STUDENT CONTRIBUTION

The Future of Informalism in the Economic Integration of ASEAN

Robert Gallo *

This paper examines the doctrine of informalism, its place in the field of jurisprudence and why it influences the international legal system of ASEAN. It analyses the problems associated with the development of ASEAN's international legal system in the context of trade liberalization. It then seeks to answer the question of how ASEAN may enhance trade liberalization through innovations in its legal system and what aspects of an informal legal system may be maintained within a hard-law framework. It does this by analyzing rule-observance in soft law as well as analyzing some examples of flexibility-enabling mechanisms. The paper recommends how instances of legal informalism may be maintained within ASEAN as it seeks to further trade liberalization between its members.

Keywords
Informalism, ASEAN, The ASEAN Way, Relationship-based Legal System, Rule-based Legal System, Credibility, Flexibility, Network Norms, Safeguard Provision, Sunset Provision

> *A legal framework to regulate economic relations among members of ASEAN is developing. ASEAN must continue to develop this framework, and as ASEAN moves into further integration, an expanded number of binding undertakings will be required. Economic relations have evolved from a loose organization based on the ASEAN way to a more 'legalistic' framework based on rules and a dispute settlement mechanism.*
>
> Paul J. Davidson, speaking at the inaugural Asian Law Institute conference at National University of Singapore, May 27, 2004

* Solicitor. LL.B. (Hons. Griffith). The author may be contacted at: rgallo@piperalderman.com.au / Address: Lvl 36, 123 Eagle Street Brisbane QLD 4000 Australia.

I. Introduction

Over the past decade, countries have become more economically inter-dependent and integrated as a result of globalization and international trade liberalization.[1] However, such liberalization has become increasingly bilateral and regional rather than truly multilateral.[2] As the prospects of successful multilateral trade negotiations fade, countries have sought alternative means of liberalising and increasing the flow of trade through bilateral and regional trade agreements and economic cooperative pacts.[3] The ASEAN is a prime example; many of the vehicles for economic integration have adopted precepts of governance based upon soft law obligations with observance of rules being maintained through informal negotiations. While informal governance has been a more accommodating way for individual countries to liberalize trade, it also raises questions about the continuing viability of such liberalization. It has been strongly argued that in order to achieve long-term stability and sustainability, international organizations dedicated to this task must progress toward a rules-based framework of rights and obligations which goes beyond the aspirational declarations and understandings which have traditionally characterized the bulk of the ASEAN's work.[4]

The subject of the ASEAN's legal structure in the context of trade liberalization has been addressed by many writers.[5] They have primarily explained the ASEAN's informal governance structure and the need to develop a rules-based system of governance to further economic integration. The authors have identified that there has been little focus on the role of informalism in its governance system and, in particular, how the ASEAN will be able to integrate informal methodologies into its inchoate but developing formal legal framework.

It is helpful to begin with a greater contextual understanding of the philosophical discipline of informalism and how it is analogized in law. 'Informalism,' as its original

1 O. Morrissey & I. Filatotchev, *Globalization and Trade: The Implications for Exports from Marginalised Economies*, 37 J. Dev. Stud. 1-3 (2000).

2 S. Gupta, *Changing Faces of International Trade: Multilateralism and Regionalism*, 3 J. Int'l Com. L. & Tech. 260 (2008).

3 *Id. See also* L. Tan, *Will ASEAN Economic Integration Progress beyond a Free Trade Area?*, 53 Int'l & Comp. L. Q. 935 (2004).

4 V. Aggarwal & J. Chow, *The Perils of Consensus: How ASEAN's Meta-Regime Undermines Economic and Environmental Cooperation*, 17 Rev. Int'l Pol. Econ. 262 (2010).

5 *E.g.*, P. Davidson, *The ASEAN Way and the Role of Law in ASEAN Economic Cooperation*, 8 Sing. Y. B. Int'l L. 165 (2004); M. Ewing-Chow, *Culture Club or Chameleon: Should ASEAN Adopt Legalization for Economic Integration?*, 12 Sing. Y.B. Int'l L. 225 (2008).

