William & Mary Business Law Review

Volume 15 (2023-2024)
Issue 1

Article 6

11-2023

A New Dawn for the Common Law: A Proposal for a New Court System for the ASEAN Trade in Goods Agreement

Nicholas R. Gucciardo

A NEW DAWN FOR THE COMMON LAW: A PROPOSAL FOR A NEW COURT SYSTEM FOR THE ASEAN TRADE IN GOODS AGREEMENT

NICHOLAS R. GUCCIARDO*

ABSTRACT

The Association of Southeast Asian Nations (ASEAN) formed the ASEAN Trade in Goods Agreement (ATIGA) to facilitate trade liberalization between the bloc's members. The ASEAN Member States have continued to implement the agreement according to the dispute settlement mechanism set out in the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (Protocol). However, this Note will argue that the current dispute settlement mechanism (DSM) is inadequate because the panel system does not always provide a final forum for disputes between Member States. A new mechanism is necessary to better adhere to the principles of the ASEAN Charter, strengthen Southeast Asia as a trade destination, and facilitate legal access for firms based in common law countries. This Note, therefore, argues for the establishment of a permanent court system that adjudicates disputes over tariff rates under the principles of the ASEAN Charter as well as the provisions of the ATIGA and the Protocol.

* Nicholas R. Gucciardo is a Juris Doctorate candidate at the Marshall-Wythe School of Law at the College of William & Mary. For the 2023–2024 academic year, he serves as a Notes Editor for staff members of the *William & Mary Business Law Review*. He received his Bachelor of Arts from the George Washington University in International Affairs and Economics.

TABLE OF CONTENTS

INTRODUCTION 219
I. HISTORY OF ATIGA AND ITS INADEQUATE DISPUTE SETTLEMENT MECHANISM 220
II. NECESSITY FOR A PERMANENT ATIGA COURT IN SINGAPORE 225
III. JURISDICTION AND STRUCTURE OF THE ATIGA COURT 227
IV. ATIGA COURT ADOPTION OF THE COMMON LAW SYSTEM 232
V. POTENTIAL DIFFICULTIES IN THE ADOPTION OF AN ATIGA COURT 236
VI. BENEFITS OF THE ATIGA COURT FOR ASEAN MEMBERS AND U.S. ALLIES 241
CONCLUSION 243

INTRODUCTION

The Association of Southeast Asian Nations (ASEAN) is a ten-member bloc of 662 million people across Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, and Vietnam (Member States).[1] As of 2019, the combined gross domestic product (GDP) of ASEAN Member States was US $3.2 trillion, making the bloc the world's fifth-largest economy.[2] In light of the recent trade dispute between the United States and China, ASEAN Member States, such as Vietnam, appear poised to gain even greater significance to U.S. firms keen on reducing their exposure to Chinese political developments.[3]

Consequently, it is incumbent upon countries that support a "free and open Indo-Pacific"[4] to direct more attention towards economic and legal developments in Southeast Asia. Without adequate attention to Member States' needs, China may economically co-opt Member States more easily when Beijing engages in aggressive geopolitical behaviors.[5] Such economic influence may subdue the Member States into acquiescence if the Chinese Communist Party (CCP) engages in military maneuvers that adversely impact the region.[6] In particular, ongoing tensions over maritime borders in the South China Sea may become more advantageous to the CCP if Beijing has economic leverage over Member States that object to CCP incursions into their sovereignties at sea.[7] If China is able to control the South China Sea, then ASEAN Member States and non-members would be forced to play by Beijing's rules unless they want their commercial

---

[1] CFR.org Editors, *What Is ASEAN?*, COUNCIL ON FOREIGN RELS. (Apr. 11, 2022, 3:30 PM) [hereinafter CFR.org ASEAN Backgrounder], https://www.cfr.org/backgrounder/what-asean [https://perma.cc/R83X-4CFA].

[2] *ASEAN Development Trajectories Reach New Milestone*, ASEAN (Aug. 23, 2021), https://asean.org/asean-development-trajectories-reach-new-milestone/ [https://perma.cc/VJ5C-ERZ5].

[3] *The Real Winners of the US-China Trade Dispute*, DEUTSCHE WELLE (Oct. 29, 2020), https://www.dw.com/en/the-real-winners-of-the-us-china-trade-dispute/a-55420269 [https://perma.cc/J7SU-8J55].

[4] Antony J. Blinken, U.S. Sec'y of State, A Free and Open Indo-Pacific, Address at Universitas Indonesia (Dec. 14, 2021).

[5] *See id.*

[6] *See id.*

[7] *See id.*

activities to be interrupted.[8] Not only would this development devastate ASEAN as a bloc, but it would destroy the economic competitiveness of many entities around the world.[9]

Therefore, to best solidify an anti-Beijing alliance for a free and open Indo-Pacific, in addition to various U.S. foreign policy and diplomatic initiatives, ASEAN Member States must establish accessible rule of law in the realm of international trade.[10]

In Part I, this Note supplies important background information on the ASEAN Trade in Goods Agreement (ATIGA).[11] Part I also discusses the current ASEAN Enhanced Dispute Settlement Mechanism (DSM) and argues that it is not adequate to meet the principles set out in ATIGA.[12] Second, to better meet the principles ATIGA promotes, this Note advocates for the establishment of a permanent international trade court system based in Singapore with jurisdiction over all ASEAN Member States.[13] Third, this Note proposes a structure for this permanent court that will ensure that the principles of ATIGA are being met and that Member States receive equal representation.[14] Fourth, this Note promotes the idea that the common law is a suitable method of adjudication for a hypothetical ATIGA court system.[15] Fifth, this Note addresses some of the potential challenges that may confront the creation of said court system.[16] Lastly, this Note argues for the benefits that a permanent court would bring to ASEAN Member States and common law jurisdictions outside the bloc.[17]

I. History of ATIGA and Its Inadequate Dispute Settlement Mechanism

The ASEAN signed the ASEAN Trade in Goods Agreement (ATIGA) with the purpose of "establishing ASEAN as a single

---

[8] *See id.*
[9] *See id.*
[10] *See id.*
[11] *See* discussion *infra* Part I.
[12] *See* discussion *infra* Part I.
[13] *See* discussion *infra* Part II.
[14] *See* discussion *infra* Part III.
[15] *See* discussion *infra* Part IV.
[16] *See* discussion *infra* Part V.
[17] *See* discussion *infra* Part VI.

market and production base characterized by the free flow of goods, services, investment, skilled [labor] and freer flow of capital."[18] Member States sought to accomplish this goal through trade liberalization.[19] Member States were first required to eliminate import tariffs on products traded between the Member States.[20] Member States also committed to gradually reduce and eventually eliminate import duties for goods originating from Member States.[21] In addition, Member States agreed to refrain from introducing tariff rate quotas on goods traded between Member States or goods originating from other Member States.[22]

Even though the Member States reached an agreement to liberalize trade, Member State governments and private firms dealing with the bloc may still have disputes over the agreement's implementation.[23] In Malaysia, for instance, a glass manufacturer may find that its own ministers incorrectly applied certain taxes when they were supposed to follow the rates imposed by ATIGA.[24] In Indonesia, an importer of "propylene copolymers" may have to appeal against the Indonesian government for incorrectly applying an import rate on the general product that originated in Singapore.[25]

Currently, articles 88 and 89 of ATIGA stipulate that Member States may use the ASEAN Consultations to Solve Trade and Investment Issues (ACT), now the non-binding ASEAN Solutions

---

[18] Ass'n of Southeast Asian Nations [ASEAN] Trade in Goods Agreement [hereinafter ATIGA], https://asean.org/asean2020/wp-content/uploads/2020/12/ASEAN-Trade-in-Goods-Agreement.pdf [https://perma.cc/6MEM-33UX].

