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Iran Going Nuclear – Liberals' Paranoia and Realists' Apprehension

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ABSTRACT
Set against the backdrop of the successful November 2013 negotiations between Iran and the P5+1, this article argues that there is very little basis for liberals' paranoia in Iran achieving nuclear capability. Using realists' arguments on the subject, the article then sets out to examine the validity of these many arguments. Among the claims looked at is the fear that Iran might spark a Middle East arms race; that its leaders are irrational and therefore unreliable; and that they might transfer nuclear weapons to violent entities. The change in Iranian leadership in 2013 and a thawing of relations between Iran and the West since then has meant that the paranoia of the past might now give way to a wary apprehension of things that might be.

Keywords: Iran, nuclear arms, liberalism, realism, United States

INTRODUCTION

A country's aspiration to achieve nuclear capability is always a subject of intense debate, dividing pacifists and fortifiers within the broad spectrum of international relations theories. This is more so when the said country happens to be the Islamic Republic of Iran. Realists in general argue that Iran's motive is driven by a need for power and security in a turbulent and often hostile region. Liberals, on the other hand, point to the domestic factors influencing the country's desire to secure nuclear capability even in the face of enormous opposition from the Great Powers. Neither side see the validity of allowing Iran to go nuclear, despite arguments from Iran itself that its nuclear programme is for peaceful purposes.(Housseni

2009) In this sense, both liberal and realist thought argue that Iran should not be allowed to possess nuclear capabilities; liberals because of the internal traits of the Iranian regime, and realists because of the power that flows from the possession of nuclear capabilities.

Within the many models of realist thought, however, one strand argues that a nuclear Iran need not necessarily be a threat to the peace and security of the region and the world as a whole. Defensive realists make the argument that Iran's nuclear programme could potentially be a stabilising factor for the region in the overall nuclear arms race.

This article will examine the arguments pertaining to the threat of having Iran as a nuclear state from both the realist and liberal viewpoint, then focus in particular upon each of the counterarguments put forth by defensive realism. In so doing, the writer hopes to unravel a picture distorted by perception and mistrust. The end result of entertaining defensive realist arguments in this instance will be to balance extreme paranoia with wary apprehension on the implications of a nuclear-capable Iran.

IRAN AND THE SANCTIONS REGIME

Sanctions against Iran began as early as 1979 following the popular revolt against the Shah of Iran, Mohammad Reza Shah Pahlavi. US President Jimmy Carter who considered the Shah an ally of the United States, signed Executive Order 12170 in November of that year, blocking all property and interests of Iran that fell within the jurisdiction of the United States. The amount of Iranian interests covered by this Executive Order totalled US$12 billion at the time. President Bill Clinton followed this with the Iran Sanctions Act (ISA) – formerly the Iran-Libya Sanctions Act (ILSA) – passed by Congress in 1996 to hinder the development of Iran's petroleum sector, and as a response to Iran's heightened nuclear programme activities. However, the ISA also had a number of built-in loopholes including a US$20 million investment threshold before firms would be in default of the ISA. In 1998, Petronas Malaysia was one of the beneficiaries of the Clinton Administration's waiver of the ISA sanctions under an agreement brokered between the European Union and the United States.

The United Nations, on the other hand, was only able to agree to sanctions against Iran in 2006 with the passing of UN Security Council resolution 1696 in response to Iran's continued programme of uranium enrichment under President Ahmadinejad. Since UNSC 1696 (2006), however, there have been four substantive Security Council sanctions against Iran under Article 41 of Chapter VII of the Charter of the United Nations. The sanctions include a complete embargo on all activities which could contribute to Iran's enrichment programme or development of nuclear weapon delivery systems, travel bans on certain listed individuals as

well as the freezing of Iranian assets overseas. A final Security Council resolution, adopted in June 2010, extended the assets freeze to Iran's Islamic Revolutionary Guard Corps. The European Union, on the other hand, levied sanctions against Iran as late as 2012 by imposing an oil embargo and assets freeze on transactions with Iran's Central Bank.

Iran has had to pay a heavy price for its nuclear programme. Estimates of the impact of the sanctions range anywhere from US$61 billion (or 32 per cent of Iran's GDP)[1] to US$100 billion (the amount of money Iran claims is frozen in foreign banks)[2].

Despite what would have been a major deterrence to the country's policy, Iran has forged ahead with its nuclear programme. It is perhaps this display of obstinacy and recklessness that has seized the concern of Iran's detractors. Given the crippling level of sanctions imposed upon Iran for pursuing its nuclear dreams, analysts have given various reasons why Iran seems determined to achieve nuclear status.

The most often cited reason is that the nuclear capability is for military purposes, that Iran is seeking to build a bomb that would enable it to target Israel, or at least rival Israel's opaque nuclear capability. In a similar vein, security analysts also assert that Iran's nuclear ambitions is for defensive reasons – the United States Administration has intermittently made no secret of its distrust for the Iranian regime, the 'axis of evil' in international relations. Nuclear capability in this regard would greatly enhance the regime's deterrence of the ever-present foreign threats. Arguing that the Iranian revolution was an event that Americans could never accept, the younger generation of Iranians believe that only a strong and viable Iran – a nuclear Iran – would be able to force the West to accept and respect Iran as an independent Islamic state. (Takeyh 2012) The side effect to this deterrence is that Iran would be able to establish itself as a hegemon in the region, an ambition long held by successive generations of Iranian leaders.

None of these reasons have been able to be conclusively proved. There remains yet one more reason for Iran's insistence on nuclear capability which has trailed behind in media popularity – that Iran wants to go nuclear for economic reasons. Despite the country possessing the third largest oil reserves in the world and the second largest gas reserves, Iran's economy trails behind those of its Persian Gulf neighbours. (Ilias 2010) It is estimated that the country imports more gas than it exports because of the peoples' dependence on the highly subsidized natural gas. Uranium enrichment is therefore seen as key in making energy supply available for the population.

SHOULD THE WORLD BE WORRIED?

Iran's aspiration to possess nuclear capabilities, whether for 'peaceful purposes' or not, should not be viewed with extreme paranoia. At most, it should spark merely a certain degree of wariness within the treaty-abiding international community. Iran is above all, a state party to the Non-Proliferation Treaty. It has been a member

of the Treaty since 1968, and numbers among the 190 states who are party to the Treaty. While Iran's relationship with the International Atomic Energy Agency (IAEA) has been nothing short of turbulent, Iran has by and large adhered to its obligations under the Treaty. Consider the comparison: India, Pakistan and Israel have never been parties to the Non-Proliferation Treaty; the Democratic Republic of Korea acceded to the Treaty in 1985 but withdrew in 2008.

In order to give due consideration to the arguments made both by liberals and realists, it is pertinent that this paper looks at each in further detail. The paragraphs below will therefore take each aspect of the arguments presented and consider further if any counter-arguments may be made, in order to present a balanced viewpoint to the reader.

The Mad Mullah Argument

Iranian spiritual leaders have often been portrayed as irrational power-hungry individuals who seek to advance Iran at the cost of the rest of the world. One Western think-tank even went so far as to label Ayatollah Ali Khamenei, Supreme Leader of Iran, as a "mad mullah". (Fitzpatrick 2012) Being irrationally power-hungry is in itself an anomaly since power-hungry individuals are also strategic-minded in pursuit of that power. A leader that wants to maintain power must show that he is acting in the best interests of the people – not that he is irrational – and Iranian leaders are no exception to the rule.

This charge of being irrational is inherently a liberals' charge. Kantian liberals believe that only liberal democracies promote peace and are conducive to a peaceful world order, and therefore all states must be re-made in the liberal democracy mould. Since Iran is not a liberal democracy, liberals can only conclude that Iran would be a threat to the peace and security of the region.

Contrary to media speculation and fervent liberal thought, however, the leaders of Iran are not self-destructive. When the European Union was mulling over a possible oil embargo in January 2012, the Iranian leadership attempted to sway the decision by promising retribution with the closing of the Strait of Hormuz. Around 20 per cent of the world's traded oil is shipped through the Strait of Hormuz. This is roughly about 17 million barrels per day from a worldwide figure of 87 million barrels per day in total worldwide production.[3] Iran's blockade of the Strait would severely affect the world's oil supply and significantly increase the price of oil.

To Iran's credit however, it did not attempt to close the Strait of Hormuz, perhaps knowing that if it did, then the US and international response to its actions would have been swift and likely crippling. The Iranian leadership might use rhetoric and inflammatory accusations against the West in a bid to glean support from the population but it has clearly demonstrated that it is not suicidal.

Incidentally, despite Iran's aspirations to be a nuclear state, Iran's spiritual leader, Ayatollah Ali Khamenei has not made it a secret of his dislike for nuclear weapons, describing it as a big sin. Khamenei has issued a *fatwa* that "the production, stockpiling and use of nuclear weapons are forbidden under Islam and that the Islamic Republic of Iran shall never acquire these weapons." (IAEA 2005). This bitter pronouncement is perhaps attributable in large part to the effects suffered from the Iran-Iraq War, when deadly chemical weapons were used by Iraq. TIME Magazine reports that Iran today is still the world's largest laboratory for the study of the effects of chemical weapons, (Wright 2014) with more than 80,000 Iranian survivors from the 1988 War.

The Sparking of an Arms Race

One of the major concerns of allowing Iran to develop nuclear capabilities is that it could potentially spark an arms race in the Middle East. This is the argument most used by offensive realists who believe that states will accumulate the maximum amount of power in order to dominate the international system and dictate their wishes upon other states. Given the political power play in the Middle East, Iran's potential domination of the Middle East would result in other states such as Saudi Arabia also acquiring nuclear capability, in an effort to counter Iran's hegemonic tendencies. This would in turn mean a nuclear arms race in the region and a proliferation of nuclear weapons in the region. One of the leading arguments if such a scenario were to emerge is that in the short run when only Iran possesses nuclear capabilities, other states in the region would naturally gravitate towards Iran and acquiesce with Tehran's wishes. US influence in the region would be diluted. In the long run, when other states also develop nuclear capabilities, there would be a multipolar system in place with each state trying to outdo the other. The United States' ability to defend its interests in the region would be compromised and its influence in the Middle East diminished. (Edelman *et al* 2011)

Political analysts who support this view argue it is inherently likely that a nuclear-armed Iran would be a more belligerent Iran. Its aggression would now be backed up by the ability to not only defend its interests but also that of its supporters, and that this aggression would primarily be directed towards Israel, resulting in a nuclear stand-off between the two countries. Either way, whether Iran's nuclear capabilities sparked an arms race in the region or Iran becomes more belligerent as a result of acquiring nuclear capabilities, this line of argument projects that it is the United States and Israel which will be on the losing end of the equation.

Defensive realists, on the other hand, believe that states will accumulate just enough power for there to be a balance in the international system with no particular state becoming too powerful to dominate the rest. This will produce a much more stable Middle East, given that there will be two states with nuclear capabilities to balance each other. In this sense, the nuclear arsenal, far from becoming a weapon

and an instrument of threat, becomes a deterrence to the other states. Proponents of this view argue that history has borne this theory out, with the Cold War as a glaring example of stability in bipolarity. In the case of Iran's desire to acquire nuclear capability, defensive realists see this as Iran's need to counter the nuclear capability possessed (but undeclared) by Israel.

Defensive realist Kenneth Waltz argued that the nuclear age has been around for 70 years without there being widespread proliferation. (Waltz 2012) Since the emergence of nuclear states has slowed down in recent years, there is no reason to believe that the possibility of Iran acquiring nuclear capability would be the spark that would set the Middle East aflame. Despite Israel's nuclear opacity (Israel has never officially admitted to having nuclear capability) and its refusal to join the Non-Proliferation Treaty, it is believed that Israel developed nuclear capability before the 1970s. Since then, no other country in the Middle East has come close to developing a nuclear arsenal, putting paid to the argument that the possession of the bomb by one country need not result in a race by its neighbours and competitors to also acquire it.

In fact, before his death in 2013, Waltz further developed a monograph he wrote in 1981 that went so far as to argue that peace in the Middle East would be virtually guaranteed if Iran were to become a nuclear state. This may seem to stretch the theory too far, and it is unlikely that either liberals or realists would want to test the theory in reality.

One consideration that has to be taken into account in the balance of power or balance of threat theory is that the political tussle for leadership of the Middle East goes much deeper than a simple power struggle. Underlying the tensions of the region are the religious differences of one sect against another. The past decade has shown the depth of the bitterness between Sunnis and Shiites – evident in the turmoil surrounding Iraq and more recently Syria. Iran is a Shiite state surrounded by a sea of states where the Shiites are in a minority. Among the countries with which Iran shares a border, only Iraq, Bahrain and Azerbaijan have a sizeable Shiite majority as compared to its Sunni population. The other states – Afghanistan, Pakistan and Turkey with which Iran shares a land border; and Saudi Arabia, Kuwait, Qatar and the UAE which share the Strait of Hormuz with Iran – are predominantly Sunni with Shiites forming a small minority (25 per cent or less). Further afield, Lebanon is the sole outlying country with 36 per cent of its population Shiites while 22 per cent are Sunnis.

Given this scenario, instead of perceiving Iran as a power-hungry state intent upon dominating the Middle East, an alternative picture emerges – one that portrays Iran as a state merely seeking to ensure its survival in a hostile environment. Both pictures are equally realist in nature; the liberal still believes that until there is a regime change in Iran, the country would constitute a threat

to liberal countries everywhere. There is no real evidence supporting the assertion that Iran is aggressive or that it wants to annihilate its Sunni neighbours. The reverse, however, is not true as evidenced by Saddam's invasion of Iran via Khuzestan resulting in the eight-year Iran-Iraq War. This can also be seen in a series of efforts designed to isolate Iran internationally because of its uranium enrichment programme. The disappointment expressed by some of Iranian's neighbours that the Western powers have decided to negotiate with Iran rather than take steps to further isolate it, is also an indication of the power-struggle that has enveloped the region.

