legal instrument.[58]

Although ATIGA Agreement is an international agreement, the binding force of the ATIGA relies heavily on the "commitments" of the ASEAN Members. The reliance on commitments is stated in the Preamble of ATIGA. This 'commitment' is restated in the Preamble of the Declaration of ASEAN Concord.

The decision of the ASEAN Leaders to set up the AEAN Economic Blueprint is supporting further this conclusion that ATIGA Agreement, although its status as an international agreement, is a soft law instrument.

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[56] *See* for example, Thomas Schmitz, Op.cit, note 3, p. 1 or Inama and Sim, Op.cit., note 3, p 197 (arguing among others that "ASEAN does not have sufficiently, developed, legal and institutional foundations").

[57] The Economist, 2 January 2016 as quoted in: Kishore Mahbubani and Jeffery Sng, Op.cit, note 1, p. 2 (emphasis in italics is added).

[58] For the discussion of the meaning of soft law (in international economic law), see: I Seidl Hohenveldern,"General Course on Public International Law," III Recueil des Cours 55 (1986); P. Weil, "Towards Relative Normativity in International Law," 47 AJIL 413 (1983); see also: Huala Adolf, Hukum Ekonomi Internasional: Suatu Pengantar (International Economic Law: An Introduction), Bandung: Keni Media, 5th ed., 2011, chapter III) (written in Indonesian language).

Another evidence to support this conclusion is the special provision for developing countries under the ATIGA Agreement. The special provisions for CMLV countries seems to be no more than providing longer period of time to comply with the ATIGA Agreement. This provision suggests that the compliance of the provisions, is also relying on the commitment of all members.

The implication of the ATIGA agreement is accordingly minimal. The available mechanism of dispute settlement to enforce the ASEAN legal instruments, including the ATIGA agreement, seems to be idle for the many years to come.

The critics levelled to ASEAN legal instruments above is well evidenced. However, I am of the opinion that the ASEAN, ASEAN legal instruments including the ATIGA Agreement cannot be compared and seen by using a common approach in analyzing the legal implication of the agreement.

Firstly, ASEAN is not seen from its level of integration a full integration regional organization. ASEAN is just a free trade area which in its creation has its foundation based on commitments of its Members.

Secondly, since ASEAN is heavily based on the commitments of its members and in the light of its still merely a free trade area, it indicates that the legal implication of the ASEAN Agreement is also dependant upon its members.

Thirdly, ATIGA Agreement (and its legal instruments) is just a part of a broader system of ASEAN Community. It is a part of ASEAN Community (in addition to the ASEAN Social and Cultural Community and ASEAN Security Community). It may possibly be right to conclude that the ASEAN Economic Community is not intended to fully apply the sturdy legal character of its legal instruments.