form, is an inclination toward acting and doing things on an ad-hoc basis.[6] It rejects the need for organized structures which facilitates functionality or problem-solving. Philosophically, informalism strives for a sort of independence from the structured disciplines of applied sciences in answering questions to which they may be applicable.[7] Informalists favor the use of basic logic in the solution of a problem, rather than the precepts of a particular body of knowledge. When informalism is applied to the discipline of jurisprudence, it takes on a relatively similar character, engendering the same aversion to institutionalized mechanisms of problem solving as in a philosophical context. For instance, someone who may be categorized as an 'informalist' would reject the need for established mechanisms such as courts to provide a solution to legal problems because it would undermine alternative solutions, *e.g.*, group consensus.[8] Additionally, informalism may favor legislative instruments that are more aspirational than operative, containing few mandatory provisions so as to allow adherents to comply with it uninhibited by prescriptions of how best to do so. Informalism in the context of international law is a close relative of soft law because of its vague operative nature and lack of an official enforcement mechanism. However, there is a distinction to be drawn between soft law and legal informalism. Informalism is concerned with the methodologies of implementing rules (be they hard or soft) in order to establish and maintain a functioning system of laws. Soft law is so consistent with informalism that it may serve as a practical example of informalism in the legal sense. Informalism in a legal sense has been portrayed as an entrenched cultural value of many of the Southeast Asian countries that form ASEAN, though some have acknowledged that other factors may also play a part in its preference for informalism.[9] This social attitude would appear to find expression in the way in which relations are conducted and in agreements they make with each other.

The subject of ASEAN's emerging legal order and its status as a coherent regional trading block is of prime importance in the context of discussions about the rise of major regional powers such as China and India.[10] The ability of ASEAN to develop itself into a

6 *See* Encyclopedia Britannica Academic Edition, Western Philosophy, *available at* http://www.britannica.com.libraryproxy.griffith.edu.au/EBchecked/topic/1350843/Western-philosophy/260429/The-informalist-tradition?anchor=ref923027 (last visited on Nov. 4, 2011).

7 *Id.*

8 R. Kidder & J. Hostetler, *Managing Ideologies: Harmony as Ideology in Amish and Japanese Societies*, 24 L. & Soc'y Rev. 898-904 (1990); R. Abel, *Informalism: a tactical equivalent to law?*, 19 Clearinghouse Rev. 375 (1985).

9 S. Peng, *The WTO Legalistic Approach and East Asia: From the Legal Culture Perspective*, 1 Asian-Pac. L. & Pol'y J. 85-86 (2000). For an opinion against the thesis of the cultural origins of legal informalism, *see* M. Kahler, *Legalization as Strategy: The Asia-Pacific Case*, 54 Int'l Org. 549, 562 (2004).

10 J. Ravenhill, *Fighting Irrelevance: An Economic Community with ASEAN Characteristics*, 21 Pac. Rev. 469 (2008). *See also* A. Greenwald, *The ASEAN-China Free Trade Area (ACFTA): A Legal Response to China's Economic Rise?*,

truly liberalized and integrated common market is very significant to its rise as a new regional center of power and influence. While the fate of ASEAN as a regional counterbalance to potential hegemony is probably of most utility to international relations scholars, the answer to this question is predicated on issues of a legal nature. Further, in the context of international trade law, the ultimate success of ASEAN may serve as a test case for the viability of regional alternatives to both purely multilateral and bilateral agreements.[11]

The primary purpose of this paper is to examine the problems associated with the development of ASEAN's international legal system in the context of trade liberalization and suggest ways in which ASEAN's legal framework could develop. Part two will examine the current status of ASEAN's legal order and how it relates to the philosophical doctrine of informalism. Here, the author will review opinions on the subject of ASEAN's legal system and how debate on the issue of ASEAN's legal future has been framed in the context of its progress toward a rules-based system. Part three will discuss the merits of informal legal systems as an operational alternative to the prevailing academic view. The author will also explore the applicability of some other legal mechanisms which in principle are amenable to the informalist doctrine. Part four seeks to answer the question of how the ASEAN's legal system might evolve in the future. The author will argue that the ASEAN should adopt a framework of compulsory jurisdiction and reintroduce informalism through legislative and jurisprudential mechanisms which influence the application of ASEAN's rules in a way more palatable to ASEAN's ingrained informalist preferences.

II. Difficulties in the ASEAN Economic Integration

A. The ASEAN Way

The ASEAN was first formed in 1967 with the signing of the Bangkok Declaration between Indonesia, Malaysia, Thailand, Singapore and the Philippines.[12] Originally created as an association for mutual security, ASEAN's prime directive was to maintain national sovereignty against outside influences.[13] Its members have always been

16 DUKE J. COMP. & INT'L L. 193 (2006). *See also* Tan, *supra* note 3, at 935 & 961.

11 L. Low, *Multilateralism, Regionalism, Bilateral and Crossregional Free Trade Arrangements: All Paved with Good Intentions for ASEAN*?, 17 ASIAN ECON. J. 65 (2003).

12 *See* the ASEAN official website, *available at* http://www.asean.org/about_ASEAN.html (last visited on Nov. 4, 2012).