Iran's insecurity is not unfounded. One by one, Iran's trusted allies in the region have fallen victim to instability, either through political uprising in their countries or through outside interference resulting in the fall of a regime. The former condition, realist would argue, is merely a manifestation of the breakdown in the social contract between the state and the citizens, thereby giving the citizens the right to revolt. The latter condition would be perceived by liberals to be a natural evolution to a non-liberal state of affairs. History has also taught Iran that it can only depend on itself. In the eight-year Iran-Iraq War, it was Saddam whom the outside world supported and Iraq to whom they supplied arms and provided intelligence reports. Even Iran's neighbours lent their support to Saddam, further isolating Iran.

Even if the development of nuclear capability was for the production of nuclear weapons, the defensive realist's argument is that the weapon would primarily act to dissuade those countries seeking Iran's downfall from mobilising, at least in military terms. The weapon would therefore not be an instrument of war but a weapon of deterrence, giving pause to other countries that might want to make a grab for hegemony in the region.

In Support of Terrorists

In 2002, US President George W. Bush made a State of the Union address that argued that certain countries constitute an axis of evil, and that the weapons of mass destruction sought by "*these regimes pose a grave and growing danger. They could provide these arms to terrorists, giving them the means to match their hatred.*" (Bush 2002) The address encapsulated the fear that arms such as nuclear weapons, should never fall into the hands of 'axis of evil' regimes, which in 2002 included North Korea, Iran and Iraq.

There is no doubt that there may be some countries that have supported terrorist organisations in the past. But since 9/11, countries know better than to associate themselves with terrorist organisations or known terrorist networks. For one, terrorists are notoriously self-serving. Terrorists as an organised structure recognise no formal master and serve no political entity. They are not beholden

to any country, as the United States found to its cost after having supported the Afghan mujahideens against the Soviets. It was these mujahideens who later morphed into what we now label as the Al-Qaeda. Once the financial support runs dry or the arms supply runs out, terrorists organisations have no compunction about moving on and even biting the hand that had previously fed it.

Secondly, terrorist organisations are self-adapting. Terrorists have one agenda, and one agenda only, and that is to achieve their goals through the process of terrorising a population into submission. Their stated political objective is – more often than not – the secondary reason for their existence and continued struggle. Terrorism is about groups being extremist in the means by which they achieve their ends; it is not about the group clinging onto extremist ends. The ties that bind terrorists are not the stated objective or the political aim. It is the sense of camaraderie or brotherhood, of fighting together against a particular something, never mind what that something might be. (Abrahms 2008)

These two factors give an indication that terrorist organisations are first of all, unreliable and secondly, unpredictable. How does one control a terrorist, and *can* one control a terrorist effectively? If terrorist organisations are difficult to manage and manipulate, then this disproves the idea that a state – any state – would want to hand over their nuclear weapons to such organisations. There is no guarantee that a terrorist organisation that has been handed the bomb by its state sponsor would use the bomb in the way that the sponsor intended. A miscalculation on the part of the state sponsor could potentially mean the destruction of the country's own regime by the very organisation it sought to manipulate. It does not do for states with nuclear weapons to simply hand over their comparative advantage to terrorist organisations.

In realist terms it makes no sense for a country to hand over advanced capability to another entity. These weapons are seen as part and parcel of power, and no country driven by the need for power would want to give up that power. The only reason why a country would be willing to allow its weapons to be used by proxy would be if it wanted to avoid being discovered as the perpetrator or to avoid retaliation from a major power. With today's nuclear attribution capability, where nuclear forensics could be applied to trace the origins of the nuclear material, it would be difficult if not impossible for anyone to use nuclear weapons and then seek to remain anonymous. Of course, there are inherent problems with nuclear attribution, not least which are the challenges of gaining the cooperation of states to provide samples of their nuclear materials in the first place for purposes of identification. These are challenges which are not insurmountable, however, and forensically using a process of elimination to determine which countries could not have manufactured the weapon is one way this could be done.

In an effort to allay fears that it is possible for a nuclear state to use nuclear weapons by proxy and not have it discovered by the major powers, Lieber and Press conducted a study using conventional terrorist incidents as a benchmark. Since there have been no nuclear terrorist attacks, the closest data that could be used for the study was data from conventional terrorist attacks. They found that there is a direct correlation between the rate of attribution and the level of fatalities from the terrorist attacks. That is, the higher the number of fatalities from the attack, the higher the chances of attribution and the lower the chances of the perpetrator remaining anonymous (Lieber 2013). Therefore, with a nuclear attack, where the rate of fatalities would be much higher than a conventional terrorist attack, there would be no hope of the sponsors behind the attack to remain undiscovered for long, particularly so if the targeted country has enough sophisticated intelligence agencies or is allied to a country that has.

In essence, the major arguments against Iran achieving nuclear capability, namely that Iran's leaders are irrational; that Iran going nuclear would be the catalyst that would spark a Middle East arms race for dominion over the region; and that Iran would likely transfer their nuclear weapons to terrorist organisations intent on harming the West, can be countered. The bottom line is that Iran's nuclear ambitions are a threat to Israel, America's ally in the region, and to the Gulf countries that seek hegemony for themselves.

THE FUTURE OF IRAN

This past winter of 2013 saw the Islamic Republic of Iran finally coming in from the cold. After decades of sanctions and recriminations against the regime in Tehran, the November talks between the administration of Hassan Rouhani and six major powers finally yielded concrete and conclusive agreement on certain aspects of Iran's nuclear enrichment programme. Though heralded as a 'temporary' agreement, the six-month window of accord between the parties was nevertheless a major breakthrough in a tense standoff between Iran and the West, and allowed Iran access to some US$4.2 billion of its overseas assets.

Negotiating against Iran were the "P5 + 1", referring to the five members of the United Nations' Security Council (Britain, China, France, Russia and the United States) and Germany. Even before talks began in November 2013, information was leaked that the P5 + 1 would insist upon its four conditions before agreement could be reached. These include: 1) suspension of Iran's nuclear enrichment to 20 per cent; 2) reduction in the existing stock of nuclear materials; 3) the halt of the Arak heavy water plant construction; and 4) international inspection of all Iranian nuclear installations.(18 November 2013) No one could predict that an agreement would be reached, and despite strong political rhetoric from both Israel and Saudi Arabia against the draft agreement, Iran and the P5+1 were able to hammer out a deal. After so many years under sanction, why were the negotiators only now able to come to an agreement?

Two important factors contributed to this milestone. The first was the change of leadership in Iran from Mahmoud Ahmadinejad to Hassan Rouhani in June of 2013. Ahmadinejad's presidency had been marked by his own criticisms against the West, criticisms that were at times taken out of context and reported widely in Western media, portraying the Iranian president as an irrational leader of a state with nuclear ambitions. His remarks that the Holocaust was a myth perpetuated by the Western powers, and that the "existence of the Zionist regime is tantamount to an imposition of an unending and unrestrained threat" against all Islamic countries ensured that Ahmadinejad would not find favour with the Western and developed countries. Relations between the United States and Iran, particularly, declined in the eight years that Ahmadinejad was President.

By contrast, Rouhani is seen as a "moderate cleric" who wants to repair his country's international reputation and put Iran on a path to economic prosperity. Rouhani is a man known to the Western powers – as a member of Iran's Supreme National Security Council from 1989 to 2005, he negotiated with France, Germany and the United Kingdom on Iran's nuclear technology. Given the soured relations between Tehran and DC in the past, the White House wasted no time in reaching out to the new Iranian president.

Secondly, the combined sanctions on Iran were putting undue pressure on its economy. In 2011 and 2012, the United States and the European Union's sanctions against Iran's oil were successful in slashing Iran's revenue from oil by some US$$40 billion. Iran's crude oil production dropped to 3 million barrels a day in 2012 compared to its production in 2011 which topped 3.7 million barrels per day. The United States Energy Information Administration (EIA) estimated that Iran's net oil export revenues plummeted from US$95 billion in 2011, to barely US$69 billion in 2012. This must have severely hurt Iran's economy and could have prompted it to seek an end to the economic sanctions crippling the country. Rouhani had furthermore based his election campaign on the promise of economic development, a manifesto which ordinary Iranians looked forward to being fulfilled after languishing in economic stagnation for many years.

The telephone call between US President Obama and Iranian President Rouhani on 27 September 2013 marked the first direct communications between the two leaders since the Iranian Revolution in 1979 and started Iran on the path towards the 24 November agreement. But the agreement is only the first step in what promises to be a long road before the West is satisfied with Iran's progress. Iran's agreement to the deal was also meant to show transparency and openness in its intention to use nuclear power for peaceful purposes but even this may not satisfy the liberals' fear of a nuclear capable Iranian regime. Already, hawkish sentiment against the agreement has suggested that Iran is merely buying time in order to get its economy back on its feet before it pursues nuclear arms. On the

technical front, the IAEA inspectors have inspected the Arak heavy water plant and the Garchin uranium mine, and certified that uranium enrichment above five per cent U-235 has ceased at Natanz and Fordow. The Parchin military complex, however, would not be subject to inspection by the IAEA. This is in line with NPT guidelines which does not permit inspection of military sites.

The general distrust with regard to Iran's uranium enrichment programme is obvious among liberals, feeding into their paranoia of Iran becoming a nuclear state. Even though the IAEA has been unable to uncover evidence that might suggest that Iran's civilian nuclear energy programme is anything more than what it seems, liberals still insist that Iran is likely to divert resources from their civilian programme into the production of nuclear weapons.

Defensive realists are more sanguine. They argue that even if Iran were to develop nuclear weapons, the United States would still be in a position to deter Iran from using those weapons. However, since September 2012, President Obama has warned the UN that a "nuclear-armed Iran is not a challenge that can be contained", indicating that the United States was not even willing to entertain the idea that Iran should get nuclear capability. But that was before the November 2013 agreement. Now that it seems that Iran may be able to pursue a peaceful nuclear programme after all, perhaps it is the realists' turn to dominate popular thinking.

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1 Estimates from the US National Trade Council.

2 Iran's Majlis Planning and Budget Committee, as quoted in The Tehran Times, 27 October 2013.

3 Statistics from the US Energy Information Administration.

Reforms in Myanmar (Burma): By Chance or Design?

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ABSTRACT

The changes that have been ushered by Myanmar's nominally-civilian government since early 2011 have caught the attention of many around the world. While some were fairly surprised at the changes that began unfolding, others however remain sceptical and cautiously optimistic. This is because while elections were held on 7 November 2010, these were however, far from free and fair. In fact, the military that usurped power in 1962 remain at the helm but one that is now disguised as pseudo-civilian government. In line with the reforms that began unfolding since early 2011, this article argues that all these changes that have been undertaken are a product of almost two decades of careful strategic planning by the country's military junta, mainly aimed at perpetuating its hold on state power. A careful analysis of events since 1988 proves that these reforms were by no means impromptu but rather one that had been carefully planned and designed.

Keywords: Myanmar, military rule, elections, reforms, democracy

INTRODUCTION

Myanmar gained independence from British colonial rule on 4 January 1948 and subsequently saw the introduction of a Westminster-styled parliamentary democracy in the country under the tutelage of Prime Minister U Nu. However, Myanmar's experiment with parliamentary democracy was short-lived and lasted a mere 14 years as on 2 March 1962, the country's *tatmadaw* (military), under the leadership of General New Win, staged a coup and seized power. The

tatmadaw remained in power from 1962 until at least late 2010 when a nominally-civilian government took over the reins of state power from the military junta. Whilst the Burma Socialist Programme Party (BSPP) became the sole political organisation in the country from 1962 onwards, in 1988 and in view of mass demonstrations, it was dissolved. However, instead of transferring state power to a civilian authority, the *tatmadaw* staged yet another coup when the State Law and Order Restoration Council (SLORC) took over the reins of power in 1988. In 1997 and with the country still under the tight grip of the *tatmadaw*, the SLORC was refashioned to become the State Peace and Development Council (SPDC) and would hold the reins of power until 29 March 2011, when a nominally-civilian government led by President Thein Sein and his Union Solidarity and Development Party (USDP) assumed control.

For many around the world and especially those who have been following the events in Myanmar since 1988, the reforms that have been ushered by the country's new nominally-civilian government since early 2011 did bring about an element of surprise. Nonetheless, for those Myanmar watchers who had been following developments in the country for decades, these reforms were in fact premeditated such that the military junta had been planning since 1990, towards how best it could preserve its hold on state power. Therefore, this article argues that reforms which began unfolding from 2011 onwards were planned in such a way that the military could continue its dominance on state power and remain relevant in Myanmar's future political landscape.

THE 1990 ELECTION AND UNFULFILLED PROMISES

Under immense external pressure mainly due to its high-handed policies during the 1988 demonstrations, the military junta finally relented and announced on 20 September 1988 that elections would be held. On the same note, on 22 September 1988, the SLORC Secretary-1, Khin Nyunt, announced that after elections are held, the military would "systematically hand over the state power to the party that wins."[1] As such, the military junta issued a decree providing the country's Election Commission legal status, and a week later, enacted the Political Party Registration Law that conferred recognition to "any political organisation which accepts and practises genuine multiparty democracy."[2] As a strategy to further deflect growing international pressure, on 10 November 1989, the junta issued Announcement No. 326 which fixed 27 May 1990 as the date for the national election – after a hiatus of 28 years.

When the election was finally held, some 93 parties contested fielding 2,209 candidates, with some 87 independents. It is noteworthy to mention that even the military junta organised its own political party, the National Unity Party (NUP),

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1 Seekins, *The Disorder in Order: The Army-State in Burma since 1962*, Bangkok: White Lotus, 2002, p. 184.

2 Ibid.

which contested in some 413 seats. It was obvious that by putting up the NUP, the military junta was indeed making an attempt to hold on to state power. However, when the results were announced, the National League for Democracy (NLD) led by Aung San Suu Kyi, as well as its affiliate parties won with a landslide victory, securing 392 seats out of 485. All in all, the NLD obtained 80.8 per cent of the seats contested and secured 59.9 per cent of the popular vote. The military junta-backed NUP performed miserably such that it only won 10 seats.[3] Although during the campaigning period only the NUP was allowed access to government-controlled media with severe restrictions imposed on all the other parties, nonetheless, the elections were indeed free and fair. The miserable performance of the NUP shocked the top brass of the military junta who had hoped to cling on to state power through the latter.