[19] *Id.*

[20] *Id.* art. 19, ¶ 1.

[21] *Id.* art. 19, ¶ 2.

[22] *Id.* art. 20.

[23] *See* Ass'n of Southeast Asian Nations [ASEAN] Protocol on Enhanced Dispute Settlement Mechanism art. 3 [hereinafter ASEAN Protocol on EDSM], https://asean.org/asean-protocol-on-enhanced-dispute-settlement-mechanism/ [https://perma.cc/KK2R-BA8R].

[24] *See e.g.*, DDG Glass Mfg. Sdn. Bhd. v. Menteri Kewangan & Anor [2020] MLJU 1527 (Malay.).

[25] Ali Salmande, *Indonesian ATIGA Case: A Dispute on Authenticity of Form D*, ASEAN L. OBSERVERS (Sept. 4, 2020), https://aseanlawobservers.wixsite.com/mysite/post/indonesian-atiga-case-a-dispute-on-authenticity-of-form-d [https://perma.cc/QK5C-9WW7] (discussing the Indonesian Tax Court's decision in case No. PUT.57357/PP/M.IXB/19/2014).

for Investment, Services and Trade (ASSIST), and the ASEAN Compliance Monitoring Body (ACB) to settle disputes.[26] Member States who wish not to utilize the ASSIST "consultative mechanism," can turn to the mechanism found in the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (Protocol).[27]

The dispute settlement mechanism (DSM) exists for when states have disputes with each other over the implementation of ATIGA and other ASEAN economic agreements.[28] The dispute settlement mechanism starts with the Senior Economic Officials Meeting (SEOM).[29] The SEOM is the ASEAN institution that is responsible for monitoring the progress of ATIGA's implementation.[30] After receiving a request from a complaining party, SEOM establishes a panel unless, by consensus, it decides not to establish a panel for a particular dispute.[31] These panels consist of three (or five) "well-qualified governmental and/or non-governmental individuals."[32] These individuals can include former panel advocates, former members of the ASEAN Secretariat, international trade law or policy scholars, as well as former senior trade policy officials of a Member State.[33]

Reporting to the SEOM, the panel is supposed to confidentially reach an "objective assessment" of the parties' dispute and reach a decision without the parties being present.[34] Within sixty days of the panel's creation, the panel "shall" submit findings and make recommendations to the SEOM.[35] Once the panel submits this report, the SEOM adopts the panel report within thirty days unless a party appeals the panel finding or the SEOM, by consensus, decides not to adopt the report.[36]

---

[26] *See* ATIGA, *supra* note 18, arts. 88–89; ASEAN Solutions for Investments, Services and Trade, ASEAN, https://assist.asean.org/en/home [https://perma.cc/9YJ4-TEWD].

[27] *See* ATIGA, *supra* note 18, arts. 88–89.

[28] *See* ASEAN Protocol on EDSM, *supra* note 23, arts. 1, 5.

[29] *See* ATIGA, *supra* note 18, art. 50, ¶ 1.

[30] *Id.*

[31] *See* ASEAN Protocol on EDSM, *supra* note 23, arts. 1, 5.

[32] *Id.* app. II(I)(1).

[33] *Id.*

[34] *Id.* arts. 7–8.

[35] *Id.* art. 8, ¶ 3.

[36] *Id.* art. 9, ¶ 1.

At the appellate level, a body of seven people established by the ASEAN Economic Ministers (AEM) hears cases.[37] Members of the appellate panel serve a four-year term and may be reappointed once.[38] On appeal, the appellate body hears cases via a three-person panel.[39] SEOM and the parties "shall" accept the findings and recommendations by the appellate body unless a consensus of SEOM does not adopt the report.[40]

Within the ASEAN bloc, an emerging position in the literature exposes the shortcomings of the current dispute mechanism.[41] For instance, in the geopolitical context, several scholars at Universitas Padjadjaran in Indonesia have argued that arbitration as a final dispute settlement mechanism is "unfulfilling" to meet the needs of Member States, especially where national borders are involved.[42] They cite the failures of ASEAN to prevent border disputes over the Preah Vihear Temple and the Sipadan and Ligitan Islands from reaching the International Court of Justice (ICJ).[43]

Other scholarship has noted the failure of ASEAN to act as a regional problem solver in the face of the Asian Financial Crisis of 1997.[44] ASEAN attempted to mitigate the fallout from the crisis by proposing the ASEAN Surveillance Process (ASP) as a mechanism to prevent future crises, but the Member States did not provide the regional organization adequate power to hold other Member States accountable.[45] Consequently, Member States mainly bore the brunt of the crisis by themselves, and ASEAN suffered a setback in confidence from Member States and the global community.[46]

---

[37] *Id.* art. 12, ¶ 1.

[38] *Id.* art. 12, ¶ 2.

[39] *Id.* art. 12, ¶ 1.

[40] *Id.* art. 12, ¶ 13.

[41] *See infra* notes 42–43 and accompanying text.

[42] Ahmad Syofyan et al., *ASEAN Court of Justice: Issues, Opportunities and Challenges Concerning Regional Settlement Disputes*, 24 J. LEGAL, ETHICAL & REGUL. ISSUES 1, 4–6 (2021), https://www.abacademies.org/articles/asean-court-of-justice-issues-opportunities-and-challenges-concerning-regional-settlement-disputes-10467.html [https://perma.cc/Q3ZP-FLS2].

[43] *Id.* at 4.

[44] Megan R. Williams, Note, *ASEAN: Do Progress and Effectiveness Require a Judiciary?*, 30 SUFFOLK TRANSNAT'L L. REV. 433, 443 (2007).

[45] *Id.*

[46] *Id.* at 443–44.

Outside of ASEAN, a court must also create unified legal interpretations over trade agreements that affect commerce within and outside of ASEAN Member States.[47] London-based think tank Asia House has argued that too many free trade agreements (FTAs) lead to the "noodle bowl effect."[48] Besides the ASEAN Free Trade Area, ASEAN is party to ASEAN+1[49] FTAs with several larger outside economies and multilateral FTAs such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).[50] Individual Member States have also unilaterally signed bilateral trade deals with the European Union (EU) and the United States.[51] Due to the overlapping existence of the agreements' different definitions and requirements for rules of origin, there is no unified regional international trade law towards outside powers.[52] A unified body of regional international trade law, created by one court or one court system, would be more consistent with ASEAN's original mission to serve as a shield for its Member States against the interests of more powerful external actors.[53]

Courts should be the last resort for disputes between parties if they cannot reach agreeable solutions.[54] However, if the parties find that consultations and arbitration will not solve their problems, then a more robust and binding mechanism is necessary to ensure a stronger rule of law over trade in goods and services, taking the place of the current dispute resolution process led by economic experts.[55]

---

[47] *Re-Thinking ASEAN Integration: European Precedents and Southeast Asian Futures*, ASIA HOUSE 13 [hereinafter *Re-Thinking ASEAN Integration*], https://asiahouse.org/wp-content/uploads/2019/04/ASEANresearch0525.pdf [https://perma.cc/ZMH5-5SZ8].