13 M. Williams, *ASEAN: Do Progress and Effectiveness Require a Judiciary?*, 30 SUFFOLK TRANSNAT'L L. REV. 440

reluctant to cede sovereignty to an overarching organization. Initiatives of the organization were always to be implemented strictly on the basis of consensus, so that each member could not be coerced to accede to the will of the majority.[14] For economic integration as the primary purpose, the preference for informalism has emerged.[15] Writers have posited that ASEAN's aversion to strong international governance stems from a cultural background shared by its constituent peoples that favors associations and interactions based upon relationships rather than rules. This principle is often referred to as "The ASEAN Way,"[16] as first described by Paul Davidson.[17] In his work, Davidson analysed features of the ASEAN's model of international governance. He drew a distinction between rules-based legal systems and relationship-based legal systems. His analysis categorized ASEAN as an example of the latter.[18] While rules-based systems rely upon the objective application of rules by a third party to maintain a framework of governance, relations-based systems allow rules and obligations to be largely determined or altered by the relationships existing between members.[19]

B. The Relationship-Based Legal System and Problems of Trade Liberalization

While relationship-based organizations may prove functional in the context of basic agreements between few parties, the association and the activities that it undertakes are demonstrably more difficult to regulate as the relationship becomes more complicated. As the number of parties increases and the network of obligations and rights become more onerous, the relationship-based approach becomes strained. If the costs of the relationship increase, there is less incentive to value one's obligations. Although the tendency toward informalist laws may be in part a result of cultural values, a major force influencing an informalist approach to trade liberalization is grounded in political economy. While governments proclaim the public benefits of trade liberalization, small interest groups may be harmed by increased competition. Because these groups stand to

(2006). *See also* Ewing-Chow, *supra* note 5, at 225 (2008).

14 R. Severino, *Framing the ASEAN Charter: an Institute of Southeast Asian Studies Perspective*, INST. SOUTHEAST ASIAN SUD. 3-4 (2005).

15 P. Davidson, *The Role of International Law in the Governance of International Economic Relations in ASEAN*, 12 SING. Y.B. INT'L L. 213, 215 & 221 (2008). For further discussion on the ASEAN charter and the informalist values that it enshrines, *see* S. Tay, *The ASEAN Charter: Between National Sovereignty and The Region's Constitutional Moment*, 12 SING Y.B. INT'L L. 151 (2008); E. Tan, *The ASEAN Charter as "Legs to Go Places": Ideational Norms and Pragmatic Legalism in Community Building in South-East Asia*, 12 SING Y.B. INT'L L. 171 (2008).

16 Davidson, *supra* note 5 (2004).

17 *Id.* at 1.

18 *Id.* at 167-169.

19 *Id.*

lose much more than the average consumer would gain, they are more organized and vocal in their opposition to trade liberalization.[20] This is precisely the reality that governments need to deal with in the context of trade liberalization. It is often referred to as 'regulatory capture.'[21] Hence, the obligations initially agreed to become more difficult to honor over time.[22] Furthermore, member States will be unwilling to grant further liberalization if other member States breach their duties.[23] As such, a relationship-based governance system is difficult to maintain as it possesses no power to enforce commitments against violating parties.

C. The AFTA and the EDSM

The arguments of rules-based governance proponents would appear to lend themselves to the ASEAN case. The primary document of ASEAN's trade liberalization efforts, the ASEAN Free Trade Agreement ("AFTA"), has achieved only minor success in respect of its objective. Trade expansion has suffered from lengthy tariff reduction timelines which have been drawn out further by extensive use of the AFTA's 'emergency measures' for protectionist purposes.[24] The result is tariff rates that provide little improvement over the WTO tariff rates. Further proof of ASEAN's frustratingly slow pace of liberalization is seen in the many bilateral trade agreements that some of its members, such as Singapore and Thailand, have engaged in.[25]

The ASEAN Enhanced Dispute Settlement Mechanism ("EDSM") protocol is the latest iteration of the community's commitment to dispute resolution.[26] As per the EDSM, disputes may be referred to arbitration or mediation.[27] Any dispute resolution under the EDSM is entirely voluntary and relies upon the willingness of disputants to

20 A. Sykes, The WTO Agreement on Safeguards: A Commentary 64-66 (2006). *See also* S. Singham, A General Theory of Trade and Competition: Trade Liberalization and Competitive Markets (2007). *Cf.* Z. Önis, *The Logic of the Developmental State*, 24 Comp. Pol. 109 (1991).

21 S. Rao, Governing Power: A New Institution of Governance, the Experience with Independent Regulation of Electricity 329-330 (2004).