While prior to the election the military junta had repeatedly stated that it would transfer state power to whichever party that wins the election, however, after the results were announced, the junta simply refused to do so. One major excuse was that the 1974 constitution, being a constitution of the socialist era, did not contain provisions for the transfer of state power and that a new constitution had to be promulgated. However, on 27 July 1990, Khin Nyunt categorically stated that the NLD's victory did not give the latter the legitimate right to stake a claim on state power. On this, he was quoted as saying that:[4]

> A political organisation does not automatically obtain the three sovereign powers of the legislative, administrative and judicial power by the emergence of a *Pyithu Hluttaw* [parliament]... only the SLORC has the right to legislative power.

The military junta's refusal to transfer thus created a political miasma in the country that would last until at least November 2010, when another round of elections were held – but this time contested by the military junta-backed USDP. In a similar direction and aimed at weakening the country's democratic forces, especially the NLD, the military junta began intimidating and harassing the country's proponents of democracy such that arbitrary arrests became the norm. In fact, the country's democracy icon, Aung San Suu Kyi, too had been subjected to 15 years of house arrest since 1988.

CONSOLIDATING AND TRANSFORMING THE *TATMADAW*

Apart from denying the NLD its victory in 1990, the military junta also embarked on a programme to expand the country's *tatmadaw*. By soliciting the support of China which provided military hardware to Myanmar from 1988 onwards, the

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3 Ibid., p. 210.

4 *Asia Yearbook 1991*, Hong Kong: Far Eastern Economic Review (FEER), 1992, p. 86.

military junta began massively expanding and modernizing the *tatmadaw*. Whilst its strength in 1988 numbered to some 200,000 active personnel, by 2002, this figure was at around 400,000 to 500,000, thus making the Myanmar's armed forces the second largest in Southeast Asia and the twelfth largest in the world.[5]

The main reason for the military expansion and modernization often officially cited by the *tatmadaw* is the possibility of foreign invasion, especially since Myanmar is located between two Asian giants, namely China and India. In addition, the justification to expand is also related to the high number of ethnic-based insurgencies at the country's periphery which in turn could undermine the integrity of the state. Nonetheless, since 1988 and with increased militarization of the state, the army has also been frequently used to suppress dissent, mainly from the country's democratic forces. In fact, a recent report revealed that despite reforms by the country's nominally-civilian government, Myanmar's arms imports had in fact increased. The report noted that in 2011 alone, some US$700 million was spent for arms procurement and between 2011 and 2012, some US$1.2 billion was spent for arms purchase which mainly came from China and Russia.[6] According to the same source, "the military of Myanmar is far better equipped than it was just three years ago"[7] and that "it has received some of the most advanced weapons systems on the international market."[8]

Coupled with this is the frequent reference made by the country's nominally-civilian on the central role of the *tatmadaw* vis-à-vis the state. In fact, in his inaugural speech to the nation on 30 March 2011, the country's new president, Thein Sein, highlighted the need for a powerful modern army and acknowledged the central role of the *tatmadaw* in the country.[9] In addition, three days prior to the 7 November 2011 election, the military junta passed a controversial law – the Public Military Service Law (PMSL) – which requires all males and females between the age of 18 and 45, to serve with the *tatmadaw* for two years and up to five years should a state of emergency be declared.[10] Besides this, the military junta also created a new intelligence unit that is tasked with gathering information

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5 Andrew Selth, "Burma's armed forces: Does size matter?," *East Asia Forum*, 17 September 2010, http://www.eastasiaforum.org/2010/09/17/burmas-armed-forces-does-size-matter/> See also, *Myanmar: The Future of the Armed Forces*, Brussels: International Crisis Group (ICG), 27 September 2002.

6 Jacob Sommer, "Myanmar's Military" Money and Guns," *New Mandala*, 6 December 2012, <http://asiapacific.anu.edu.au/newmandala/2013/12/06/myanmars-military-money-and-guns/>

7 Ibid.

8 Ibid.

9 Phanida, "Burma must build up armed forces, says President Thein Sein," *Mizzima News*, 30 March 2011, <http://archive-2.mizzima.com/news/inside-burma/5094-burma-must-build-up-armed-forces-says-president-thein-sein.html>

10 "Myanmar enacts military draft law for men, women," *Associated Press*, 9 January 2011.

on the home front, mainly the activities of political parties, ethnic-based insurgent groups, cease-fire groups and any violent domestic actions.[11]

Apart from this, there are also those in the military junta who have been very resistant towards recent suggestions by the country's democratic forces, and mainly the NLD, to amend the constitution which currently provides great leverage to the military. This is because the 2008 Constitution not only provides the *tatmadaw* a privileged position vis-à-vis national politics but there is also the fear of retribution over its past human rights atrocities should a civilian government fully take over state power. The *tatmadaw* is aware that any change to the 2008 constitution can eventually bring about its own demise.[12] In addition, the powerful post of Commander-in-Chief of the Myanmar Armed Forces is currently occupied by Senior General Min Aung Hlaing[13], a close confidante and protégé of former Senior General Than Shwe. In fact, despite his retirement, there is evidence to suggest that Than Shwe, who was at the helm from 1992 to early 2011, continues to play the role of a kingmaker in Myanmar's political landscape.[14]

THE NATIONAL CONVENTION

One of the tacit strategies employed by the military junta in denying the NLD its win in the 1990 election was that power would only be transferred to a civilian authority after a new constitution had been promulgated. Whilst before the election the military junta consistently maintained that the new constitution would be drafted by the party that won the election, however, after the election, the story completely changed. After the May 1990 election, the military junta began arguing that state power would only be transferred to the NLD after it had created a new constitution. This is because the 1974 constitution did not allow for transfer of power to a civilian authority as it was a constitution by the military during the socialist era. For this purpose in 1993, the military junta convened a National Convention aimed at drafting a new constitution.

The National Convention held its first meeting in January 1993 – two-and-a-half years after the May 1990 election – and comprised of some 702 members. Of these, some 555 (or more than 80 per cent) were hand-picked by the military junta. The rest consisted of 93 NLD members, 48 members from the defunct BSPP

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11 "Burma forms new intelligence unit," *The Irrawaddy*, 3 May 2011, <http://www2.irrawaddy.org/article.php?art_id=21223>

12 Nai Kasauh Mon, "Why the Tatmadaw is Resisting Real Reform," *Independent Mon News Agency* (INMA), 14 March 2014, http://monnews.org/2014/03/14/tatmadaw-resisting-real-reform/> See also, *Myanmar's Military: Back to the Barracks?*, Asia Briefing No. 43, Brussels: International Crisis Group (ICG), 22 April 2014.

13 See also, Su Mon Thazin Aung, "The Man to Watch," *Foreign Policy*, 15 January 2014, <http://www.foreignpolicy.com/articles/2014/01/15/the_man_to_watch>

14 Bertil Lintner, "The Military's Still in Charge," *Foreign Policy*, 9 July 2013, <http://www.foreignpolicy.com/articles/2013/07/09/the_militarys_still_in_charge>

and pro-junta NUP, while another six were elected members. While the NLD was the biggest winner in the May 1990 election, its membership in the National Convention comprised of a mere 13 per cent. In fact, even the post of chairman as well as other main positions in the National Convention were exclusively allotted to high-ranking members of the military junta. The entire proceedings of the National Convention were highly restrictive as the delegates were disallowed from raising questions. In fact, it was mainly due to this that the NLD staged a walk-out in 1995 and although in 1997 it applied to rejoin the process, these attempts were simply rejected by the military junta. As such, in 1995, *The Nation* even dubbed the National Convention as "a piece of absurdist theatre… the world's slowest-operating rubber stamp body."[15]

Until the constitution was finally drafted in 2008, the whole process dragged on for some 15 years with the National Convention suspended some 13 times. In fact, the NLD was never allowed to rejoin the process and the 2008 constitution is mainly a product of the military junta. On this one source notes that:[16]

> The SLORC's insistence on a new constitution was an attempt to not only to delay the transfer of power but also to impose a constitution satisfactory to the military authorities, rather than one drawn up by the new National Assembly and submitted to the people for approval.

GOING THE INDONESIAN WAY

Beginning 1993, the top officials of the *tatmadaw* began making a number of high-level visits to Indonesia, with the main aim of emulating the Indonesian model and civilianizing the role of the Myanmar military.[17] For example, in 1995, Myanmar's supremo Senior General Than Shwe, met with President Suharto during a visit to Jakarta and it was also reported that Khin Nyunt had been making frequent visits to the Indonesian capital. Further to this, it was also reported that Myanmar's ambassador to Indonesia, U Nyi Nyi, a close confidante of Khin Nyunt, was lobbying the Indonesians for Myanmar's admission into the Association of Southeast Asian Nations (ASEAN). Interestingly, the Myanmar embassy in Jakarta then was also the largest of its embassies in Southeast Asia – a point that further reinforces the importance of Indonesia to Myanmar during the said period.[18]

In the meantime, even the Myanmar's junta's mouthpiece, the *New Light of Myanmar*, dubbed the relationship between both countries as "two nations with

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15 Cited in James F. Guyot, "Burma in 1996: One Economy, Two Polities," *Asian Survey*, Vol. 37, No. 2, February 1997, p. 192.

16 *Burma: Beyond the Law*, London: ARTICLE 19, 1996, p. 13.

17 Ulf Sundhaussen, "Indonesia's New Order: A Model for Myanmar," *Asian Survey*, Vol. 35, No. 8, August 1998, p. 768. See also, Christina Fink, *Living Silence: Burma under Military Rule*, London: Zed Books, 2001, pp. 233-234;

18 "SLORC's big brother in ASEAN," *The Irrawaddy*, Vol. 5, No. 1, January 1997, p. 12.

a common identity" while a Yangon-based diplomat, quoted in anonymity, stated that "no other country is close to the regime [SLORC] than Indonesia such that it was seen as a "big brother" by the Myanmar military junta.[19]

Nonetheless, evidence that the Myanmar military junta was attempting to emulate the Indonesian model became clear when Poerwanto Lenggono, the Indonesia ambassador to Myanmar, revealed in 1997 that the former was attempting to imitate Indonesia in three key areas, namely its state ideology of *Pancasila*, the 1945 constitution and the dual function (*dwi-fungsi*) role of its military. He noted that "we didn't ask them. They imported the whole lesson, saying that they would like to learn from us."[20] In fact, the Indonesian constitution was even published in the Burmese language by the SLORC, thus leading M. C. Tun, a Myanmar veteran journalist, to remark that "they asked [the] people to learn from it [the Indonesian constitution] while drafting the Burmese constitution."[21]

In addition, the formation of the Union Solidarity and Development Association (USDA) – a patronage institution – by the Myanmar military junta in 1993, was in fact an idea that was contributed by Indonesia's army-backed Joint Secretariat of Functional Groups.[22] While this 'special relationship' between Indonesia and Myanmar began in 1993, however, it abruptly ended in May 1998 when President Suharto was ousted from power after 32 years of ruling the country. Nonetheless, one source notes that:[23]

> Until the 1997 economic crisis and the subsequent fall of the Suharto regime a year later, Indonesia played an important role in providing Burma's military rulers with an ideological basis for the seizure of power in 1988... Suharto's *dwi-fungsi*, or dual role function, model role of the military, [gave] it control over the state as well as national defence, offered the Burmese regime a means of legitimizing their own rule.

THE CREATION OF THE USDA

As a result of the many trips to Indonesia aimed at emulating the Indonesian model, on 15 September 1993, the Myanmar military junta announced the formation of the USDA. Modelled on the Indonesian Golkar (or Partai Golongan Karya), the

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19 "SLORC's big brother in ASEAN," *The Irrawaddy*, Vol. 5, No. 1, January 1997, p. 12; and "The Suharto Connection," *Burma Alert*, Vol. 8, No. 6, 1997, p. 3.

20 "SLORC's big brother in ASEAN," *The Irrawaddy*, Vol. 5, No. 1, January 1997, p. 12.

21 "SLORC's big brother in ASEAN," *The Irrawaddy*, Vol. 5, No. 1, January 1997, p. 12.

22 Seekins, *The Disorder in Order*, 2002, p. 298; and David I. Steinberg, *Burma: The State of Myanmar*, Washington DC: Georgetown University Press, 2001, p. 114.

23 Aung Zaw, "ASEAN-Burma Relations," in *Challenges to Democratization in Burma: Perspectives on Multilateral and Bilateral Responses*, Stockholm: International Institute for Democracy and Electoral Assistance (IDEA), 2001, p. 48; and Bertil Lintner, "Just as ugly," *Far Eastern Economic Review* (FEER), 27 November 1997, pp. 23-24.

motto of this new junta-backed organisation was "morale, discipline, solidarity and unity" and was created as a "social organisation formed with the sons and daughters of the country to serve the interest of the nation and the people."[24]

Despite the USDA's claim of open and voluntary membership into the organisation, however, civil servants, soldiers and even students were compelled to join. Whilst many found their names simply added to the rolls of the USDA without prior consent, many more were even coerced to join especially when they applied for national identification cards. In fact, the USDA cadres specifically targeted the youth either with coercion or by providing incentives such as sports leagues and other extra-curricular activities. In return, the USDA members enjoyed privileged access to services such as public transportation tickets that non-members found difficulty in getting. In addition, the USDA members also enjoyed protection especially when door-to-door searches were conducted by the military, with home of members routinely passed over.[25] Apart from that, it was much easier for the USDA members to pass checkpoints especially when travelling out of town – where severe restrictions were imposed on all ordinary people. In fact, they were also given priority for low-cost housing and even for employment abroad, such as in Malaysia, because only its members were given forms to apply.

Although the stated aim of the USDA was to promote the welfare of its members, nonetheless, the USDA was also utilised as a tool for political intimidation, especially targeting opposition members and specifically from the NLD. Two major episodes involving the USDA members intimidating the NLD supporters were in November 1996 when some 200 USDA members attacked Aung San Suu Kyi's motorcade in Yangon, and on 30 May 2003 when the USDA members even made an attempt on Aung San Suu Kyi's life in Depayin. In fact, the USDA members also frequently undertook mass rallies either in show of support for the military junta or in denouncing the NLD and Western criticism as well as pressure.