[48]. The "noodle bowl effect" arises when a sudden proliferation of free trade agreements increase compliance burdens, "complicate trade processes and diminish the ease of doing business . . . ." *Id.*

[49] *See id.* ASEAN+1 FTAs involve separate free trade agreements between the bloc and Australia, New Zealand, China, Hong Kong, India, Japan, and South Korea.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *See* Williams, *supra* note 44, at 435–37, 455–57; *see also* Syofyan et al., *supra* note 42, at 4–6.

[54] *See* discussion *infra* Part II.

[55] *See supra* notes 28–39 and accompanying text.

II. NECESSITY FOR A PERMANENT ATIGA COURT IN SINGAPORE

The best solution to the shortcomings of the current dispute settlement mechanism[56] is a permanent court of judges rather than a panel of economists.[57] A permanent court for international trade between all Member States and non-Member States is also necessary.[58] One of the main purposes of ASEAN, as pushed by Thai Foreign Minister Thanat Khoman, was to protect Southeast Asia from "colonial domination" by outside powers.[59] If the Member States are to protect their individual and collective export and import interests, then a permanent court for international trade should bind all ASEAN Member States through its rulings.[60] If one Member State is willing to sacrifice the interests of the rest of the bloc for greater investment from an outside power, the main purpose of ASEAN may be compromised.[61]

Given its geography, influence, and legal history, Singapore is best suited to host the seat of the ATIGA court system.[62] Singapore is an island nation located in the Singapore Strait between Malaysia and Indonesia.[63] The Singapore Strait connects the Melaka Strait (and the Bay of Bengal trading zone) with the South China Sea.[64] Singapore's geography is therefore notable as a "focal point for Southeast Asian sea routes."[65]

---

[56] *See generally* ASEAN Protocol on EDSM, *supra* note 23.

[57] *See* Williams, *supra* note 44, at 454–56; *see also* Syofyan et al., *supra* note 42, at 4–6.

[58] *See* Williams, *supra* note 44, at 455–57.

[59] *See id.* at 436–37.

[60] *See* Ass'n of Southeast Asian Nations [ASEAN] Charter, art. 1 ¶¶ 5, 15 [hereinafter ASEAN Charter], https://asean.org/wp-content/uploads/images/archive/publications/ASEAN-Charter.pdf [https://perma.cc/BDD6-HYEF]; *see also* Williams, *supra* note 44, at 456–57.

[61] *See* ASEAN Charter, *supra* note 60, art. 2, ¶ 2(n).

[62] *See infra* notes 62–72 and accompanying text.

[63] CIA, *Singapore*, THE WORLD FACTBOOK (Sept. 25, 2023), https://www.cia.gov/the-world-factbook/countries/singapore/ [https://perma.cc/T7MN-FAYK].

[64] CIA, *Singapore—Details*, THE WORLD FACTBOOK, https://www.cia.gov/the-world-factbook/countries/singapore/locator-map [https://perma.cc/T7MN-FAYK]; *see* Vernon Cornelius-Takahama, *Singapore Strait*, SINGAPORE INFOPEDIA, https://eresources.nlb.gov.sg/infopedia/articles/SIP_969_2005-01-19.html [https://perma.cc/PG2S-KYXM].

[65] CIA, *supra* note 63.

Furthermore, Singapore has become one of the most influential ASEAN Member States.[66] As of 2021, its GDP per capita not only outpaces other countries in the region, it is also one of the highest in the world.[67] Singapore's commercial activity and economic prosperity come from its internationally renowned logistics hubs for international shipping.[68] As a result, the Singaporean economy is highly dependent on international trade, with a trade-to-GDP ratio of 326%, the fourth-highest in the world.[69]

Finally, Singapore is particularly suitable as the home for a new regional trade court because of its entrenched familiarity with the common law.[70] In 1819, Sir Thomas Stamford Raffles established a trading post in Singapore so that the British East India Company could prevent the Dutch from dominating trade in the Straits.[71] In establishing the port, Sir Raffles established the Singaporean legal system through the Resident Court, its magistrates, and a jury.[72] By 1826, the British applied common law to Singapore and Malaysia as the combined Straits Settlements.[73] Consequently, Singapore's embrace and sustained advancement of the common law[74] could be helpful in establishing a new court system because of its adherence to judicial principles

---

[66] Ankit Panda, *Singapore: A Small Asian Heavyweight*, COUNCIL ON FOREIGN RELATIONS (April 16, 2020, 8:00 AM), https://www.cfr.org/backgrounder/singapore-small-asian-heavyweight [https://perma.cc/NH5B-BCQC].

[67] *See id.*; *GDP per capita (current US$)*, THE WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?most_recent_value_desc=true&year_high_desc=true [https://perma.cc/X3XC-WRBA].

[68] Panda, *supra* note 66; *see* Yin Lam & Karuna Ramakrishnan, *Three Factors That Have Made Singapore a Global Logistics Hub*, WORLD BANK BLOGS (Jan. 26, 2017), https://blogs.worldbank.org/transport/three-factors-have-made-singapore-global-logistics-hub [https://perma.cc/M394-5PA8].

[69] Panda, *supra* note 66.

[70] Chai Yee Xin, *UPDATE: A Guide to the Singapore Legal System and Legal Research*, GLOBALEX (Jul./Aug. 2021), https://www.nyulawglobal.org/globalex/Singapore1.html [https://perma.cc/KY6Y-WBZ8].

[71] Herwin Mohd Nasir, *Stamford Raffles's Career and Contributions to Singapore*, SINGAPORE INFOPEDIA (Jan. 2019), https://eresources.nlb.gov.sg/infopedia/articles/SIP_715_2004-12-15.html [https://perma.cc/8PX9-JWAR].

[72] *Id.*

[73] Xin, *supra* note 70.

[74] *See* Eugene K. B. Tan & Gary Chan, *The Singapore Legal System*, SING. L. WATCH (Feb. 2019), https://www.singaporelawwatch.sg/About-Singapore-Law/Overview/ch-01-the-singapore-legal-system [https://perma.cc/5DJJ-PED3].

like stare decisis (judicial precedent) and ratio decidendi (operative reason for the decision).[75]

III. JURISDICTION AND STRUCTURE OF THE ATIGA COURT

Before delving into the potential application of the common law by the court, one must better understand the necessary legal authorization and foundations to establish an ATIGA court.[76] Article twenty-four, paragraph one of the ASEAN Charter stipulates that if a dispute is related to a "specific ASEAN instrument," then the Member States must settle the dispute "through the mechanisms and procedures provided for in such instruments."[77] Article eighty-nine of ATIGA specifies that Member States "shall apply" the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (Protocol) to disputes arising under the agreement.[78] As previously explained, the current dispute settlement mechanism does not explicitly include a permanent court.[79]

However, Article one, paragraph three of the Protocol states that "[t]he provisions of this Protocol are without prejudice to the rights of Member States to seek recourse to other fora for the settlement of disputes involving other Member States."[80] A plain reading of this treaty provision appears to provide an opening for parties to bring disputes before other judicial fora because the provisions do not discount settlements if they are reached outside of the regular process of the Protocol.[81] If the drafters more explicitly excluded the establishment of a permanent court, then the possibility of an existing court vanishes.[82] Based on the plain reading of the provision, the establishment of a permanent international trade court or court system is not restricted by ASEAN treaty law or its institutions.[83] Therefore,

---

[75] Xin, *supra* note 70.

[76] ASEAN Charter, *supra* note 60, pmbl.

[77] *Id.* art. 24, ¶ 1.

[78] ATIGA, *supra* note 18, art. 89; ASEAN Protocol on EDSM, *supra* note 23.