22 *Id.*

23 T. Meyer, *Soft Law as Delegation*, 32 Fordham Int'l L. J. 888, 894 & 898 (2009).

24 ASEAN Free Trade Area art. 6. For details, *see* C. Findlay & S. Urata, Free Trade Agreements in the Asia Pacific 145-146 (2009).

25 *See* Singaporean Government website, *available at* http://www.fta.gov.sg/sg_fta.asp (last visited on Nov. 5, 2011); Thai Ministry of Foreign Affairs website, *available at* http://www.mfa.go.th/main (last visited on Nov. 5, 2011). *See also* J. Tongzon, *US-Sing Free Trade Agreement: Implications*, 20 ASEAN Econ. Bull. 174 (2003); D. Peofilo & H. Le, Sing and ASEAN in the Global Economy: The Case of Free Trade Agreements, *available at* http://www.jstor.org/discover/10.1525/as.2003.43.6.908?uid=3738392&uid=2129&uid=2&uid=70&uid=4&sid=21101392039677 (last visited on Nov. 4, 2012).

26 *Supra* note 12.

27 EDSM Protocol arts. 4 & 16.7.

submit to arbitration. Despite its six-year history, no disputes have been brought for resolution through the EDSM channels by the ASEAN member States.[28] Although it allows arbitrators who are not political representatives of the countries involved, the dispute resolution process is still administered to a significant degree by political representatives.[29] Hence, any proceedings may be reduced to more informal negotiations between the parties. That is why all disputants within ASEAN have continued to rely upon such relationship-based methods of dispute resolution and forgo the pretence of alternative dispute resolution that the EDSM provides.

III. Practical Considerations of Informal Legal Systems

A. Credibility and Flexibility

Having regard to the cultural heritage and operational doctrine of ASEAN, to maintain governance entrenched in informalism, there is a visible tension between the desires for informalism and the need for a rules-based system. Rule-based advocates have outlined that the legal system must be enforced. From the perspective of many national leaders of ASEAN and the informalist doctrine, there is also a great need for *flexibility*.[30] The flexibility of an agreement depends on the degree to which obligations must be followed without any formal sanctions. The greater the flexibility, the less credible its obligations become.[31] Flexibility will make an instrument more attractive for States to implement. However, the loss of credibility will make compliance harder to ensure. It is often the case that international instruments, imposing mutual obligations upon sovereign States, require a modicum of balance between credibility and flexibility.[32] In this regard, rules-based advocates argue that this is a strict zero-sum game, while others conclude that credibility can coexist with flexibility.[33]

28 P. Vergano, The ASEAN Dispute Settlement Mechanism and its Role in a Rule-Based Community: Overview and Critical Comparison, Presented at Asian International Economic Law Network Inaugural Conference, June 30, 2009, at 1.

29 *Supra* note 4, at 262 & 271-272.

30 T. Meyer, *supra* note 23, at 888, 898. [Emphasis added]

31 *Id.*

32 A. Guzman, *The Design of International Agreements*, 16 EUR. J. INT'L L. 3 (2005).

33 For rules-based advocates, *see* Davidson, *supra* note 5; Tan, *supra* note 3. For advocates of soft law, *see Id.*; B. Koremenos, *Loosening the Ties that Bind: A Learning Model of Agreement Flexibility*, 55 INT'L ORG. (2001).

B. Network Norms

Operational informalism has been almost universally viewed as problematic with repect to economic integration and trade.[34] Although practical political problems may work against an informal ASEAN legal system,[35] scholarly opinion is in no way resolute in its opposition to soft law.[36] In assessing the the viability of the informalist doctrine vis-a-vis ASEAN's legal framework, it is helpful to analyse current views on the advantages and defects of soft law. The power of soft law to construct and maintain a legal system has been regarded as 'network norms.'[37] Normative analysis shows that when parties opt into a particular protocol, community, treaty or other instance of soft law and begin the process of cooperation, long-term relationships and an increasing like-mindedness impose themselves upon member parties.[38] As network members become incorporated into organized patterns of interaction, these observed rules and shared outlook on issues become norms of the network and are implicitly followed.[39]

It has been suggested that over time network norms will be internalized by each individual in the network, making external pressures to conform needless.[40] However, even in the absence of total *agreement*, norms scholarship posits that 'prevailing' norms which are observed by a majority will impose an obligation on all to *acquiesce* to their operation.[41] The implementation of a particular initiative is thus in some way coerced by informally established protocols of the network. As each member of the network implements the initiative, the norm is strengthened as a protocol, making it more coercive as a result.[42] In this way, norms are both cause and effect of implementation. Within the network, 'sanctions' of sorts can automatically fall upon those members that act contrary to a norm. These sanctions are not applied by any judicial body, but are