From 1995 onwards, the USDA's neighbourhood offices also began recruiting informants to monitor the activities of democracy activists and report episodes of public dissent. In fact, in June 1997, General Maung Aye, the country's Commander-in-Chief of the Army, even acknowledged the security role of the USDA by officially referring to it as an "auxiliary national defense force". Further and less than three years later, the military junta even began providing military training for the USDA members – with trainees receiving arms and even regarded as reserve forces of

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[24] "Perspectives – Hailing USDA's firm resolve and efforts," *New Light of Myanmar* (NLM), 19 February 2002. See also, "Perspectives – Aims for all," *NLM*, 14 February 2002; and "Perspectives – Calling for more active involvement of USDA members," *NLM*, 7 February 2002.

[25] *The White Shirts: How USDA will become the new face of Burma's Dictatorship*, Mae Sot, Thailand: Network for Democracy & Development (NDD), May 2006, pp. 18-25.

the army.[26] Headquartered in Yangon and frequently dubbed as "Hitler's Brown Shirts" by the NLD, the USDA even boasted a membership of some 24 million members and was organised into 16 state and division associations, 63 district associations, 320 township associations and 14,865 village-tract associations.[27]

THE ROADMAP TO DEMOCRACY

On 30 August 2003, the military junta unveiled a 7-point "Roadmap to Discipline-Flourishing Democracy" which included reconvening the stalled National Convention aimed at drafting the national constitution, a national referendum on the new constitution and eventually free and fair elections. This was revealed by the country's Prime Minister, Khin Nyunt, who reiterated that the whole process was aimed at transforming Myanmar into "a modern, developed democratic country."[28] Following this, in October 2003, the military junta also announced that it was in 'direct contact' with all of the country's political parties – including Aung San Suu Kyi and the NLD – mainly aimed at initiating a "home-grown" process to restore democracy in Myanmar. On the same note, Khin Mong Win, Myanmar's Deputy Foreign Minister, also revealed that:[29]

> The process that has begun with the announcement of the seven-step roadmap is being implemented. The roadmap is the future of the country. It is the roadmap to the establishment of a democratic society in the country. Our position has always been that the process must be home-grown.

The statement above was a clear indication that while the military junta recognised the need to change the status quo of the political system in the country, however it had to be undertaken based on their terms.

THE 2008 CONSTITUTION

The constitution drafting process which began on 9 January 1993 was finally concluded on 3 September 2007. Following this, in February 2008, the military junta announced that a national referendum would be held on the constitution in May 2008, with the aim of gaining public approval. As such, on 4 April 2008, the constitution was made public, only in the English and Burmese language, with little consideration given to the numerous ethnic minorities in the country.[30] This

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26 Min Zin, "The USDA factor," *The Irrawaddy*, Vol. 11, No. 6, July 2003, p. 28.

27 Zin Linn, "Burma's Nazi Party plots landslide victory in Nov. 7 polls," *Asian Correspondent*, 23 August 2010, <http://asiancorrespondent.com/39357/burma%E2%80%99s-nazi-party-plots-landslide-victory-in-the-7-november-polls/>

28 Aung Zaw, "Roadmap to nowhere," *The Irrawaddy*, Vol. 11, No. 7, August-September 2003, p. 27.

29 "Burma seeks 'home grown democracy'," *BBC News*, 3 October 2003, <http://news.bbc.co.uk/2/hi/asia-pacific/3160484.stm>

30 *Vote to Nowhere: The May 2008 Constitutional Referendum in Burma*, New York: Human Rights Watch (NRW), 2008, p. 29. See also, "New Burma constitution published," *BBC News*,

was in fact Myanmar's third constitution, with the first promulgated in 1948 and the second in 1974.

When the constitution was finally taken to the people, numerous reports of blatant incidents of rigging were reported. Although the country was ravaged by Cyclone Nargis on 2 May 2008, the military junta went ahead with its referendum despite strong criticism from the international community. Further, on 15 May 2008, the military junta made an absurd claim that some 92.4 per cent of the country's eligible voters had approved the new constitution, with the total turnout for the referendum put at 99 per cent.[31]

Based on provisions in the 2008 constitution, a bicameral legislature – the *Pyidaungsu Hluttaw* – was created at the Union level with the House of Nationalities (*Amyotha Hluttaw*) and House of Representatives (*Pyithu Hluttaw*). In both these assemblies, 25 per cent of the seats are reserved for the *tatmadaw*, with representatives appointed by the country's commander-in-chief. The House of Nationalities (or upper house) comprises 224 seats while the House of Representatives (or lower house) has 440 seats. In addition, there are also 14 major administrative regions/states with its own regional assembly where again some 25 per cent of seats are reserved for the *tatmadaw*. Minus the 25 per cent seats reserved for the *tatmadaw* in both upper and lower houses, the USDP alone has 129 seats (or 76.7 per cent) in the upper house and 259 seats (or 79.6 per cent) in the lower house which it won in the November 2010 elections.[32]

In addition and based on provisions within the 2008 Constitution, military officers are also allowed to contest in the elections for the remaining 75 per cent of the seats once they retire from army service. Besides that, the final article of the constitution (Article 445, Chapter 14) provides amnesty to the SLORC and its predecessors, thus giving immunity to the country's former military rulers especially since 1988. Furthermore, any amendment to the 2008 Constitution require a vote of more than 75 per cent in the parliament, thus providing the *tatmadaw* with a veto over any proposed amendment.[33] It is therefore clear that the 2008 Constitution has indeed given the country's *tatmadaw* a privileged and advantageous position vis-à-vis the country's future political structure – at least for the foreseeable future until the present constitution is either amended or a new one is promulgated.

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9 April 2008, <http://news.bbc.co.uk/2/hi/asia-pacific/7338815.stm>

31 Neil Lawrence, "The show must go on," *The Irrawaddy*, Vol. 16, No. 6, 2008, pp. 26-29.

32 Thar Gyi, "USDP Wins 76.5 percent of vote," *The Irrawaddy*, 18 November 2010, <http://election.irrawaddy.org/news/612-usdp-wins-765-percent-of-vote.html>

33 *Impunity Prolonged: Burma and Its 2008 Constitution*, New York: International Center for Transitional Justice (ICTJ), September 2009, p. 32-34.

FROM USDA TO USDP

In the months prior to the 2010 election, the military junta began transforming its civilian arm, the USDA, into a political party. Once the USDA was finally transformed to become the USDP, it then started making the necessary preparations for the forthcoming election.[34] Once again, the rational of the *tatmadaw* was towards gaining legitimacy – something that had seriously eroded from 1962 onwards – as well as perpetuating its hold on political power. This was a major tactical move that had been planned for decades by the country's ruling military junta.

The USDP was launched on 29 March 2010 and registered on 2 June 2010. With the USDP's registration, the USDA was finally dissolved on 15 July 2010. All properties and funds that were amassed by the USDA in its seventeen years of existence were also transferred to the USDP – an issue that led to a major controversy in the country.[35] The USDP not only managed to acquire the much needed funds but also the political and social clout of the USDA, thus providing it with the necessary infrastructure to contest in the November 2010 election. One source noted that the reason for the transformation of the USDA to become the USDP was "designed to ensure that the junta dominates the elections later this year."[36] On a similar note, one source revealed that:[37]

> The disbanding of the USDA now makes it undeniably clear that the USDP is nothing but the political manifestation of the USDA. As one observer noted, "This is neither the abolishment of the USDA nor its assets transferred somewhere else. This is just a name change from USDA to USDP.

THE 2010 ELECTION

Having secured a constitution that would guarantee the military's position vis-à-vis the country's political structure, the military junta then held the election on 7 November 2010 – making it the first in 20 years since the May 1990 election. The entire process was conducted in a highly restrictive manner such that stringent regulations were imposed on political parties – with the USDP excluded. Not only were speeches of political parties vetted and censored by the country's Election

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34 *Burma: A Violent Past to a Brutal Future, The Transformation of a Paramilitary Organization into a Political Party*, Mae Sot, Thailand: Documentation & Research Department, Network for Democracy & Development (NDD), November 2010.

35 See "PM's party 'to inherit' USDA's funds," *Democratic Voice of Burma* (DVB), 19 July 2010, <https://www.dvb.no/elections/pm%E2%80%99s-party-%E2%80%98to-inherit%E2%80%99-usda-funds/10787>

36 "Burma junta support group USDA disbands," *BBC News*, 15 July 2010, <http://www.bbc.co.uk/news/world-asia-pacific-10651760>

37 "USDA Disbands, Paving a Dreadful Path to USDP Dominance," *Burma Partnership*, 19 July 2010, <http://www.burmapartnership.org/2010/07/usda-disbands-paving-a-dreadful-path-for-usdp-dominance/>

Commission, a non-refundable candidate surety fee of US$500 was also imposed on all candidates. All in all, a political party would have had to spend some US$600,000 if it intended to contest in all the seats throughout the country. For a country where most people earn less than one dollar a day, this was considered extremely hefty. In addition, the NLD was required to re-register to be eligible to contest in the November 2010 election. As this would have meant that the NLD would automatically denounce its landslide victory in the May 1990 election, the NLD simply refused to comply. As a result of its defiance to the new regulation, the NLD was automatically deregistered on 6 May 2010. As such, the NLD did not participate in the much awaited election thus paving the way for the USDP to secure a landslide victory.

Nonetheless, two other smaller parties that claim to represent the country's democratic forces did participate in this highly controversial election. These were the Democratic Party (DP) led by Than Than Nu, daughter of the country's first premier, U Nu, and the National Democratic Force (NDF), a splinter of the NLD that decided to participate in the election despite the NLD's decision to stay away. On the other hand, the military junta not only fielded candidates through the USDP but even the NUP which won five seats in the Upper House and 12 in the Lower House.

When the election was finally held, some 29 million of the country's eligible voters took to the polls and the number of seats contested was at 1,171, for both the upper and lower houses as well as the Regional Assemblies. All in all, 37 political parties fielded candidates with the pro-junta USDP and NUP contesting in most areas. The other parties only managed to field some 500 candidates mainly due to the US$500 surety fee imposed on all candidates.[38] The whole charade was carefully orchestrated by the military junta such that the USDP won with a landslide majority. In sum, the 2010 election was neither free, fair nor inclusive, thus leading most Western nations to slam the election as a "sham", mainly aimed at perpetuating military rule but in a different form.[39]

THE RELEASE OF AUNG SAN SUU KYI, THE REINSTATEMENT OF THE NLD AND THE 2012 ELECTION

Exactly seven days after securing its landslide victory in the November 2010 election, the military junta finally released Aung San Suu Kyi from house arrest unconditionally on 13 November 2010.[40] In addition to this, Aung San Suu Kyi was also accorded freedom of movement in the country – one that was denied

38 David Scott Mathieson, "Flawed math behind Myanmar's 'democracy'," *Asia Times Online*, 16 May 2011, <http://www.atimes.com/atimes/Southeast_Asia/ME17Ae01.html>

39 Kanya D'Almeida, "Looking beyond Burma's 2010 elections," *IPS News*, 24 October 2010, <http://www.ipsnews.net/2010/10/looking-beyond-burmas-2010-elections/>

40 "Burma releases pro-democracy leader Aung San Suu Kyi," *BBC News*, 13 November 2010, <http://www.bbc.com/news/world-asia-pacific-11749661>

in the past. This was seen as a highly tactical move mainly aimed at reducing immense international pressure over a highly rigged election. On Aung San Suu Kyi's release, Zarni opined that "Suu Kyi's release has taken some of the anger away from the junta over the election."[41]

Immediately after her release, Aung San Suu Kyi began consulting her lawyers over the reinstatement of the NLD. This is because on 6 May 2010, the SLORC had declared the NLD as illegal when it refused to register for the November 2010 election. The refusal of the NLD to register was because its decision to do so was tantamount to nullifying its own victory in the May 1990 election.[42] Nonetheless, after a series of negotiations with the new government, the NLD was finally allowed to register on 13 December 2011 when the country's Election Commission approved its application. This was done mainly to contest in the forthcoming by-elections for some 45 seats that were scheduled for April 2012.

In the said by-elections held on 1 April 2012, the NLD contested for some 44 seats of the 46 seats and won 44. It won 37 seats in the House of Representatives and four seats in the House of Nationalities. Not only did Aung San Suu Kyi secure victory in the Kawhmu Township seat in the Yangon region but the NLD even won all the four seats in the Naypyidaw Union Territory – a stronghold of the military junta. These by-elections were fairly free and fair to the extent that foreign observers, namely from the European Union (EU) and ASEAN, were allowed into the country for the first time since 1988.[43] In addition, all political parties contesting in the by-elections were given air-time over radio and television and even allowed to publish a policy statement in the state-run *New Light of Myanmar* (NLM).[44]

The reason why the USDP allowed the NLD to register and eventually Aung San Suu Kyi to contest in the by-elections was mainly aimed at legitimizing their own victory in the November 2010 election. Having secured a landslide victory in a highly controversial election, the USDP was now in dire need to acquire some degree of legitimacy. Moreover, despite the NLD's landslide victory in the 2012 by-election, its representation in the Lower House currently stands at a mere six per cent – a figure considered miniscule when compared to the USDP's.

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41 "Myanmar's junta's proxy wins 77% of contested seats," *The Times of India*, 22 November 2010.

42 "Burma's National league for Democracy fails to register for election," *The Guardian*, 29 March 2010, <http://www.theguardian.com/world/2010/mar/29/burma-opposition-polls>

43 "Burma: Aung San Suu Kyi 'wins seat' in historic election," *The Telegraph*, 1 April 2012, <http://www.telegraph.co.uk/news/worldnews/asia/burmamyanmar/9178934/Burma-EU-observers-will-not-declare-historic-Myanmar-by-elections-free-and-fair.html>

44 Michael F. Martin, *Burma's April Parliamentary By-Elections*, CRS Report for Congress, Washington DC: Congressional Research Service (CRS), 28 March 2012, p. 4.