[79] *See* ASEAN Protocol on EDSM, *supra* note 23; *see also* Syofyan et al., *supra* note 42, at 3–5.

[80] *See* ASEAN Protocol on EDSM, *supra* note 23, art. 1, ¶ 3.

[81] *Id.*

[82] *Id.*

[83] *Id.*

Member States have the legal latitude to create a new permanent international court outside of the dispute settlement mechanism.

The jurisdiction of the ATIGA court should only extend to issues of international trade.[84] Even though this requirement may seem obvious, others have advocated a judicial mechanism that could settle other issue areas as well.[85] Article two of the ASEAN Charter enshrines sovereignty and non-interference as "fundamental principles."[86] In particular, Article two, paragraph two, stipulates that ASEAN Member States, "shall act in accordance with the following Principles . . . non-interference in the internal affairs of ASEAN Member States."[87] In addition, Member States shall "respect . . . the right of every Member State to lead its national existence free from external interference, subversion and coercion . . . ."[88]

For example, in an area such as human rights, limiting the scope of an ATIGA court to only narrow definitions of tariff barriers would prevent the court from becoming too preoccupied with sensitive internal issues affecting the security of domestic regimes.[89] Otherwise, states would be disincentivized from joining a court that could violate the non-interference principle of the ASEAN Charter.[90] Therefore, it is important to limit the scope of the court's subject matter jurisdiction to international trade issues.[91]

Furthermore, international trade rules do not run afoul of these principles because international commerce necessarily crosses national borders as goods and services flow as imports and exports between countries.[92] Article two, paragraph two of the ASEAN Charter also explicitly endorses "adherence to multilateral trade rules . . . for . . . [the] progressive reduction towards

---

[84] *See infra* text accompanying notes 84–94.

[85] *See* Syofyan et al., *supra* note 42, at 4–5; *see also* Williams, *supra* note 44, at 456.

[86] ASEAN Charter, *supra* note 60, art. 2, ¶¶ 1–2(a), (e)–(f).

[87] *Id.* art. 2, ¶ 2(e).

[88] *Id.* art. 2, ¶ 2(f).

[89] *See* CFR.org ASEAN Backgrounder, *supra* note 1.

[90] *See* ASEAN Charter, *supra* note 60, art. 2, ¶ 2(e); CFR.org ASEAN Backgrounder, *supra* note 1.

[91] *See supra* text accompanying notes 88–89.

[92] *See Commerce*, BLACK'S LAW DICTIONARY (11th ed. 2019).

elimination of all barriers to regional economic integration . . . ."[93] This provision illustrates how international trade is outside the purview of non-interference and sovereignty principles because the ASEAN Charter directly demands cooperation by Member States through compliance with multilateral trade rules.[94] Therefore, the establishment of an ATIGA court would not conflict with the fundamental principles of the ASEAN Charter.[95]

An ATIGA court must prioritize and reflect equality between Member States through equal representation on the bench.[96] Considering that there are an even number of Member States in ASEAN, appointing one judge per member state may be problematic because of the potential for split decisions.[97] There are three potential approaches for adding an eleventh judge that could equitably represent Member States' interests.

First, considering that Indonesia's gross domestic product is approximately twice the size of the next largest economy,[98] Indonesia will inevitably play an outsized role in ASEAN institutions.[99] Therefore, the eleventh judge could be granted to Indonesia, leaving Indonesia as the only member state with two judicial appointments.[100] However, allowing Indonesia to have greater influence in a permanent court would likely disturb the equality of Member States across ASEAN.[101]

A second, and arguably more realistic option is to have a rotating term for the eleventh seat in a similar fashion to how countries rotate appointments of Advocate Generals (AGs) to the Court of Justice of the European Union (CJEU).[102] After a certain

---

[93] ASEAN Charter, *supra* note 60, art. 2, ¶ 2(a), (n).

[94] *Id.* ¶ 2(n).

[95] *Id.*

[96] *Id.* ¶ 2(a).

[97] *See* CFR.org ASEAN Backgrounder, *supra* note 1.

[98] *See id.*

[99] *See id.*

[100] *See supra* text accompanying notes 97–98.

[101] *See Equality of States*, BLACK'S LAW DICTIONARY (11th ed. 2019); ASEAN Charter, *supra* note 60, art. 2, ¶ 2(a).

[102] *See, e.g.*, Declaration No. 202/350 of June 7, 2016, Declaration on Article 252 of the Treaty on the Functioning of the European Union Regarding the Number of Advocates-General in the Court of Justice, 2016 O.J. (C 202) 350 [hereinafter Declaration No. 202/350]; *see also* NIGEL FOSTER, FOSTER ON EU LAW 59 (8th ed. 2021).

amount years, the Member State that selects the eleventh judge could rotate.[103] Therefore, within twenty years, every member state will have had the chance to hold a second seat on the court, so long as the number of Member States remains the same.[104]

A third option would be a lobbying effort to bring an eleventh member into ASEAN.[105] One could consider Timor-Leste as an option, but the historical qualms between Timor-Leste and Indonesia may make such an option impractical.[106] On the other hand, the Chief Negotiator for Timor-Leste's Accession to the WTO recently claimed that "membership in ASEAN and WTO are . . . processes to be intertwined and essential for the success of our vision of Timor-Leste as a modern and diversified economy with high-quality infrastructures and a growing, healthy, and well-educated middle class by 2030."[107] With both the President and Prime Minister of Timor-Leste in attendance for these remarks, the government of Timor-Leste could be signaling its interest and intention to become an ASEAN Member State sooner rather than later.[108] If Timor-Leste succeeds in joining the WTO and ASEAN, the membership of an ATIGA court would have an eleven-member body where each Member State is equally represented with one seat on the bench.[109]

Furthermore, if one ATIGA court is not enough to handle the caseload, a protocol that creates an ATIGA-based judiciary should consider the possibility of establishing multiple courts.[110] After all, the bloc holds 662 million people and a massive GDP of US $3.2 trillion.[111] In the original EDSM Protocol, ASEAN incorporated a first-instance panel as well as a more permanent

---

[103] *See* Declaration No. 202/350, *supra* note 102.

[104] *See* CFR.org ASEAN Backgrounder, *supra* note 1.

[105] *See infra* text accompanying notes 106–09.

[106] David Lisson, *Defining "National Group" in the Genocide Convention: A Case Study of Timor-Leste*, 60 STAN. L. REV. 1459, 1475–92 (2008).

[107] Joaquim Amaral, Coordinating Minister for Econ. Affs., Opening Remarks at the High-level Conference on WTO/ASEAN Accession of Timor-Leste (July 12, 2022), https://www.wto.org/english/news_e/news22_e/2-acc_15jul22_e.pdf [https://perma.cc/BVW2-PH29].

[108] *Id.*

[109] *See supra* text accompanying notes 106–07.

[110] *See infra* text accompanying notes 111–24.