34 Williams, *supra* note 13, at 433, 454-456 (describing how the ASEAN Way is an impediment to further economic integration and deters FDI); H. Lay, *Will ASEAN Economic Integration Progress Beyond a Free Trade Area?*, 53 INT'L & COMP. L.Q. 935 (2004); Ewing-Chow, *supra* note 5, at 225; P. Davidson, *supra* note 5, at 165. For some notable exceptions, *see* C. Lin, *ASEAN Charter: Deeper Regional Integration under International Law?*, 9 CHINESE J. INT'L L. 821 (2010); M. Kahler, *Legalization as Strategy: The Asia-Pacific Case*, 54 INT'L ORG. 549, 571 (2000).

35 *Supra* note 21.

36 J. Goldstein, M. Kahler, R. Keohane & A. Slaughter, *Introduction: Legalization and World Politics*, 54 INT'L ORG. 385 (2000).

37 C.Whitehead, *What's Your Sign? – International Norms, Signals, and Compliance*, 27 MICH. J. INT'L L. 695, 704 (2006). *See also* L. Lessign, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 958 (1995).

38 A. Aviram, *Regulation by Networks*, BYU REV. 1179, 1225 (2003).

39 A. Slaughter, A New World Order 137 (2005). *See also* Whitehead, *supra* note 37.

40 H. Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996); *Why Do Nations Obey International Law?*, 106 YALE L. J. 2599 (1997).

41 Whitehead, *supra* note 37, at 706. [Emphasis added]

42 *Id. See also supra* note 23, at 888.

instead a product of perceived loss of trust and reputation of the breaching member.[43] A loss of reputation in the group may curtail a member's ability to acquire commitments from its fellow members in the future. A breaching member's loss of credibility may therefore damage its success in subsequent rounds of negotiations and new initiatives.[44] Moreover, the continuous nature of the relationship between members makes cut-and-run strategies, in which a member dishonors its commits without consequences, impossible to implement.[45] Following the network norms theory, even if there is a benefit for national governments to break trade liberalization agreements, these will usually be outweighed by the long-term benefits of cooperation and compliance.[46]

Additionally, norms may be useful in setting the level of acceptable compliance within the network of members.[47] Some rules with members' agreement would be harder to comply with than others; a few may be even inconsequential if not observed. Because of the long-term benefits from cooperation, members will put a premium on the maintenance of relationships over the vindication of one-off grievances. Over time, members will determine on their own what level of non-compliance constitutes an actionable breach. With this, there comes a visible distinction between aspirational, long-term approval of the initiative and compliance with its operative provisions. Such divergence of compliance would maintain network cohesion. In the long-term, it would allow for more support for further initiatives, even from those members who breached their obligations.[48] However, it would appear to do this at the expense of the integrity of the rules. Unpopular but necessary provisions may be out of sight, leading to a "race to the bottom" in allowing more rule deviations, while still being nominally in favor of the rule in an aspirational and long-term sense.[49] The ASEAN's preparedness to do this is evidenced by its current practice whereby members compartmentalize issues that are difficult to resolve.[50]

Furthermore, Andrew Guzman opines that the more contentious or 'higher stakes' the provision is, the more members will avoid credibility and instead opt for

43 R. Axelrod, *An Evolutionary Approach to Norms*, 80 AM. POL. SCI. REV. 1095, 1107 (1986). *See also* A. Guzman, *The Cost of Credibility: Explaining Resistance to Interstate Dispute Resolution Mechanisms*, 31 J. LEGAL STUD. 302 (2002).

44 Whitehead, *supra* note 37, at 695, 709-710.

45 *Id.* at 710. *See also* J. Goldsmith, J. & E. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999).

46 *Supra* note 38.

47 Whitehead, *supra* note 37, at 715-716.

48 *Supra* note 38.

49 L. Leviter, *The ASEAN Charter: ASEAN Failure or Member Failure?*, 43 N.Y.U. J. INT'L L. & POL. 167-169 (2010). *See also* Aggarwal & Chow, *supra* note 4, at 269.

50 *Id.*

flexibility.[51] In this way, parties will value their own ability to breach the agreement over their ability to enforce it. Because of the premium generally placed by developing countries on the advancement of domestic industries,[52] exposing industries to more international competition through lowering tariffs would appear to be a significantly high-stakes activity. When this analysis of high stakes agreements is combined with the ASEAN's propensity to turn a blind eye to the most difficult issues, the norms model begins to exhibit some practical weaknesses in its ability to ensure compliance. Based on this critical analysis of network norms in the context of ASEAN, it may be seen that norms alone may not be able to compel sufficient and constant levels of compliance in tariff reduction because there will be too much incentive to maximize flexibility. These systemic breaches may be too problematic for member States to address.