CONCLUSION

Under intense internal and external pressure and realising that its system of governance had outlived its purpose, there arose the need to refashion the country's political structure but one that was aimed at retaining and perpetuating the *tatmadaw*'s hold on power. From the discussion above, it is evident that the recent reforms in Myanmar are by no means coincidental but rather one that has been carefully designed over the last two decades by the *tatmadaw*. Taking stock of recent developments, it is obvious that the *tatmadaw* would continue to shape the political landscape of the country for some time to come. On this, McCarthy is of the view that "the military [*tatmadaw*] has taken steps to secure their reserve domains in, or at least their influence over, political society in the foreseeable future" and considers the new set-up in the country as "indirect military rule."[45] In a similar tone, another source opines that:[46]

> There remains widespread skepticism that reforms underway in Myanmar, despite their expediency and comprehensiveness, are simply cosmetic, civilian window dressing masking the institutionalization of military rule in its latest incarnation. Given the longevity and durability of the generals' hold on power in various regime types, this is not an unjustified perspective. Indeed, the military, or *Tatmadaw*, remains the most powerful actor in the political system but its role has changed significantly.

Although it might be pessimistic to suggest that little can be expected out of these recent changes, nonetheless, all these little things would surely snowball to something bigger in future and perhaps usher real political change in the country. On a similar note, one source opines that:[47]

> The military's withdrawal from everyday administration has opened new political space for multiple parties to become engaged in Burmese politics. But the military's involvement in politics is not coming to an end anytime soon. Reformers need to understand this reality, and take a cautious but calculated approach to engage the military in pursuing policy changes of mutual benefit in the short and medium term. But transforming civil-military relations has to remain a long-term goal. Without it, Myanmar will remain vulnerable to military coups, when what it really needs is a professional military that supports democratic governance.

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45 Stephen McCarthy, *Civil Society in Burma: From Military Rule to "Disciplined Democracy"*, Regional Outlook Paper No. 37, Brisbane: Griffith Asia Institute, Griffith University, 2012, p. 1.

46 Adam P. MacDonald, "New Roles and Relations for Myanmar's Military," *Asia Times Online*, 6 June 2014, <http://www.atimes.com/atimes/Southeast_Asia/SEA-01-060614.html>

47 Adam P. MacDonald, "The Tatmadaw's new position in Myanmar politics," *East Asia Forum*, 1 May 2013, <http://www.eastasiaforum.org/2013/05/01/the-tatmadaws-new-position-in-myanmar-politics/>

ASEAN as an Economic Community: The Importance of Institutions

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ABSTRACT

ASEAN has been progressing from the creation of the ASEAN Free Trade Area (AFTA), towards a more comprehensive view of the region. At the ASEAN Summit in Phnom Penh in 2002, it was proposed that the ASEAN Economic Community (AEC) be established, with the intention of creating an economic community by 2015. AEC seeks to develop regional economic integration, economic cooperation and fostering a community that values regional security and political stability. These are ambitious goals, none of which are possible without a solid institutional base. However, the notion of an institutional structure has been limited hitherto to that of establishing appropriate organisations for the functioning of a regional community. More foundational than organisations are the norms and conventions that guide economic behaviour since institutions conceived in this manner are the route to a sense of community among a disparate collection of member states.

Keywords: ASEAN Economic Community (AEC), ASEAN, regionalism, regional integration, institutions

INTRODUCTION

The development of an ASEAN economic community has progressed gradually, starting with the creation of the ASEAN Free Trade Area (AFTA) in 1992. Under AFTA, the older ASEAN member states agreed to grant preferential tariffs, eventually working towards their abolishment, and ultimately doing away with non-tariff barriers (NTBs). This understanding progressed to the adoption of the ASEAN Vision 2020 in 1997. The ASEAN Vision sought to create a community of caring societies, a region with the free flow of goods, services, capital and investments. It was also thought that there would be equitable economic development, lower poverty, and socio-economic disparities would be narrowed within the region with ASEAN Vision 2020.

In 2002, it was proposed at the ASEAN Summit in Phnom Penh that the ASEAN Economic Community (AEC) would be created. The attention of creating an economic community by 2015 was motivated by several factors, among them the idea of strengthening regional economic integration, fostering economic cooperation and building a community that values regional security and political stability. The very notion of a community among member states with differing levels of economic development and of variegated political positions implied that there was a keenness to work as an entity beyond the boundaries of economic, political and security issues.

The purpose of this article is to focus on the issue of institution building for ASEAN as an economic entity. This article is posited on the premise that there is a need for broad-based institution building in ASEAN and, therefore, seeks to establish grounds for the creation of an institutional framework. One strand of the literature does address institutions but in a fashion that concentrates on organisations (see for instance, Nesadurai, 2013 and ADB, 2010). Another strand focuses on the institutional aspects of regionalism, but within the domain of political issues (Tang, 2008, for instance). Haggard (2011) does address institutions as they affect economic arrangements in ASEAN, but, again, it relates to organisations and economic arrangements such as free trade agreements. In the face of regionalisation (ADB, 2008) and the creation of a regional entity such as an economic community among ASEAN member states (ASEAN, 2009), a more foundational understanding of institutions is necessary.

It is necessary to bear in mind that the states in Europe had a robust system of democracy, competition policy and law, as well as accompanying notions of public accountability, freedom, transparency and good governance well before the founding of the European Union. The European nations had well-developed organisations prior to entering into any regional union. Prior to these organisations, or rather because of the prevalence of certain institutions, these organisations were able to function effectively. It is to these basic institutional principles that we

have to turn our attention, if the notion of an economic community is to take root in ASEAN. This must be a precursor to any discussion on the programmes and organisations that must be established for the functioning of ASEAN as a single entity (Chia, 2013 and ADB, 2010).

This paper sets out the conceptual framework in the next section. The third section argues that the ASEAN agenda depends on institutional effectiveness. This line of argument is further developed in the fourth section, where it is reasoned that ASEAN's competitiveness and long-run growth requires sound institutions. The fifth section puts forward several general principles that must govern natural and regional institutions for the proper functioning of ASEAN as a single entity. Finally, some concluding remarks are made.

CONCEPTUAL FRAMEWORK

Policy makers, who for long have been solely concerned with prices and other macroeconomic variables, now realise that institutions matter. It is increasingly accepted that institutions are necessary for economic development. There are two ways in which institutions interact with the functioning of the economy. First, institutions can be conceptualized as the basis upon which markets and the economy, as a whole, can effectively function. Institutions, then, form the platform for the effective functioning of the economy. Second, institutions can be thought of as the set of rules that influence or determine how transactions and exchanges are made.

There is much debate on what is meant by institutions. North (1990:3) defines institutions as "rules of the game… or … humanly devised constraints." Lin and Nugent (1995: 2306-2307) stay close to North's definition when they state that institutions are a "set of humanly devised behavioral rules that govern and shape the interactions of human beings, in part by helping them to form expectations of what other people will do." Further, Denzau and North (1994) speak of institutions as "shared mental models." Taking these three definitions together, it is possible to derive a working definition of institutions that is useful at the microeconomic and macroeconomic levels.

There are three characteristics that mark institutions. First, institutions can be thought of as rules that guide the way in which individuals react to repeated situations. Thus, weights and measures are commonly accepted as rules that determine how goods are measured, and their shared acceptance makes trade easy. Second, institutions help form expectations in so far as the presence of commonly accepted norms and conventions provides some indication of how individuals in society can be expected to behave. Third, institutions permit coordination of individual strategies. Social norms, conventions and rules frame the way individuals think about social and economic situations. Since these perceptions are shared through common rules, they facilitate economic transactions and exchanges.

There is both an informal as well as a formal dimension to institutions. The formal institutional framework would consist of formally constituted rules and regulations. Typical examples of such institutions include laws and legally enforceable agreements. However, the manner in which individuals as economic agents act is often based on conventions and norms. In this case, the institutions that determine how individuals act in prescribed situations is a consequence of social interactions that may have evolved over an extended period of time. These informal institutions are enforced not through a court of law but through social sanctions.

Institutions are not always positive. Indeed, economies are often beset by institutions that are ineffective or efficiency-constraining. A society which unwittingly condones corruption puts in place a set of institutions that deprives a large section of society of their right to actively participate in the economy. Bribery, for instance, is an efficiency-constraining institution. Institutions, by equal measure, could be positive. A society which encourages individuals to exercise their entrepreneurial skills fosters the growth of positive institutions that would see the rise of small and medium enterprises. Those institutions that restrict the efficient functioning of markets and the full participation of individuals in the economy cannot be considered as positive institutions.

The presence of institutions that produce negative outcomes is a cause of concern for policy makers. At the macro level, corruption, the lack of transparency and an unclear regulatory framework would be among those instances where institutional rigidities would constrain the efficient functioning of markets.

The definition of institutions that was discussed earlier applies to institutions that produce negative outcomes. When corruption, for example, is not discouraged, it can lead to a set of norms that strengthens the practice of corruption, leading ultimately to shared expectations about corruption and a well-formed process through which it can be executed. Corruption will, then, affect bureaucracies and creep into the market system. Pursuing this example, the market will be distorted, as will be the price system. This would have unfavourable consequences on growth.

It is relevant at this point to note that some economists have associated organisations with institutions. Nelson (1994:57) includes “industry associations, technical societies, universities, courts, government agencies, legislatures, etc.” as part of institutions. Greif (2006) shares a similar view on organisations. This is in contrast to North’s (1990) view that restricts itself to rules, norms and beliefs, and does not extend to the players of the game. This distinction between the rules of the game (as formed by rules, norms, conventions and beliefs) and the players of the game (as defined by organisations) is a useful distinction. However, in practice, rules as they define institutions, spill over into organisations and organisations

become the carriers of rules. In other words, organisations house and act as the platform for the replication and diffusion of rules.

A strict division between rules and organisations is not particularly useful to the policy maker. The purist's approach of distinguishing carefully between the two aspects can make it difficult for the policy maker who wishes to achieve changes in the economic environment. This is because it is often more feasible to target organisations than to correct the beliefs and expectations that people hold. Indeed, the manner in which individuals interact and carry out their economic transactions is determined by habits, norms and conventions, and in that sense these are the basic building blocks of economic exchange and interaction. However, it would be difficult if not impossible for the policy maker to bring about changes at so fundamental and subjective a level. Instead, it would be more feasible for a policy maker to alter habits, norms and beliefs by modifying and transforming the processes, rules and regulations that are associated with the functioning of agencies, associations and various organisations.

INSTITUTIONAL EFFECTIVENESS AND THE ASEAN AGENDA

The ASEAN Charter (ASEAN, 2007) affirms that among its purposes is the creation of a single market and production base. Simultaneously, Article 1.7 of the Charter recognises that ASEAN should pursue democracy, good governance and the rule of law. Article 1.7 is a direct call for institutional reform and the strengthening of institutional effectiveness in ASEAN member states. Clearly, the member states accept that good institutional foundations are necessary for the achievement of ASEAN's key economic objectives.

Several critical economic objectives are mentioned in the Charter. The most prominent among them are the goals of achieving an ASEAN that is "stable, prosperous and highly competitive" (Article 1.5). Article 1.6 mentions poverty alleviation as one of the central purposes of ASEAN. And this obviously includes closing the development gap, which can be accomplished either by independently generating growth or through cooperative efforts, although they are not mutually exclusive. Perhaps the most inclusive of all economic goals is that of enhancing the "well-being and livelihood of the peoples of ASEAN" (Article 1.11). This is a broad goal that goes beyond the achievement of higher levels of income among ASEAN members.

Implicit within the pursuit of democracy, good governance and the rule of law is the understanding that ASEAN has to have a firm institutional foundation. Indeed, democracy would not be possible if good institutions are absent in a country. But a stronger statement accepting the importance of good institutions is embedded by embracing good governance and the rule of law. While we will have more to discuss on governance in subsequent sections, it must be stated that good governance is only possible if accompanied by strong institutional frameworks.

Further, the Charter implicitly subscribes to the view that goals such as growth, poverty alleviation, enhanced well-being and competitiveness are possible on a long-term basis only if supported by sound institutions.

Two principles that are mentioned in the Charter emphasise the necessity for achieving sound institutions. Article 2(h) specifically states that ASEAN and its member states shall seek to adhere "to the rule of law, good governance, the principles of democracy and constitutional government". This is a strong indication that ASEAN embraces good institutional frameworks as a set of principles that will guide ASEAN towards achieving its economic objectives. The economic centrality of ASEAN depends heavily on its position as an integrated regional entity that is actively engaged in trade and as a production base. This focus is reflected in Article 2(n) which makes reference to the principle of adhering to multilateral trade rules and a commitment to rules-based regimes as a way to effectively conduct economic transactions. This is underscored by the emphatic stress in this clause on abidance to these institutions in "a market-driven economy".

Trade and foreign direct investment are acknowledged as drivers of economic growth. And the agenda to achieve ASEAN economic centrality must be linked to trade and FDI as agents promoting growth. There is evidence that these factors have been instrumental in creating employment and contributing to poverty alleviation but the basis for this is possible only in a market-based economy. The ASEAN Charter recognises this. It is not within the scope of a charter to elaborate on the merits of a market-driven economy. Needless to say, the proper functioning of markets is not possible without strong and effective institutional frameworks. Indicators of governance encompass many of the institutions that are essential for markets to function efficiently.

The ASEAN Economic Community (AEC) Blueprint (ASEAN, 2007) takes a significant step in elaborating upon the goals and principles mentioned in the ASEAN Charter with respect to achieving market efficiency. The issues in this regard are of special relevance because they indicate the seriousness with which ASEAN takes the question of good institutions in relation to establishing AEC. The primary goal of the AEC Blueprint is to "transform ASEAN into a stable, prosperous, and highly competitive region with equitable economic development" (AEC Blueprint, 2008). This is an ambitious goal and it is supported by elements that demand sound institutional foundations.

The specific considerations that are necessary in order to achieve AEC's goals are outlined in the Blueprint. And if the Blueprint envisages institutional reforms to achieve the ASEAN Community by 2020, it is only to be expected that a more stringent and comprehensive set of reforms be undertaken so as to achieve economic centrality and prosperity by 2030. The AEC envisages that ASEAN

will be transformed into: a) a single market and production base, b) a highly competitive economic region, c) a region of equitable economic development, and d) a region fully integrated into the global economy.

In outlining the actions that will be taken for ASEAN to achieve the desired characteristics, it is to be noted that the Blueprint stresses the requirements of good institutions and good governance appear as desirable strategies. It is explicitly stated that promoting transparency and visibility of all actions undertaken in connection with international trade transactions will foster trade facilitation. The issue of transparency is recognised as a contributory element in introducing standards and technical regulations.