[111] *See* CFR.org ASEAN Backgrounder, *supra* note 1.

appellate body.[112] A protocol creating an ATIGA court or court system could provide the Member States with the ability to reach agreements on the structure of a system of multiple courts and their locations and jurisdictions that appears similar to the current EDSM structure.[113]

Ideally, the court system would have courts of first instance scattered across the Member States and organized into regional circuit courts similar to the U.S. federal court system.[114] For instance, the Philippines has the world's twelfth largest population at 116,434,200 people[115] and a GDP of approximately US $921.8 billion.[116] Considering the large population, the court for circuit one should cover all of the Philippines and be based in Manila.[117] Furthermore, Indonesia has a population of 279,476,346 people.[118] Circuit two should cover all of Indonesia and be based in the new capital of Nusantara, or Jakarta if the plan to relocate the nation's capital fails.[119] Circuit three should cover Thailand, Singapore, Malaysia, and Brunei, with its court situated in either Singapore or Kuala Lumpur.[120] Finally, circuit four should consist of Cambodia, Laos, Myanmar, and Vietnam, with its court based in Hanoi.[121]

Furthermore, the highest ATIGA court should be based in Singapore because of that nation's importance to international trade and commercial law in Southeast Asia.[122] This appellate court would be the court of last instance in an ATIGA court system

---

[112] *See* ASEAN Protocol on EDSM, *supra* note 23, arts. 1, 5, 12, ¶ 1.

[113] *Id.* art. 1, ¶ 3.

[114] *See Introduction to the Federal Court System*, OFFS. OF THE U.S. ATT'YS, https://www.justice.gov/usao/justice-101/federal-courts [https://perma.cc/2EY8-9ST7].

[115] CIA, *Philippines*, THE WORLD FACTBOOK (Aug. 15, 2023), https://www.cia.gov/the-world-factbook/countries/philippines/ [https://perma.cc/K993-99HK].

[116] *Id.*

[117] *Id.*

[118] CIA, *Indonesia*, THE WORLD FACTBOOK (Sept. 25, 2023), https://www.cia.gov/the-world-factbook/countries/indonesia/ [https://perma.cc/WU7C-LTSK].

[119] *See* Arpan Rachman, *Indonesia Is Still Moving Its Capital to Nusantara Despite Rising Public Opposition*, GLOBAL VOICES (Oct. 30, 2022, 3:01 PM), https://globalvoices.org/2022/10/30/indonesia-is-still-moving-its-capital-to-nusantara-despite-rising-public-opposition [https://perma.cc/47KA-GMBL].

[120] *See* Williams, *supra* note 44, at 454–56.

[121] *See supra* text accompanying notes 110–12.

[122] *See supra* notes 56–75 and accompanying text.

in the same way that the SEOM appellate body is the last instance of dispute resolution.[123] This two-layered structure is appropriate because the structure's similarities to the Protocol on Enhanced Dispute Settlement Mechanism make the court system's structure familiar to SEOM.[124]

IV. ATIGA COURT ADOPTION OF THE COMMON LAW SYSTEM

The ATIGA court would need strong foundations in different sources of law based on treaties, common law rulings, and doctrinal principles.[125] WTO treaties, agreements, and decisions could supply a foundation of treaty law that applies to trade in goods.[126] Such existing agreements include the Marrakesh Agreement Establishing the World Trade Organization, General Agreement on Tariffs and Trade 1994, and other agreements around more specific issues in trade in goods.[127] Incorporating principles established through these agreements would protect any ATIGA court rulings from reversal by the WTO.[128] If losing parties appealed to the WTO, and the WTO forced compliance by Member States, then an ATIGA court would struggle to maintain legitimacy and be weakened as a bulwark against outside powers seeking greater economic power in Southeast Asia.[129]

At the regional level, the ASEAN Charter, the ATIGA, and the Protocol would serve as the foundational law for the ATIGA court's jurisprudence.[130] These documents would make up a basic "constitutional" body of law that an ATIGA court system would

---

[123] *See* ASEAN Protocol on EDSM, *supra* note 23, art. 12, ¶ 13.

[124] *Id.*

[125] *See infra* notes 126–31, 152–63 and accompanying text.

[126] *See e.g.*, Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154 arts. II, ¶ 2, XIV, XV, XVI, & annex 1A [hereinafter Marrakesh Agreement]; General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]. All ten ASEAN Member States are members of the World Trade Organization. *See Members and Observers*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm [https://perma.cc/98HS-5MJM].

[127] *See* Marrakesh Agreement, *supra* note 126.

[128] *See id.*

[129] *See supra* notes 54–61 and accompanying text.

[130] *See e.g.*, ASEAN Charter, *supra* note 60; ATIGA, *supra* note 18; ASEAN Protocol on EDSM, *supra* note 23. A court could leverage the existing framework of regional agreements to legitimate its trade-focused jurisprudence.

rely upon and apply to formulate its rules of law.[131] Beneath the GATT and the ASEAN Treaties should lie binding case law that refers to the principles and rules explicitly and implicitly provided by treaties and prior case law.[132]

In Europe, the European Court of Justice (ECJ) developed the principles of direct effects and supremacy to solidify the power of European Community treaty law through case law.[133] In particular, the ECJ held in *Van Gend en Loos v. Nederlandse Administratie der Belastingen* that European Economic Community (EEC) Treaty law created a new legal order where Member States restricted their own sovereign rights "albeit within limited fields."[134] The ECJ then went a step further in solidifying the supremacy of Treaty law over national law in *Flaminio Costa v. E.N.E.L.*[135] By agreeing to integrate their laws according to the EEC Treaty, it became "impossible for the States, as a corollary, to accord precedence to a unilateral and subsequent measure over a legal system accepted by them on a basis of reciprocity."[136] These holdings[137] demonstrate that it is possible for individual states to surrender some of their sovereignty without necessarily ceding it in the areas most sensitive to domestic regimes.[138]

Malaysia's High Court (Johor Bahru) provided an example of how an ATIGA court could potentially apply the ASEAN Charter and ATIGA to resolve a trade dispute.[139] A glass manufacturer was initially granted a licensed manufacturing warehouse (LMW) license to export its glass products but sought review

---

[131] *See supra* note 130.

[132] *See supra* text accompanying notes 126–28. *See infra* text accompanying notes 149–53.

[133] *See* FOSTER, *supra* note 102, at 94–95, 141–44.

[134] Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen (Feb. 5, 1963), https://curia.europa.eu/juris/showPdf.jsf?text=&docid=87120&pageIndex=0&doclang=EN [https://perma.cc/8XGG-726T].

[135] Case 6/64, Flaminio Costa v. E.N.E.L. (July 15, 1964), https://curia.europa.eu/juris/showPdf.jsf?text=&docid=87399&pageIndex=0&doclang=EN [https://perma.cc/H3YG-MP7F].

[136] *Id.*

[137] *Case 26/62, Van Gen den Loos; Case 6/64, Flaminio Costa.*

[138] *Case 26/62, Van Gen den Loos; Case 6/64, Flaminio Costa.*

[139] DDG Glass Mfg. Sdn. Bhd. v Menteri Kewangan & Anor, [2020] MLJU 1527 (Malay.).

after an adverse customs determination.[140] The applicant maintained the license if they exported at least eighty percent of the "total value of finished product" and not more than twenty percent "for local sales or home consumption subject to payment of the prevailing customs duties."[141] Shortly after the applicant received the license, a minister entered an order that allowed the applicant to sell the glass products locally at the zero percent ATIGA rate of duty.[142] When the applicant applied to renew the license, the same terms applied except that the applicant was allowed to increase local sales to less than or equal to forty percent of the value of the "total finished products."[143] When the Malaysian government conducted an audit of the applicant, the government found a breach of the licensing conditions.[144] The government then imposed import duties at a thirty-percent rate rather than the zero-percent ATIGA rate on products that were "sold in excess of the approve[d] quota for local sales."[145]