C. Informal Mechanisms of International Instruments

Other mechanisms exist which are not strictly categorized as soft law but considered tools of the informalist doctrine. Two such mechanisms are worth exploring here. These are 'safeguard' provisions and 'sunset' provisions.

1. Safeguard Provisions

Safeguard provisions permit parties in certain circumstances to suspend their obligations. A well-known example may be found at Article XIX of the General Agreement on Tariffs and Trade ("GATT").[53] These provisions allow member states to impose emergency duties on imports in the case of sudden damage or imminent threat of damage to domestic industries as a result of a surge in imports. Safeguards may be considered as informal provisions because they allow members to self-protect and suspend the operation of an otherwise binding and restrictive agreement. By their presence in international instruments, they allow for a partial solution to the problems of political economy and regulatory capture that attend international trade liberalization.[54] Each government can feel safer about committing to a tariff reduction target under an agreement if they are provided an exception to protect significant harm

[51] *Supra* note 32, at 46.

[52] Önis, *supra* note 20, at 109.

[53] GATT art 1(a). XIX, *available at* http://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm (last visited on Nov. 25, 2012). It reads: "If, ... , any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession."

[54] Sykes, *supra* note 20, at 59.

to domestic industries. Safeguards have been referred to as a 'safety valve' of the WTO.[55] While incentivising entry into agreements, such provisions allow governments to avoid the effects of political pressure from their constituents and industry lobbies without completely dishonoring the agreement. Under safeguard provisions, governments can take temporary administrative action where necessary, thereby removing the imperative to implement more restrictive and long-term measures such as legislative amendments.[56] It can therefore be seen that safeguard provisions would aid in the preservation of cooperation among members and the long-term compliance with an instrument's obligations.

The current analysis of safeguards is postulated exclusively in the context of the WTO, whose legal system maintains compulsory jurisdiction over its members' disputes.[57] In this situation there is some degree of oversight for the use of safeguards. Members who implement safeguards may be sued by aggrieved members and must demonstrate the legitimacy of their actions, showing an unforseen danger to domestic industries and causally linking it to imports.[58] By contrast, the exercise of safeguard provisions under the AFTA goes unchallenged because the EDRM lacks compulsory jurisdiction to enforce disciplinary measures against unmeritorious implementations. The evident result of informalist concession of safeguards without compulsory jurisdiction is one of extensive and prolonged implementation of safeguards.[59] The ASEAN currently serves as a perfect example of this principle. Several ASEAN members have implemented safeguards measures under the AFTA to avoid having to lower tariffs in accordance with their obligations. A noticeable case is Malaysia, which protected its automobile industry for an extended period of time under the pretext of legitimate safeguard implementation.[60] The overuse of safeguards further serves as an example of a problematic "race to the bottom." Though safeguards appear to be a useful method of introducing informalism into a legal system, their existence without a compulsory jurisdiction is problematic.

B. Sunset Provisions

A sunset provision is a term that sets a date on which a part of an will no longer be effective. They have been used in several international instruments as a way of

55 *Id.*

56 *Id.* at 60.

57 Sykes, *supra* note 20, at 60.

58 GATT art. XIX.

59 A. Reyes, *Tariff Troubles: Exemption requests are undermining AFTA*, ASIA WEEK, Aug. 25, 2000.

60 Tan, *supra* note 3, at 941.

increasing the flexibility of an agreement's obligations in a temporal sense.[61] It permits obligations to be renegotiated. Despite being a predefined instance of hard law, sunset provisions should be categorized as an instance of informalism in a legal context because they are regarded as a mechanism by which hard law obligations may cease and informal methodologies of negotiation and relationship-based rules may be reintroduced. Sunset provisions offer members flexibility in the agreement at a future stage, so that members' uncertainty will not inhibit *ex ante* acceptance of its provisions.[62]

In the context of ASEAN, sunset provisions would have the effect of *postponing* the practice of constant negotiation and compromise for a certain period of time, rather than eliminating it completely. [Emphasis added] This may have two useful functions for ASEAN. First, it makes agreements more appealing to the ASEAN leaders who generally have preferred informalism. Second, these provisions will more likely provide a period of uninterrupted observance of the agreement's obligations. This may be also useful in helping to entrench norms within the system. Normative analysis suggests that the longer a rule is observed, the stronger it will be as a norm and the more compulsive force it will have.[63] In this way, current ASEAN norms will not hinder the development of new norms which emphasize rule-observance.