The AEC Blueprint recognises the fact that the free flow of investment will enhance ASEAN's competitiveness in attracting FDI. In this regard, it is mentioned in the document that international best practices will have to be introduced to increase investor confidence and to draw new investments and reinvestments into ASEAN. Obviously it is neither possible to create investor confidence nor to improve on ASEAN's competitiveness unless there are concerted efforts to improve on the institutional structure in the member states. In fact, the foundation for the success of the Blueprint and the possibility for prosperity, growth and competitiveness depend on strong institutions and good governance.

ASEAN COMPETITIVENESS AND LONG-RUN GROWTH

Governments can play a role in smoothing the path to greater development, something that is particularly relevant to developing economies that are striving to attain developed economy status (Nambiar, 2009). It is equally useful to those economies that are emerging and seek greater integration into global economic processes. Governments would, then, attempt to obtain the right set of institutions. Rodrik (2000, 2004) argues that economies need to acquire market-supporting institutions. He suggests that the institutions that are of primary importance in this regard are the following: a) property rights, b) regulatory institutions, c) institutions for macroeconomic stabilization, d) institutions for social insurance, and e) institutions of conflict management. In emphasising the role of institutions for growth, Rodrik maintains that there is adequate evidence to believe that democracy supports higher growth rates over the long run. There is evidence (Rodrik, Subramaniam and Trebbi, 2006) that democracies yield more predictable long-run growth rates, produce greater short-term stability and are better able to absorb negative shocks. Rodrik's findings have a direct relevance to ASEAN because unless the institutions that he has identified are acquired, ASEAN will fail to be competitive.

The demand to be competitive is pressing for ASEAN in the context of the present economic landscape. Two points stand out in this regard. First, the rise

of China and India as economic players puts direct pressure on ASEAN to be competitive. Otherwise, ASEAN faces the risk of losing out on opportunities for trade and investment to China and India. Second, softer economic conditions among developed economies reduce the external demand that some ASEAN states have long taken for granted. ASEAN's competitiveness has to be addressed if it is to rise above the unfavourable conditions in the external environment over the coming years. But more than concern over the near future, for ASEAN to sustain its growth against the fast-growing economies (eg the BRICS) or even to take advantage of their growth, it has to be competitive. Current competitiveness indicators give some direction as to the areas that require improvement.

The ASEAN Competitiveness Report 2010 (Wong, Shankar and Toh, 2011) indicates that ASEAN's ranking on competitiveness stands at 57 out of 132 countries. This ranking, by itself, is not encouraging but added to this is the observation that there has been no improvement to this position over the last five years. The Competitiveness Report suggests, as one of its key messages, that for ASEAN "to successfully move from vision to action, its institutional mechanisms and capacity have to be strengthened" (ASEAN Competitiveness Report 2010:v). The link between competitiveness and long-term growth is obvious; no less obvious is the imperative to enhance institutions and achieve good governance, since the latter is a more direct expression of the state of institutions in an economy. Long-term growth cannot be expected to improve, under existing conditions, unless there is the political will to reform institutions and achieve good governance.

An area of weakness that stands out for many ASEAN member states is in administrative infrastructure. Many ASEAN economies have weak administrative infrastructures. This expresses itself as difficult or confusing customs procedures, burdensome and time-consuming procedures to start businesses, and long time spans to begin businesses. Brunei, Indonesia and The Philippines are particularly weak in this area. Singapore, however, stands out by virtue of this area being a source of strength. The rule of law is next in importance as an area of weakness for ASEAN, with it being a problem in particular for Malaysia, Thailand and Cambodia. This indicator could do much to hamper ASEAN's move to greater development because it could negatively colour the perceptions of potential investors. Not only will this discourage foreign investors but it will also discourage domestic investors from investing in their respective economies.

Among the sub-indicators that constitute rule of law, corruption and crime recorded unsatisfactory results. Human development is a source of weakness for Malaysia, Cambodia and Thailand. This sub-area refers to the lack of skills, labour productivity and basic health. Human development aside, it is clear that

institutional reform is necessary if ASEAN is not to slide down in its competitiveness and objective of achieving sustained growth and prosperity.

The initiative to reform administrative practices so as to ease the process of doing business should be on the national agenda of respective ASEAN member states. The same applies to rule of law. There is no doubt that national agencies should be concerned about these matters. Nevertheless, ASEAN as an over-arching entity is affected by the inadequate performance on these indicators; and ASEAN as a regional grouping has a role to play in coordinating and encouraging individual states to improve their institutional structures. While each member state will undertake the necessary reform at the national level, there is also place for an approach that can be taken at the regional level.

Efforts at the national level are required if the region is going to assert its position and strength as a consolidated group of economies. Otherwise, it will be difficult for ASEAN to compete in the global market and achieve high growth. The pre-conditions for competitiveness, aside from the efficiency and marketability of the products and services being offered, will lie in the strength of the institutions that prevail in ASEAN. Rodrik's suggested list of institutions would be covered by ensuring that economies subscribe to a minimal set of governing principles at the national and regional level. It is equally necessary for member countries to adopt the principles of good governance. These steps would ensure that property rights, regulatory institutions, and freedom from violence, crime and terrorism are guaranteed, thus promoting what would be the core set of elements of competitiveness.

PRINCIPLES OF NATIONAL AND REGIONAL INSTITUTIONS

An important objective for ASEAN member countries is to achieve greater economic growth. It is not sufficient that growth rates keep increasing; it is also necessary that these rates be sustainable and resilient. The economic and financial crises of 1987 and 2008 underscore the need to have growth paths that are robust and capable of recovering from unexpected shocks. The economies of ASEAN are dependent on the economies of developed countries such as Japan, the European Union (EU) and the United States of America (USA). This makes them susceptible to fluctuations that spring from untoward economic events in the source countries. This is another reason why the ASEAN economies have to be robust and possess the wherewithal to recover. This kind of economic resilience can only come about if there are adequate institutions that can absorb downturns in the economy and help restore pre-crisis equilibrium.

The sustainability of growth has often been neglected because of the emphasis on immediate returns to investments. The notion of intergenerational utility takes into account the time dimension of utility. Implicitly, this means that

positive returns as well as the costs that have to be incurred in encouraging growth are spread over time. There are two aspects to sustainability that have to be considered. The environmental impact of growth has to be taken into account. There is awareness that growth cannot be continually sustained if there is continued damage to the environment. The negative consequences of the over-exploitation of the environment may well result in diminished utility over a longer time horizon.

The notion of sustainability can also be examined from the macroeconomic perspective. Specifically, this refers to the question of fiscal sustainability. Good fiscal governance means that economies undertake fiscal deficits at times of economic downturn, when the economy needs pump-priming and requires the intervention of government expenditure to stimulate the economy. However, there are some countries in ASEAN which do not subscribe to fiscal discipline and have fiscal deficits even when they experience positive growth rates. Governments that pursue continued periods of fiscal deficit, even at times of high growth, are putting their economies at risk of fiscal fragility, something that is not sustainable in the long-run. It is necessary to put in place institutions that will guard national economies against undertaking fiscal policies that are not sustainable in the long-run.

At the national level, the most important step for ASEAN economies that aspire to enjoy continued rates of growth is to establish institutions that are supportive of structural reform. The basis for this is to acknowledge the role of the market and to accept that the state has its place as a facilitator of the proper functioning of the market. The role of markets and the state is determined by the nature of goods produced, as prescribed by economic theory. In the case of goods which the private sector is able to sell, it is best to allow the private sector to produce and supply them. However, where market failure exists (or has the potential to exist), and in the case of public goods, the role of the market will be limited. Thus, in these cases, the state would find its proper place and should be expected to provide these goods.

There are two principles that should guide good microeconomic policy: a) the proper functioning of markets, and b) the free play of competition. Developing economies should pursue both these objectives wherever possible. It is not possible to follow these principles without the support of the government but that does not mean that the government should intervene. Instead, the government should create institutions that would help overcome restrictions and hindrances to the functioning of markets. This implies that the government should use its machinery in order to introduce and enforce the requisite administrative and legislative requirements; it should also set up the necessary implementation and enforcement agencies.

There are innumerable institutions that have to be established for the microeconomic management of an economy. These institutions would include, for instance, processes to apply for licenses; applications to permit the inflow of foreign labour; accounting standards; and processes which will allow minority shareholders to complain against practices that are against their favour. This is a limited listing of possible institutions. But they have an important role to play; and there will be distortions to the market process if these institutions were irregular. It is easy to see that these institutions could be subject to abuse. If national institutions such as these are fraught with corruption, open to the misuse of power by those with political or bureaucratic links or subject to government manipulation, then they would not serve the purpose for which they were created. The idea behind these institutions is to ensure that markets can function effectively.

It is only if markets are left to their own devices that the price system can be used as a reliable signal for resource allocation. For this reason there are some criteria that these institutions would have to fulfil. The following are some of the principles that should guide the conduct of these institutions: 1) Accessibility, 2) Transparency, 3) Non-discrimination, 4) Accountability and 5) Rule-based processes. Institutions of all manner, whether they are the legal system or competition policy, should be accessible to all the relevant sections of society. This criterion is meant to vouchsafe that the set of rules and regulations that have been formulated are available for the use of all the individuals in a country. They cannot be available only for some groups because that would mean that they are the preserve of certain sections of the economy (Nambiar, 2009). This will allow for the possibility of abuse: the institutions will serve an elitist set of people and the dominant position of these people will be maintained. This will enable the monopolistic control that is extended over the market to be continued. Further, the goal of pursuing freedom as a feature of development will be lost if only restricted groups of national populations can enjoy the benefits of specific institutions.

Transparency is a necessary component that must be satisfied by any set of institutions. Institutions must be transparent in the sense that all the stakeholders in society must have full knowledge of the rules and regulations that have been introduced. They should also know the consequences that would result from any infringements of the associated rules, and the penalties that must be borne in such cases. The line of processes that are involved, the sequence in which they are carried out, and the administrative structure that supports the processes must be clear. Finally, the decision-making process must be explained and the decisions that are taken must be justified. The parties involved in any institutional process should be able to exercise the right of appealing against any decision that is taken; they should also be able to raise questions as to why they were excluded from any selection process.

The institutions in a nation should apply equally, wherever relevant and reasonable, to its citizens as well as foreigners. There are at least two situations under which it is entirely to be expected that prevailing institutions be valid for all individuals and firms, regardless of country of origin. In issues where the question of human rights is prominent, there should be no doubt about the principle of non-discrimination. For instance, institutions governing the labour market can be an example where non-discrimination should hold. It is on this basis that the International Labour Organization (ILO) requires in its Convention 111, with regard to discrimination in respect of employment and occupation, that all workers – domestic or foreign – should be subject to similar provisions on minimum wages. Similarly, firms of all countries of origin should be subject to the same restrictions. For example, if domestic firms can contest the fact that government projects were unfairly awarded, this right should be extended to foreign firms, too.

Stakeholders who go through specific institutional processes deserve fair and equitable consideration. They should be treated no differently from each other; and, the same processes should apply equally to all firms and individuals. The best test for the practice of these principles will be revealed through the accountability of the organisations that implement the relevant institutional processes. The organisations responsible for the proper functioning of institutions should be open to question and scrutiny by a higher authority, when discrepancies or irregularities are reported. In part, this criterion will be satisfied through the principle of transparency. The requirement of transparency will ensure that decisions are taken fairly and objectively. The authorities that organisations report to, on being urged to explain decisions taken, should be able to reveal the basis for taking specific decisions and actions. They should, as part of the principle of accountability, be prepared to explain their decision-making process, and present the data and analysis that formed their decision.

If one principle should stand above others, it is the primacy that should be accorded to rule-based processes and procedures. In essence, this principle holds that the institutional processes should be independent and not be subject to the demands of the ruling government. Regulatory agencies should not be in a position where they are influenced or, worse still, manipulated by lobbies or special interest groups. Institutional processes should be governed by rule-based processes and procedures and not be subject to influence from the private sector or vested interests linked to the government. In that sense, institutional processes should be independent and meant to provide for the welfare maximization of the economy treated as a whole, rather than for specific interest groups. Further, there should be avenues whereby disagreements in the applications of these rules and procedures can be contested, and an unbiased outcome obtained.

It has to be recognised that there are two sets of demands that will have to be satisfied in view of the fact that alongside national organisations or authorities,

there exist regional organisations. The difference between institutions and organisations is relevant at this juncture because institutions can be taken to be the rules of the game whereas organisations are the players of the game. Having made this crucial distinction, it is then possible to state that ASEAN member countries should expect the same fundamental principles that govern national agencies to also be respected at the regional level. This point deserves special attention because the institutions that are taken to be valuable should pervade ASEAN at both the national and regional levels.

The underlying currents that must mould ASEAN, as an entity, should not be different, broadly speaking, from those that are valid to nations within the community. In this respect, two tenets must always guide the thinking and behaviour of AEC. First, the objective of pursuing freedom as an integral aspect of development has to be accepted and respected. This is particularly relevant for the national agenda, even so it cannot be denied in the creation of ASEAN as a collective entity. Second, the significance of the market and its proper functioning should be constantly borne in mind. Third, the limitations of the market must be recognised and government intervention can be justified only when there is market failure. In cases where competition does not work, government intervention should be accepted but only for the maximisation of welfare of the economy as a whole and not for particular sections of the economy.

The intellectual apparatus that is often taken for granted in discussing the stated goals implicitly accepts the primacy of the market. The ambitions that ASEAN countries harbour, of achieving higher growth rates and moving out of the middle-income trap, can best be achieved if the market system is accepted. The market, through its system of price signals, guides efficient resource allocation. As much as the market is valuable for this reason, the failure of the market in various areas must also be accepted. The market cannot be relied upon to encourage research and development (R&D), neither will it be effective in overcoming income inequalities. The tacit acceptance of these principles will form the basis for discussion among member states in efforts to spur growth, close development gaps, foster intra-regional R&D efforts and develop human capital.