In the applicant's appeal of the decision, the applicant argued that its locally sold products were entitled to the zero-percent ATIGA duty rate rather than the "dual taxation" of the additional levies.[146] The Malaysian High Court found for the applicant by holding that by imposing the thirty-percent levy, the second respondent "indeed misconstrued the law in what amounts to imposing dual tax treatment" on a good entitled to the zero-percent ATIGA rate.[147] The Malaysian High Court added that the respondent's decision to impose the dual tax treatment for local sales "was contrary not only to the letter but also to the spirit of the Customs edict of 2012 read together with *ATIGA*."[148]

The Malaysian High Court's holdings provide evidence that at least some ASEAN Member States are willing to be bound by the substantive law of ATIGA.[149] In this case, the High Court invalidated a domestic government ruling and placed greater

---

[140] *Id.* ¶ 6.
[141] *Id.*
[142] *Id.* ¶ 7.
[143] *Id.* ¶ 9.
[144] *Id.* ¶ 10.
[145] *Id.*
[146] *Id.* ¶ 11.
[147] *Id.* ¶ 61(i).
[148] *Id.* ¶ 61(vii).
[149] *See id.*

authority in ATIGA than domestic law.[150] Consequently, this case shows that ASEAN Member States are beginning to acclimate to the idea that regional international law may constitute greater authority than national domestic law.[151]

In addition, for a more consistent international trade jurisprudence, an ATIGA court should incorporate the concept of stare decisis.[152] Rulings issued by the court should become precedents that are binding on Member States, firms, and individuals throughout the bloc.[153] In the United States, decisions from the Supreme Court of the United States constitute mandatory authority over the laws of the states.[154] In Europe, case law does not necessarily constitute binding precedent per se.[155] However, certain general principles in case law, such as direct effects and supremacy, have gained a similar status in European Union legal doctrine.[156]

To best protect ASEAN interests, an ATIGA Court's case law should also apply to non-ASEAN entities that choose to do business with Member States.[157] Here, an ATIGA court could follow a similar path to that of the ECJ which, through its case law extended its jurisdiction and application of regional international trade law to non-Member States.[158] In the *Air Transport Case*, the airlines challenged measures implementing Directive 2008/101 that incorporated "aviation activities" into the directive's greenhouse gas emissions allowance trading scheme.[159] In particular, the airlines challenged the directive's emissions allowance scheme over its inclusion of flights that arrive in or depart from aerodromes in EU territory, from or to non-EU destinations.[160] The ECJ found that "each State has complete and exclusive

---

[150] *Id.*

[151] *See supra* notes 139–49 and accompanying text.

[152] *See Stare Decisis*, BLACK'S LAW DICTIONARY (11th ed. 2019).

[153] *Id.*

[154] *See* U.S. CONST. art. VI, cl. 2; H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 258–59, 262–65 (5th ed. 2014).

[155] *See* FOSTER, *supra* note 102, at 99.

[156] *Id.*

[157] *See* Williams, *supra* note 44, at 455–57.

[158] Case C-366/10, Air Transport Ass'n of America v. Sec'y of State for Energy and Climate Change, ECLI:EU:C:2011:864 (Dec. 21, 2011).

[159] *Id.* ¶¶ 1–2.

[160] *Id.* ¶¶ 112, 116–17.

sovereignty over its airspace."[161] The ECJ also found that EU legislation could be applied to firms when their aircraft are physically on the territory of the EU.[162] Therefore, the ECJ found that the "aircraft is subject to the unlimited jurisdiction of that Member State and the European Union."[163]

An ATIGA court claiming jurisdiction over outside countries and firms would be consistent with ASEAN law.[164] Such jurisdiction would follow the ASEAN Charter's principle of "the centrality of ASEAN in external . . . economic . . . relations."[165] Because a central judicial authority, rather than Member States' courts, would develop the law between the ASEAN Member States and the outside world, ASEAN can better enforce its authority on external matters.[166]

V. POTENTIAL DIFFICULTIES IN THE ADOPTION OF AN ATIGA COURT

There are three major challenges that will likely come from a protocol that permits jurisdiction over a Member State's courts in ATIGA-related disputes.[167] The first challenge will involve the sometimes problematic application of binding case law on all Member States.[168] A known problem of stare decisis, according to renowned comparatist H. Patrick Glenn, is that the concept is ultimately "self-destructing since all decisions must be reconciled in attempting harmonious statements of law."[169]

However, this problem may not present a threat to the authority of an ATIGA court.[170] Technology has evolved to facilitate electronic recordkeeping through databases such as Westlaw and LexisNexis.[171] Considering the dominance of these two

---

[161] *Id.* ¶ 111.

[162] *Id.* ¶ 124.

[163] *Id.*

[164] *See supra* note 129 and accompanying text.

[165] ASEAN Charter, *supra* note 60, art. 2, ¶ 2(m).

[166] *See* Case C-366/10, Air Transport Ass'n of America, ¶¶ 116–18.

[167] *See* discussion *infra* Part V.

[168] *But see supra* notes 139–53 and accompanying text (illustrating how Member States are already using ASEAN trade agreements to guide their legal rulings). *See also* GLENN, *supra* note 154, at 258–59, 262–65.

[169] *See* GLENN, *supra* note 154, at 258–59, 262–65.

[170] *See infra* notes 171–73 and accompanying text.

[171] *See* Jason Krause, *Towering Titans*, 90 A.B.A. J. 51, 51–52 (2004).

databases in common law legal practice, there already exists a canvas on which an ATIGA court system could organize rulings and rules of law.[172] Furthermore, based on treaty law and past disputes, the court system can begin to forge new case law from which newer database technologies may be able to help keep the case law "jurisprudence constante" and avoid the problem of maintaining harmony Glenn has described.[173]

The second challenge will likely emerge from the reluctance of certain Member States to join a protocol creating an ATIGA court.[174] Singapore and Thailand may be more willing to push for a single court because they founded ASEAN to curtail the influence of outside powers and dominant regional players like Indonesia.[175]

However, another faction of Member States that may be reluctant to accede to such a protocol would be states that joined ASEAN later, such as Cambodia, Laos, Myanmar, and Vietnam.[176] It has been observed that certain Member States have been more willing to develop economic institutions than security-related institutions.[177] One explanation is that Cambodia, Laos, Myanmar, and Vietnam can control trade liberalization to enhance their respective regimes' grip on power, whereas regional security and governance priorities can shift domestic power balances.[178] This dynamic is supported and reinforced through the ASEAN Charter's article-two enshrinement of "non-interference in the internal affairs of ASEAN Member States."[179]

The February 2021 Coup in Myanmar illustrates how security priorities prompt divergent responses from Member States.[180] On one hand, Cambodia, Laos, Thailand, and Vietnam have effectively backed the junta by pushing the bloc to recognize the junta.[181] On the other hand, Malaysia and Indonesia have attempted

---

[172] *Id.* at 52.

[173] GLENN, *supra* note 154, at 264. *See supra* note 130.

[174] *See* Lee Leviter, *The ASEAN Charter: ASEAN Failure or Member Failure?*, 43 N.Y.U. J. INT'L. L. & POL. 159, 200–02 (2010).

[175] *Id.* at 170.

[176] *Id.* at 200–02.

[177] *Id.*

[178] *Id.* at 202.

[179] ASEAN Charter, *supra* note 60, art. 2, ¶ 2(e).

[180] CFR.org ASEAN Backgrounder, *supra* note 1.