IV. A New Paradigm of Informalism for ASEAN

Recognising the pros and cons of informalism in practice, as well as the entrenched attachment of the ASEAN nations to relationship-based methodologies, it is clear that ASEAN's trade liberalization requires greater credibility to progress forward. However, ASEAN countries require a significant degree of flexibility in these processes. It is therefore useful to consider ways in which the evolving rule-based framework of ASEAN may retain informal characteristics.

One of the preconditions for a rules-based framework is compulsory jurisdiction for the dispute resolution mechanism. Without this, the point of reference for judging compliance and infraction by parties is suspect. Once the initial reluctance of compulsory jurisdiction has been overcome, there appears to be broad room for compromise between the rules-based and informalist approaches. Having compulsory jurisdiction is important because group norms allow for a slippery definition of

61 *E.g.*, The Nuclear Non-Proliferation Treaty (1968); The Antarctic Treaty (1959); The Outer Space Treaty (1967).

62 B. Koremenos, *Loosening the Ties that Bind: A Learning Model of Agreement Flexibility*, 55 Int'l Org. 294 (2001).

63 Whitehead, *supra* note 37, at 704.

compliance. There is a strong argument that norms-based compulsive mechanisms such as reputational sanctions alone are not sufficient for the progression of trade liberalization in the ASEAN. When putting in place credibility-enhancing mechanisms such as compulsory jurisdiction, one must also consider that in high-stakes agreements, States will naturally lean towards creating flexibility.[64] In the context of ASEAN, the author would suggest this rule will operate to an even greater extent. Once the issue of compulsory jurisdiction is settled, the most pressing question becomes how informalism could be reintroduced into the legal system of the ASEAN member States to become more acceptable. In this sense, it provides the necessary preconditions of rule-observance for informalist mechanisms such as safeguards and sunset provisions to operate effectively.

Safeguard measures can serve as a way of preserving informalist flexibility, provided that this is balanced with compulsory jurisdiction. Some have pointed out that the positive impact safeguards can have is in constant conflict with the need to restrict and regulate their abuses, as implementation of safeguards necessarily detracts from the goals of trade liberalization.[65] To ensure that safeguards are not used to substantially circumvent obligations, the criteria for their operation must be enforced. Yet, the harder they are to implement, the less flexible the agreement is and the less likely it is to be accepted by members. This analysis portrays safeguards as a zero-sum game between flexibility and credibility of an agreement, similar to any soft law as an international instrument. Others argue that safeguards can remove the usual trade-off between flexibility and credibility by evading governmental responsibility for operations of the law that restrict the flexibility. This theory requires two conditions. First, only the application of the law should be stringent, allowing the substance of the law to permit safeguard measures in principle. Second, any dispute over safeguards implementation will be decided by a third-party dispute resolution panel independent from national leaders. Because the dispute resolution mechanism is outside the control of the parties, responsibility for an adverse decision is much less attributable to them.[66] In this way, national leaders are more able to deflect political blame for not being able to break tariff reduction commitments through safeguards. Therefore, while increasing flexibility, safeguards may also help to reduce the urgency of the need for flexibility in the application of an agreement.

Sunset provisions may also play a useful role in the future of ASEAN's legalization. Sunset provisions preserve a critical aspect of ASEAN's informalism by permitting the

64 *Supra* note 32, at 46.

65 A. Sykes, *The Persistent Puzzles of Safeguards: Lessons from the Steel Dispute*, 7 J. Int'l L. 523, 560 (2004). *See also supra* note 32, at 3.

66 Guzman, *supra* note 43, at 303, 334.

operation of rules to still be subject to future negotiations. By postponing the relationship-based negotiation, they obviate the need for informalist measures during the rules' operative period. Further by allowing an outlet for political representatives to renegotiate rules in a legislative capacity, the tendency to apply political pressure upon the objective application of the rules (in a judicial capacity) will be reduced. It may be thus appropriate to view sunset provisions as a 'safety valve' mechanism of informalism.[67] They are eventually an innovative way of keeping informalist negotiation within the system but limiting its detrimental effects on compliance. As with safeguards, sunset clauses appear to be a mitigating factor for reintroducing a degree of informalism which is substantially removed with the advent of compulsory jurisdiction.