It must be recognised that ASEAN member countries do not share a common history of democracy or capitalism. While these might be defining goals over the next 20 years, the starting points are different and could well pose challenges. The different histories, politically and economically speaking, need not be obstacles to the shared ASEAN vision of achieving a position of centrality in the global economic system. This mission, in itself, forms a mutually accepted purpose and a common point of discussion and agreement. The more developed economies in the region could discuss and share their development experiences with the less-developed economies. The range of strategies that have been adopted varied in ideological hue,

even among the more developed ASEAN economies. In fact, this itself admits the possibility of a multiplicity of approaches, and it has the advantage of not excluding economies that, presently, have different political viewpoints. Yet, when working against a diverse background, certain rules that can govern the game of inducing cooperation and integration have to be worked out.

In the first instance, supranational organisations that have an overarching interest in specific areas of cooperation and integration have to be established. Rather, such organisations presently exist and more can be expected in the future. A more pressing concern as these organisations increase in number is the rules and norms (tacit and explicit) that govern these organisations. As organisations increase in number, and given the pre-existing development gaps, care has to be exercised in establishing the right rules of conduct. Institutions have to be established to avoid any fears that individual members may have of the organisations that exist. Otherwise, some members may exclude themselves and this will result in a weaker regional entity. The right institutions will encourage participation and they will enable greater coordination among the member states as they engage in these organisations.

CONCLUDING REMARKS

ASEAN is ambitious in its intention to achieve an economic community by 2015. There are multiple challenges as ASEAN progresses towards claiming this goal because the member states are disparate in terms of their levels of development, income and political structures. Before more challenging goals such as a common competition policy and overarching regional organisations can be established, it is essential that there be a common understanding on the rules and norms that are to be accepted by member states.

There are various reasons why it is necessary to think deeply and as a group on the question of institutions in a regional setting. This is necessary for a sense of common understanding. It is also necessary if ASEAN is to develop into a seamless single entity. Further, a broad set of common norms and mental models must be firmly put in place before higher level arrangements and organisations are discussed and created. A significant object of AEC will be to attract foreign direct investment and trade; but this presupposes good microeconomic management, something that cannot come about without a sound institutional framework. Finally, a good institutional structure depends on a set of guiding principles that can be mutually agreed upon by ASEAN member states.

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ASEAN Investment Agreements: A Tool of Economic Diplomacy in Meeting the Objectives of ASEAN Economic Community Blueprint

Sufian Jusoh[1]

ABSTRACT
ASEAN as a region is an attractive investment destination that has continuously received high level of foreign direct investment. ASEAN intends to achieve the ASEAN Economic Community status by the end of 2015 which is an important milestone for the region. To continue becoming an attractive region, ASEAN is an avid practitioner of economic diplomacy. The practice of economic diplomacy through several investment agreements will assist ASEAN in achieving its objective of becoming a single investment destination. ASEAN, which is without political and military might, may also use the investment agreements to fend off aggressive foreign policies from more powerful regional neighbours. To achieve the objectives set by the Member States, ASEAN will also need to encourage intra-ASEAN economic diplomacy practice, where the more developed ASEAN Member States will be able to contribute to the economic prosperity of the lesser developed Member States.

Keywords: Association of Southeast Asian Nations, ASEAN, ASEAN Comprehensive Investment Agreements, Economic Diplomacy, Investment, Free Trade Agreements, developed ASEAN Member States

INTRODUCTION

The Association of Southeast Asian Nations (ASEAN) was formed on 8 August 1967 by Indonesia, Malaysia, the Philippines, Singapore and Thailand. ASEAN has since expanded to cover most of Southeast Asia including Brunei, Cambodia, Lao PDR, Myanmar and Vietnam.[2] ASEAN provides a diverse investment market and opportunities for the ASEAN and third country investors, with a combined

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[2] Timor Leste is now an observer country and waiting for a full membership of ASEAN. For more information about ASEAN, please refer to the ASEAN official website www.asean.org.

Gross Domestic Product of US$3.3 trillion in 2011 and home of 600 million people. ASEAN is situated between two economies, China and India, which are collaborators and competitors to ASEAN and its Member States in attracting foreign direct investments (FDI) and other forms of economic development. ASEAN, in its quest to become ASEAN Economic Community by the end of 2015 also faces political challenges due to the latest development in China's foreign policy approach towards its territorial claims in the East China Sea and South China Sea.

ASEAN and its Member States require a comprehensive approach in adopting economic diplomacy in ensuring that the region continues to prosper as continued prosperity will become both a factor in attracting continued FDI which will contribute to economic growth; and at the same time to fend off challenges from the aggressive foreign policies from its regional neighbours and partners.

The article analyses the economic diplomacy approach adopted by ASEAN and its Member States through various international investment agreements with the aim of ensuring the realisation of the ASEAN Economic Community and the continued attractiveness of the region as a single investment hub.

The article will first define the term "economic diplomacy", followed by a short examination of the practice of economic diplomacy by economic powers. The article will then examine the various international investment agreements adopted by ASEAN and the Member States that could function as a tool in pursuing ASEAN's economic diplomacy. In concluding, the article proposes several measures that could be adopted by ASEAN in enhancing the effectiveness of the implementation of the investment agreements and their function in the practice of economic diplomacy in and by the regional grouping.

DEFINING ECONOMIC DIPLOMACY

Economic diplomacy encompasses a broad concept of diplomacy and economic policy that leads to the cross-utilisation of diplomacy, economics and politics. There is no standard or universal definition of "economic diplomacy". The term "economic diplomacy" influences the practice of diplomacy from two separate angles, that is the utilisation of economy and economic position to pursue a country's agenda through the practice of diplomacy; and on the flip is the use of diplomacy by a country to pursue economic interests in or with another country.

The approach taken in the preceding paragraph is based on the various definitions offered by different scholars and practitioners of diplomacy.[3] Economic diplomacy, according to Bayne and Woolcock is an activity pursued by state and

[3] See early works by Japanese scholars including Susumu Yamamoto, Tokyo-Washington, Iwanami Shoten, 1961; Mitsuru Yamamoto, Japanese Economic Diplomacy, Nikkei Shinsho, 1973.

non-state actor which is broad and elastic term.[4] Economic diplomacy ought to be discussed from the perspectives of both diplomacy and economics.

Rana and Chatterjee define economic diplomacy as "*a plural set of practices all aimed at advancing the home country's external economic interests*."[5] Rana and Chatterjee opine that the role of economic diplomacy may even include the management of economic aid, which is not normally included in the more traditional practice of commercial diplomacy.

In other words, the practice of economic diplomacy means *"diplomatic official activities that are focused on increasing exports, attracting foreign direct investment and participating in work of the international economic organisations i.e. the activities concentrated on the acknowledgment of economic interests of the country at the international level*".[6] There are at least two flaws in this definition. One is that some countries may use economic diplomacy in the promotion of the countries' investment in a foreign country, either for market seeking, resource seeking or efficiency seeking. Thus, to say that economic diplomacy relates to export or attracting foreign direct investment is not necessarily accurate.

Thus, the author would define "economic diplomacy" in the modern world as *"diplomatic practices that involve representation, negotiation, communication and other means involving one state over another state or international organisation with the aim of promoting and protecting the former's economic interests*."

Economic diplomacy differs from other forms of diplomacy, such as political diplomacy, as it involves all elements of diplomacy, namely, political, cultural and economy. Economic diplomacy involves the use of economy to support diplomacy and importantly, the use of diplomacy to support the economy. Economic diplomacy involves both "sticks and carrots" where there will be assistance and other forms of economic initiatives and supports and sanctions for non-compliance with certain demand or requirement imposed by the relevant countries. Thus, economic diplomacy generally involves activities shown in Figure 1 on the next page:

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4 Nicholas Bayne and Stephen Woolcock, The New Economic Diplomacy: Decision-making and Negotiation in International Economic Relations, Ashgate, 2nd Ed (2007).

5 Kishan Rana and Bipul Chatterjee, The Role of Embassies, Economic Diplomacy, India's Experience, CUTS International 2011.

6 Pavol Baranay, Modern Economic Diplomacy, www.dec.lv; see also Lichia Yiu and Raymond Saner, International economic diplomacy: Mutations in post-modern times, Discussion Papers in Diplomacy, No. 84 (The Hague: Netherlands Institute of International Relations 'Clingendael', 2003).

Figure 1: Areas of Economic Diplomacy

Figure 1 above shows that economic diplomacy involves several different activities, which encompass both the promotion and the protection of economic interests of the home countries. One of the areas of economic diplomacy is the promotion and attraction of investments, involving both the outflow of investment and inflow of investment, which include foreign direct investment. Investment related diplomacy may take in the liberalisation of investment or minimum protection of investments. Investors' protections include a range of important provisions: prohibition of performance requirements, minimum standards of treatment, compensation for losses in case of strife, and protection for transfers and against expropriation.[7]

Investment related diplomacy involves both the resource-seeking and efficiency-seeking investments. Resource seeking investment happens when a country or investor from a country seeks to secure resources from another country such as oil and gas and minerals. Efficiency seeking investment happens when an investor invests in a country for the purpose of seeking highly-skilled workers, or to utilise a high technology. Formal diplomacies in international investment take place in the negotiation and conclusion of investment guarantee agreements (IGA) or generally known as the bilateral investment treaties (BIT) and investment chapters in various regional and bilateral preferential trade agreements (PTA) or generally known as the free trade agreements (FTA).

In another area, economic diplomacy involves the practice of diplomacy in international trade. Economic diplomacy in this field generally takes place in the traditional multilateral trade organisations such as the World Trade Organisation

7 The term "investor" is generally defined as natural person of a Party or a juridical person of a Party that seeks to make (which refers to an investor of another Party that has taken active steps to make an investment), is making, or has made an investment in the territory of another Party. Investment generally means every kind of asset owned or controlled by an investor such as physical assets, certain rights and permissions, and enterprises.

(WTO) or the Asia Pacific Economic Cooperation (APEC) or other multilateral organisations. Countries practice formal economic diplomacy in the WTO, with the presence of permanent representatives (or ambassadors) and economic diplomats. At the different levels, countries practice formal and direct economic diplomacy in the negotiations of the FTA.

Thirdly, economic diplomacy also takes place in relation to international monetary issues, such as on the functions and roles of the World Bank and International Monetary Fund (IMF) and the Bank of International Settlement (BIS). Countries may practice diplomacy in the monetary field when they need to seek international financial assistance, to provide monetary assistance, to seek measures to protect balance of payment or to provide technical assistance to other countries. A country may also need to practice financial diplomacy when it seeks to impose financial sanctions or when it seeks to break an economic sanction.

Economic diplomacy may also take place when a country seeks to promote or to attract technologies and to provide or attract financial aids and technical assistance. This relates to the earlier categories including diplomacy in investment, trade and monetary fields. Finally, the practice of economic diplomacy may also take place in the promotion of a country as a destination hub.

The classifications of economic diplomacy as shown in Figure 1 above is reflected in the speech of Seije Meihara, the former Foreign Minister of Japan, in his speech to the 177th Session of Japan's *Diet*. Meihara's economic diplomacy approach is based on four pillars, namely, free trade system; securing long-term and stable supply of resources, energy and food; international promotion of infrastructure system; and promotion of Japan as tourism oriented nation.[8]

In order to do justice to economic diplomacy, Bayne and Woolcock propose to dispose some misleading stereotypes associated with the term "diplomacy." Such stereotypes include assumption that diplomacy is only conducted by people from foreign ministries; it applies to informal negotiations and voluntary cooperation; it is not to rule-based systems and legal commitments; it is elitist and it is secretive.[9]

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8 Foreign Policy Speech by Minister for Foreign Affairs Seiji Maehara to the 177th Session of the Diet, http://www.mofa.go.jp /announce/ fm/ maehara/speech110124.html. In promoting the free trade system, Japan, according to Meihara would pursue high level economic partnerships with its trading partners based on the Basic Policy on Comprehensive Economic Partnership. Japan has shown its commitments in the free trade systems including entering into the negotiations of the Transpacific Economic Partnership Agreement (TPPA) and the Regional Closer Economic Partnership Agreement (RCEP) involving several or all ASEAN Member States. Japan is also a strong supporter of the WTO including the Doha Development Agenda.

9 Nicholas Bayne and Stephen Woolcock, The New Economic Diplomacy: Decision-making and Negotiation in International Economic Relations, Ashgate, 2nd Ed (2007), 3.

HISTORY OF ECONOMIC DIPLOMACY

Several major economies in the world, such as China, the European Union (EU), Japan and the United States of America (USA) adopted economic diplomacy as part of their diplomacy practice. Japan is one of the earliest economic powers that utilises economic diplomacy. It adopted economic diplomacy after the defeat in the Second World War mainly due to the lack of voice and influence in political and other traditional areas of diplomacy. Nobusuke Kishi government adopted economic diplomacy which was implemented mainly in Southeast Asia through economic assistance such as improving infrastructure and investment environments.[10]

Economic diplomacy gains further attention from major economies at the end the Cold War to enhance prosperity.[11] China started to focus on economic diplomacy in the 1990s, which adopted two main elements, namely, promoting national interests and strategic economic goals by economic means through international contacts by the government, government agencies and officials.[12]

USA has also been very active in utilising economic diplomacy in pursuing its national interest and national agenda. Among USA's earlier and well known economic diplomacy programmes is the Marshall Plan which supported the redevelopment of Europe in the aftermath of the Second World War. Of late, at the beginning of its second term, the Obama Administration is pursuing "policy of elevated engagement" including in the Asia Pacific region. The policy of elevated engagement is part of the realignment of USA's policy towards the Asia Pacific region, which moved from military initiatives to economic and diplomatic elements.[13]

The main agenda in the shift of the policy towards the policy of elevated engagement is to create economic opportunity and economic growth "at home and abroad" and to make strategic investments to enhance USA's security and global stability.[14] Vice President Joe Biden sees Asia Pacific, ranging from India to

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10 For more discussion on the Japanese economic diplomacy see for example Hidetaka Yoshimatsu, Japan's Economic Diplomacy Towards East Asia, Fragmented Realism and Naïve Liberalism, S. Rajaratnam School of International Studies, 2007. See also Sueo Sudo, The Fukuda Doctrine and ASEAN: New Dimensions in Japanese Foreign Policy, Institute of Southeast Asian Studies, 1992.