[181] *Id.*

to prevent Senior General Min Aung of the junta from attending important summits.[182] Even in the present day, there is no consensus on regional security and human rights issues within the bloc.[183] Therefore, to persuade certain governments to sign onto a protocol, it should require that the ATIGA court's jurisdiction not infringe on any government's ability to maintain power.[184]

Another country that may be reluctant to accede to such a protocol is Indonesia.[185] Indonesia may not have the regional security problems of Myanmar, but problems with Indonesian accession may emerge because of its leverage in the ASEAN bloc.[186] Indonesia is indisputably the largest ASEAN member state in terms of gross domestic product, at US $1.1 trillion, and in terms of population, with 273.5 million people as of 2020.[187] The member state with the next largest gross domestic product is Thailand, at a mere $501.6 billion.[188] Only two other Member States, the Philippines and Vietnam, have populations of at least ninety-seven million people.[189] With that much comparative economic and population power,[190] a protocol that establishes an ATIGA court system for resolving international trade cases involving Indonesia would perhaps be written on Indonesian terms in unforeseen ways.[191]

Outside of the unique challenges presented by individual Member States, there may be some resistance to Singapore's position at the center of this proposed court system.[192] Singapore's

---

[182] *Id.*

[183] *See* ASEAN Charter, *supra* note 60, arts. 1–2, ¶ 2(a), (e)–(f).

[184] *See id.*

[185] *See* Seng Tan, *Indonesia Among the Powers: Will ASEAN Still Matter to Indonesia?*, *in* INDONESIA'S ASCENT: POWER, LEADERSHIP, AND THE REGIONAL ORDER, 287, 288–91, 298 (Chris Roberts et al. eds., 2015).

[186] *See* CFR.org ASEAN Backgrounder, *supra* note 1.

[187] *Id.*

[188] *Id.*

[189] *Id.*

[190] *See id.*

[191] *See* Christopher B. Roberts & Erlina Widyaningsih, *Indonesian Leadership in ASEAN: Mediation, Agency and Extra-Regional Diplomacy, in* INDONESIA'S ASCENT: POWER, LEADERSHIP, AND THE REGIONAL ORDER, 264, 277–79 (Chris Roberts et al. eds., 2015); *see also* Rakhmat Syarip, *Defending Foreign Policy at Home: Indonesia and the ASEAN-Based Free Trade Agreements*, 39(3) J. CURRENT SE. ASIAN AFFS. 405, 406, 419 (2020).

[192] *See infra* notes 193–203 and accompanying text.

2020 GDP was significantly smaller than that of Indonesia, Thailand, and the Philippines, while only slightly outpacing Malaysia and Vietnam.[193] With so much economic activity occurring beyond Singapore's borders, high-impact cases on import duty determinations may affect other Member State economies, but not Singaporeans.[194] However, Singapore is best positioned to be the center of a hypothetical ATIGA court system because of its proven track record as a forum for other high-stakes engagements.[195] Since 2015, Singapore has hosted the first meeting between a Chinese and Taiwanese leader, the infamous U.S.-North Korea summit meeting, and an annual Asian security forum known as the Shangri-La Dialogue.[196] Based on Singapore's ability to handle and accommodate sensitive, complicated meetings between belligerent powers, Singapore would be more than capable of serving as a neutral forum for the center of an ATIGA court system.[197]

On a legal level, Member States may fear infringements on their sovereignty because attorneys in the region are accustomed to different legal systems than the common law system.[198] In fact, many of the Member States have civil, customary, or Islamic law systems.[199] Importantly, with the exception of Indonesia, Laos, and Vietnam, every Member State's legal system is at least partially influenced by English common law.[200] Therefore, as long as some level of familiarity with the common law is established, then the burden of additional required training with an LLB or JD program from a university in Singapore would not be excessive.[201] Similarly, future lawyers who attend LLB or JD

---

[193] CFR.org ASEAN Backgrounder, *supra* note 1.

[194] *See* DDG Glass Mfg. Sdn. Bhd. v. Menteri Kewangan & Anor, [2020] MLJU 1527 (Malay.); *see also* Salmande, *supra* note 25.

[195] *See* Panda, *supra* note 66.

[196] *Id.*

[197] *See id.*

[198] CIA, *Field Listing—Legal System*, THE WORLD FACTBOOK, https://www.cia.gov/the-world-factbook/field/legal-system/ [https://perma.cc/W66A-EFVU].

[199] *See id.*

[200] *See id.*

[201] *See Qualified Person: Approved Universities—Singapore*, SING. INST. OF LEGAL EDUC. (Aug. 19, 2021), https://www.sile.edu.sg/singapore-approved-universities [https://perma.cc/ANC8-RGY2] (explaining that foreign lawyers seeking admission into the Singapore Bar can attempt to attain a bar license by

programs at certain institutions in Australia, New Zealand, and the United Kingdom, are able to qualify to practice in Singapore with additional training.[202] A hypothetical ATIGA court system should not become an obstacle for non-common-law lawyers because there are many ways to attain an education that qualifies for practice in Singapore.[203]

The third challenge will likely emanate from properly establishing the scope of the ATIGA court system's jurisdiction.[204] In other words, when cases simultaneously involve international trade disputes and other contentious issues, such as national security or human rights, a new permanent ATIGA court system must limit its jurisdiction so as not to encroach on issues outside its purview.[205] Otherwise, Member States may refuse accession to a protocol if the Member States find that their domestic politics may be compromised by the ATIGA court's jurisdiction.[206]

In his critique of the ASEAN Protocol on Enhanced Dispute Settlement Mechanism, Joel Vander Kooi argued that the Protocol needs to more directly address the risks of legal concepts like

---

graduating from one of these schools in Singapore); *see also e.g.*, *Degree Requirements: LLB Programme*, NAT'L UNIV. OF SING. (Dec. 5, 2022), https://law1.nus.edu.sg/student_matters/llb_prog/deg_req.html [https://perma.cc/VHX4-H4TG] (explaining that prospective candidates to the Singapore Bar can go to university in Singapore and take four years to graduate with a Bachelor's in Law); *Juris Doctor*, NAT'L UNIV. OF SING. (Feb. 1, 2023), https://law1.nus.edu.sg/admissions/jd.html [https://perma.cc/KF5D-CF5B] (explaining that if a prospective candidate with a degree from outside of Singapore needs a Singapore law degree, the candidate may pursue a JD from a school like National University of Singapore in two years).

[202] *Qualified Person: Approved Universities—Australia and New Zealand*, SING. INST. OF LEGAL EDUC. (Dec. 4, 2019), https://www.sile.edu.sg/Australia-and-New-Zealand-Approved-Universities [https://perma.cc/84SQ-MK67]; *Qualified Person: Approved Universities—United Kingdom*, SING. INST. OF LEGAL EDUC. (Dec. 4, 2019), https://www.sile.edu.sg/United-Kingdom-Approved-Universities [https://perma.cc/ESC3-XHUG]. Only four J.D. programs from the United States are acceptable for qualification to the Singapore Bar. *See Qualified Person: Approved Universities—United States of America*, SING. INST. OF LEGAL EDUC. (Dec. 4, 2019), https://www.sile.edu.sg/United-States-of-America-Approved-Universities [https://perma.cc/B5PC-43PE].

[203] *See supra* notes 198–202 and accompanying text.

[204] *See supra* notes 84–95 and accompanying text.

[205] *See* discussion *supra* Part III.