In addition to the informalist mechanisms in legislative form, normative analysis may provide another way of reintroducing informalism into the ASEAN legal system. This analysis has also shown that the definition of infraction and the merit of punishment are variables to be determined by the norms of the network. Through repeated interactions and experiences with previous instances of infractions of the law, a mutually understood blueprint of what constitutes an actionable offence against the rules takes form among the members. Although this paper would conclude that compulsory jurisdiction is necessary for the ASEAN's legal system to achieve greater levels of trade liberalization, a theory of ASEAN's legal future must still pay due regard to the need for flexibility in international agreements. The way in which norms can render malleable the concept of compliance presents a promising way to provide greater levels of flexibility within the framework of a legal system based on compulsory jurisdiction. It would seem appropriate in the context of ASEAN's legal system for courts exercising compulsory jurisdiction to attempt to gauge these norms of compliance and give them some regard as a relevant factor in their judgments. This could be achieved, *e.g.*, by admitting evidence of prior instances of breach. In the same way that domestic courts consider relevant factors in their sentencing, dispute resolution bodies in ASEAN may rely on prior examples in making their determinations.[68] Through this innovation, the AFTA and future economic commitments would not have to be applied rigidly. In addition, It would ensure that the promise of credibility within the ASEAN legal framework is kept while maintaining flexibility.

[67] In a similar way to Alan Sykes' construction of safeguards as "domestic safety valves" for internal political pressure. *See* Sykes, *supra* note 65, at 59.

[68] *See* E. Posner, *Law, Economics and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1699-1701 (1996). *See also* A. Guzman & T. Meyer, *Explaining Soft Law*, *available at* http://www.escholarship.org/uc/item/7796m4sc (last visited on Nov. 4, 2012).

V. Conclusion

In this paper, the ASEAN's legal system and the future of its trade liberalization efforts have been explored through the prism of the informalist doctrine. Far from being a universally harmful, some aspects of informalism may still have a future in a rules-based system that the ASEAN may wish to implement. This analysis has been distilled into three general conclusions. First, the analysis of informalist mechanisms and the pitfalls of norms theory have demonstrated the importance of having a judicial mechanism that exercises compulsory jurisdiction over all disputes arising out of the ASEAN treaty provisions.

Second, despite problems enforcement, informalist approaches, such as sunset clauses and safeguards, can be introduced if accompanied by compulsory jurisdiction. Through safeguard mechanisms, the flexibility of new initiatives will be enhanced, making them more amenable to the ASEAN policy-makers. Additionally, safeguards will play a positive role by redressing the agency problem of regulatory capture faced by national leaders; it may impede their acceptance of further initiatives. Similarly, sunset provisions in new initiatives under the AFTA will enable the 'ASEAN way' of negotiation to be maintained in the creation of new rules and provide a measure of control over new agreements. Parties will be more likely to agree to implement and comply with a particular initiative over a shorter period of time. The appearance will give the agreement greater credibility, without entirely removing its flexibility. In such a context, compliance will begin to foster stronger norms of cooperation, maintenance of existing agreements, and faith in the benefits of trade liberalization.[69]

Third, the operational modes of soft law have shown that significant commitments can be agreed to substantially in the long-term. This is due to the norms that permeate the working relationship of member States and their representatives over time. Further, the dispute settlement principle should be sensitive to the prevailing norms of the ASEAN group. When deciding cases between disputing parties, tribunals should be able to accept evidence of prior practice and precedents to provide perspective to the issues. Such a court would not exercise its compulsory jurisdiction to eradicate informalism of the past, but rather would incorporate its operative principles within the framework of a rules-based legal system. This would deliver certain flexibility and is more amenable to the cultural preference for informal progress that ASEAN's leaders have demonstrated. Such sensitivity will provide greater flexibility for governments to

[69] *See* Whitehead, *supra* note 37; *supra* note 38.

implement and comply with trade liberalization initiatives. As regards the dispute resolution body, an analysis of current practices suggests that it should be completely removed from the sphere of bureaucratic intervention and compromise. Political representatives should not participate in judicial decisions because of its harmful effects upon the integrity of a rules-based legal system.[70] Although relationship-based political negotiation should be circumscribed in a judicial capacity, it may still be allowed to continue in a legislative role. Once laws and regulations have been agreed to, the capacity to change them will become much easier. [Emphasis added] Accordingly, the worst characteristics of relationship-based legal systems which can erode the substantive provisions of soft law might be avoided.

These suggestions represent a substantial opportunity for compromise. While informalism would be removed from dispute settlement procedures,[71] ASEAN may still preserve flexibility by providing for sunset clauses and safeguard provisions. Even though it may remove soft law norms as the principal driving force behind cooperation, its compulsory tribunals may still follow these principles in its decision-making process. This 'trade-off' between a rules-based and relationship-based approach, may make it desirable for ASEAN to adapt to as a solution to its trade liberalization problems.[72]

[70] *Supra* note 4.

[71] *Id.*

[72] *See generally supra* note 15.