[206] *See* discussion *supra* Part III.

direct effects and supremacy, as well as stare decisis, in redefining the jurisprudence and reach of this adjudicative body.[207] Vander Kooi warns that the Protocol's failure to discuss these three elements creates a pathway for the Enhanced Dispute Settlement Mechanism to invalidate the laws of Member States or create new laws.[208] Without a clear limitation on the Court's ability to bind Member States and nullify domestic laws, even focusing on economic integration and trade could still ultimately undermine the ASEAN Way of respect for Member State sovereignty.[209]

However, it may be possible to empower an ATIGA court that can create binding precedent on certain matters without impinging on the internal affairs of ASEAN's Member States. An ATIGA court protocol could limit such a court's subject-matter jurisdiction to disputes relating to the ASEAN Trade in Goods Agreement and the Protocol on Enhanced Dispute Settlement Mechanism.[210] In addition, the court protocol would develop an additional set of guidelines that prescribes the subject-matter jurisdiction for an ATIGA court.[211] These guidelines should aim to prevent the infringement of Member States' sovereignty.[212]

VI. Benefits of the ATIGA Court for ASEAN Members and U.S. Allies

Despite the potential difficulties associated with creating an ATIGA court system,[213] the establishment of such a court system could benefit Member States because a stronger region-wide rule of law could enhance the region's economic strength and serve as a bastion of stability.[214] United under one court for international

---

[207] Joel Vander Kooi, *The ASEAN Enhanced Dispute Settlement Mechanism: Doing it the "ASEAN Way,"* 20 N.Y. Int'l L. Rev. 1, 2 (2007).

[208] *Id.* at 29–35.

[209] *Id.* at 35–37.

[210] *See* discussion *supra* Part III.

[211] *See* discussion *supra* Part III.

[212] *See* Vander Kooi, *supra* note 207, at 2.

[213] *See* discussion *supra* Part V.

[214] *See* Anthony Blinken, U.S. Sec'y of State, A Free and Open Indo-Pacific, Address at Universitas Indonesia (Dec. 14, 2021), https://www.state.gov/a-free-and-open-indo-pacific/ [https://perma.cc/Q536-HLG4].

trade, ASEAN would be better able to ideally organize its international trade laws through one judicial system.[215]

Uniformity is important for firms and states within the bloc because it provides them with a measure of predictability through a positive system gradually developing common rules of law.[216] Otherwise, scholars, litigators, and negotiators will be left to craft solutions only for specific cases, without precedential influence.[217] With an ATIGA court system, litigators would be able to argue before judges whose focus on a particular subject matter and legal trajectory would allow them to develop precedential principles and rules through case law that would be applicable to different fact patterns.[218]

Uniformity is also important because it permits the bloc to wield its massive economy to prevent outside powers from co-opting the interests of the bloc.[219] After all, the original mission of ASEAN was to prevent the world's superpowers from exploiting the bloc's resources without adequate compensation.[220] Through a court system that reinforces and resolves disputes involving ASEAN's laws on international trade, the Member States may better coordinate and develop rules of law that are more consistent with the key principles of centrality and unity.[221] As long as uniform international trade law, in general, remains focused on trade disputes, the bloc could prioritize ASEAN's economic interests without compromising the political futures of Member States' domestic regimes.[222] An ATIGA court system would, therefore, advance economic integration between Member States and shield the political sovereignty of Member States.[223]

Embracing common law jurisprudence through an ATIGA court system would more easily allow law firms from common law countries to advise companies on operations in emerging

---

[215] *See* ASEAN Charter, *supra* note 60, art. 2, ¶ 2(b), (g), (m)–(n).
[216] *See* GLENN, *supra* note 154, at 258.
[217] *See* ASEAN Protocol on EDSM, *supra* note 23, app. II(I)(1).
[218] *See* GLENN, *supra* note 154, at 258.
[219] *See* Williams, *supra* note 44, at 435–37.
[220] *See id.*
[221] *See* ASEAN Charter, *supra* note 60, art. 2, ¶ 2(g), (n).
[222] *Id.* art. 2, ¶ 2(e), (f).
[223] *Id.* art. 2, ¶ 2(a), (n).

markets throughout the region.[224] Anglo-American jurisprudence, for instance, would first benefit from the increased uniformity in Southeast Asian international trade law.[225] Outside firms would no longer have to worry about compliance with the noodle bowl of international trade laws since an ATIGA court would aim to create one unified body of international trade law in Southeast Asia.[226] Firms would, therefore, only worry about a single set of rules of international trade law and a central judicial institution for the entire region.[227]

Consequently, law firms could start one office in Singapore where they would argue at a first-instance court and then in front of the appellate court in Singapore that binds the rest of the region.[228] As a result, the same rules could apply to all types of traded goods.[229] This could permit more flexibility for businesses to expand their Southeast Asian supply chains throughout the region from Northern Vietnam all the way to the eastern reaches of Indonesia and the Philippines.[230]

CONCLUSION

The ASEAN Trade in Goods Agreement (ATIGA) was an important step towards trade liberalization in Southeast Asia. However, for the bloc to establish itself as an important geopolitical force, the economies of the Member States must better integrate their economies. These economies must also protect themselves

---

[224] CIA, *Field Listing—Legal System*, THE WORLD FACTBOOK, https://www.cia.gov/the-world-factbook/field/legal-system/ [https://perma.cc/W66A-EFVU].

[225] *See id.*

[226] *See Re-Thinking ASEAN Integration*, *supra* note 47, at 13.

[227] *See The ASEAN Economic Community: Investment Opportunities and Challenges in the World's Newest Market*, JONES DAY (Feb. 2016), https://www.jonesday.com/en/insights/2016/02/the-asean-economic-community-investment-opportunities-and-challenges-in-the-worlds-newest-market [https://perma.cc/D26K-V35J].

[228] *See* AKIN GUMP STRAUSS HAUER & FELD LLP, https://www.akingump.com/en/locations/singapore.html [https://perma.cc/F26Y-BUWM]; KING & SPALDING, https://www.kslaw.com/offices/singapore?locale=en [https://perma.cc/AGM2-DWM8]; WHITE & CASE, https://www.whitecase.com/locations/asia-pacific/singapore [https://perma.cc/H36S-69KE].

[229] *See* ATIGA, *supra* note 18, art. 1.

[230] *See Re-Thinking ASEAN Integration*, *supra* note 47, at 13.

from unwanted outside influences through a shared body of law. Therefore, progress towards a more connected regional economy requires a unified interpretation of treaty law in international trade. The current dispute settlement mechanism is insufficient because the current system does not create adequately strong rules of law to unify and simplify regional international trade rules.

To unify the law, ASEAN would be better suited to drafting a protocol that creates a permanent ATIGA court system centered around an appellate court in Singapore with first-instance courts scattered throughout the region. Equipped with international and regional treaty law, an ATIGA court system would create unified and binding court-made rules that are only subservient to the WTO and ASEAN treaties on trade in goods. By following Europe's lead in imposing direct effects and supremacy over domestic laws and regulations, an ATIGA court system would be able to unify the international trade regime in Southeast Asia. In Member States, such as Malaysia, recent case law is already signaling Member States' willingness to conform to a unified trade law system in Southeast Asia.

A specialized and permanent ATIGA court system in Singapore would best serve the interests of firms in ASEAN Member States and common law countries. On the one hand, such a court system could further integrate the economic interests of the Member States. On the other hand, the limitation on the court's jurisdiction over trade in goods would entice participation by Member State governments that are more reluctant to concede political power. By enhancing the legal trust between Member States, the regional bloc may be able to attain a newfound influence in the global supply chain. Through easier access to markets in Southeast Asia, countries that promote a free and open Indo-Pacific region should be able to conduct international trade more efficiently with the Member States. Perhaps through greater economic legal integration between the ASEAN Member States, ASEAN Member States will be better able to retain their sovereignty from outside powers while acting as an effective buffer for firms against Beijing-led forces.