11 Nicholas Bayne and Stephen Woolcock, The New Economic Diplomacy: Decision-making and Negotiation in International Economic Relations, Ashgate, 2nd Ed (2007). 2.

12 Zhou Yongsheng,"First Exploration of Deng Xiaoping's Thoughts on Economic Diplomacy," Beifang Luncong, Issue.1 1996, 35.

13 Robert G. Sutter, Michael E. Brown, and Timothy J. A. Adamson, Mike M. Mochizuki and Deepa Ollapally, Balancing Acts: The U.S. Rebalance and Asia-Pacific Stability, the George Washington University, August 2013.

14 Remarks by Vice President Joe Biden on Asia-Pacific Policy, George Washington University, Washington, D.C., 19 July 2013.

the Pacific Nations, which is home to about 1 billion middle-class people as a very attractive region for further economic engagement by USA. USA reaches out to the Asia Pacific region through several initiatives such as the engagement through APEC, free trade agreements and off-late, through the TPPA.

ASEAN Member States are also active participants in economic diplomacy, which are practised among the Member States or with other partners. ASEAN, through various initiatives under the ASEAN Economic Community places economic diplomacy as an important element in achieving the objectives set out in the ASEAN Economic Community Blueprint.

ASEAN INVESTMENT FRAMEWORKS AND ECONOMIC DIPLOMACY

ASEAN Economic Community

As stated in the ASEAN Declaration, among the aims and objectives of ASEAN is to accelerate economic growth, social progress and cultural development in the region to order to strengthen the foundation for a prosperous and peaceful community of Southeast Asian nations. Although ASEAN has been formed since 1967, economic cooperation started in earnest with the creation of the ASEAN Free Trade Area (AFTA) through ASEAN Agreement in Trade in Goods (ATIGA), which was followed by the ASEAN Framework Agreement on Trade in Services (AFAS) and the various agreements relating to investment, which ASEAN now adopts the ASEAN Comprehensive Investment Agreement (ACIA) in 2009.

To accelerate ASEAN's transformation into an economically stable region, ASEAN Leaders agreed at the 12th ASEAN Summit in 2007 in the Philippines to the Cebu Declaration on Acceleration of the Establishment of an ASEAN Community by 2015. The Cebu Declaration commits ASEAN Member States (AMS) "to hasten the establishment of the ASEAN Economic Community (AEC) by 2015 and to transform ASEAN into a region with the free movement of goods, services, investment, skilled labour, and the freer flow of capital."

The ASEAN leaders agreed to the AEC Blueprint at the 13th ASEAN Summit held in Singapore in 2007. The AEC Blueprint, as shown in Figure 2, consists of four key pillars, namely, single market and production base; a highly competitive economic region; a region of equitable economic development; and a region fully integrated into the global economy.

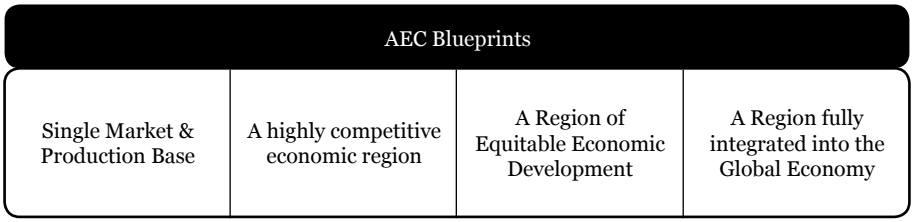

Figure 2: AEC Blueprint

In order to attain the objective of achieving the AEC in 2015, ACIA is designed to enhance the flow of cross-border investment and promotes the freer flow of capital by making ASEAN a more competitive economy and an attractive destination for foreign direct investment (FDI) whilst increasing the intra-ASEAN investment in both goods and services. Thus, ACIA complements ATIGA and AFAS which are designed to allow for the free flow of goods and services and the freer flow of skilled labour. Figure 3 below shows the relationship between ATIGA, AFAS and ACIA.

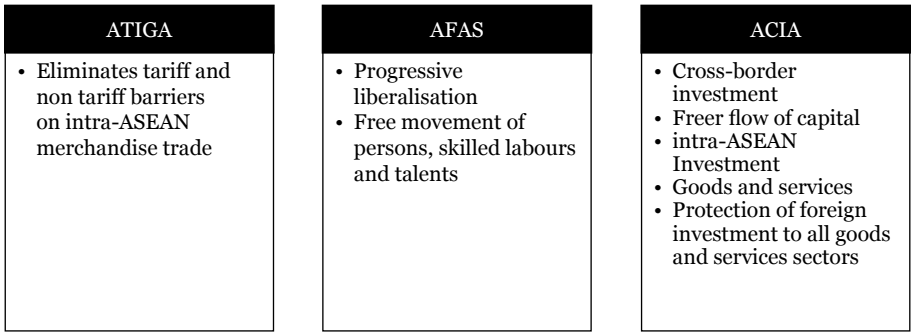

Figure 3: Relationship between ATIGA, ACIA and AFAS

ASEAN Investment: Economic and Legal Positions

ASEAN as an economic block remain a competitive and attractive destination for foreign direct investment. According to the World Investment Report 2013, in comparison with the FDI inflows in 2011, the FDI inflows into ASEAN Member States went up by 2%.[15]

15 UNCTAD, World Investment Report 2013.

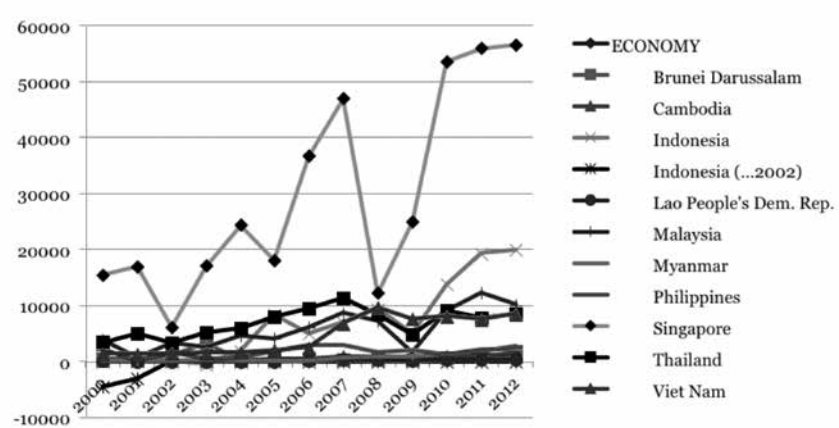

Figure 4: Investment Inflows into the ASEAN Member States 2000-2012

Based on Figure 4 above, Singapore remains the largest recipient of FDI in ASEAN. Singapore receives an increased amount of FDI from US$12.2 billion in 2008 (after seeing a steep decrease in FDI inflow from US$ 50 billion in 2007) to US$53 billion in 2010 before settling for US$56.6 billion in 2012. Indonesia is the second largest recipient of FDI in 2012 registering an inflow of US$19.24 billion (an increase from US$ 13.77 billion in 2010) and a further US$3.6 billion in first quarter of 2013[16]; followed by Malaysia (US$9 billion in 2010, US$12.2 billion in 2011 and US$10 billion in 2012) with Thailand and Vietnam slowly becoming a close competitor for FDI inflow to Malaysia.

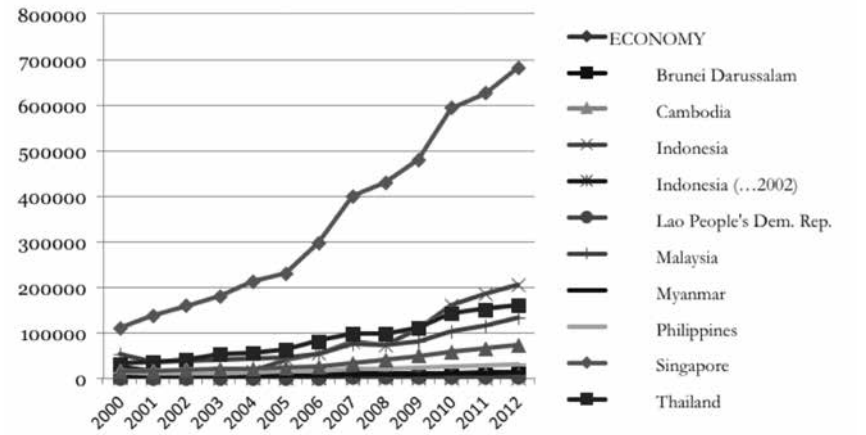

Figure 5: ASEAN FDI Stocks 2000-2012

[16] OECD, FDI in Figures, 2013.

In terms of inward FDI stock, Figure 5[17] shows that all ASEAN Member States register strong growth in the inward FDI stock lead by Singapore, followed by Indonesia, Thailand, Malaysia and Vietnam. Singapore's inward FDI stock increased from US$110,570 million in 2000 to almost US$ 683,000 million in 2012. Indonesia has overtaken Thailand in terms of inward FDI stock in 2012 at US$205,656 million, compared to Thailand's FDI stock of US$159,124 in the same year. Malaysia's inward FDI stock was at US$132,399 million for the period ended at the end of 2012.

As shown in Figure 6 below,[18] Singapore, Malaysia, Thailand and Indonesia investors also invest abroad, contributing to the outward FDI. Figure 5 shows that Singapore's outward FDI flow has seen a fluctuation between 2000 and 2012, with a US$ 20 billion invested outside the country in 2001, before reaching a negative outflow of US$250 million in 2002, and increased again to peak at US$36 billion in 2007, and reaching US$ 23 billion in 2012. Malaysia's FDI outflow sees an increase from US$2 billion in 2000, reaching close to US$ 15 billion in 2008, before easing to US$7.7 billion in 2009 and went up to US$17.1 billion in 2012. Thailand's outward FDI flow sees upward trend from US$967 in 2006 to US$11.9 billion in 2012.

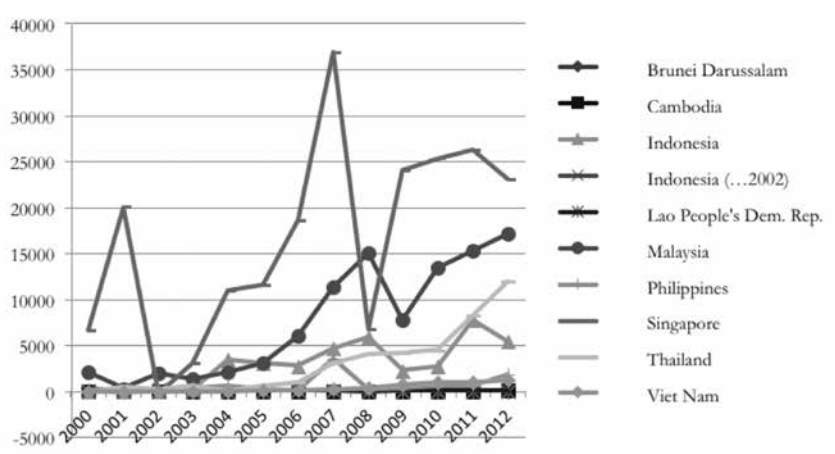

Figure 6: ASEAN FDI Outflow

ASEAN's outward FDI stock, as shown by Figure 7,[19] is still dominated by Singapore and Malaysia, followed by Thailand and Indonesia.

17 Source: UNCTAD Stats.
18 Source: UNCTAD Stats.
19 Source: UNCTAD Stats.

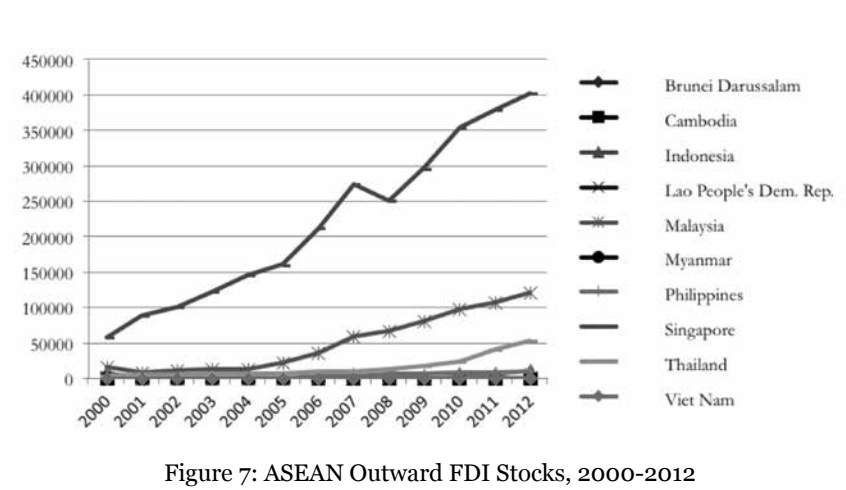

Figure 7: ASEAN Outward FDI Stocks, 2000-2012

Figure 7 also shows that Singapore's outward FDI stock increased from US$56 billion in 2000 to US$401.4 billion in 2012; compared to Malaysia's outward FDI stock that increased from US$16 billion in 2000 to US$120 billion in 2012. Thailand's outward FDI stock was at US$52.5 billion in 2012.

Challenges in Attracting FDI into Newer ASEAN Member States

The article shows that investments, domestic and foreign, FDI inflow and FDI outflow are still dominated by a few ASEAN Member States, namely Singapore and Malaysia and to certain degree, Indonesia and Thailand. Newer ASEAN Member States such as Cambodia, Laos, Myanmar and Vietnam do not attract much FDI and they seldom invest abroad. The circumstance may provide a challenge towards ASEAN achieving the ASEAN Economic Community in 2015, especially in making ASEAN as a single market and production base and a highly competitive economic region.

The challenges towards the full realisation of the ASEAN Economic Community in the investment sector may be attributed to several factors. One, newer ASEAN Member States require laws and regulations that meet the best practices in the international investment. However, the ASEAN Member States are working towards preparing new measures to address certain pertinent issues such as investment quota, restrictions in investment sectors and immigration procedures.

The disparity in the domestic measures may also be attributed to the different levels of development and liberalisation in the investment trade in services especially in relation to the commercial presence of the foreign service-providers which contribute to investment in services sectors. Different AMS provide different levels of commitment on the liberalisation of trade in services both in the AFAS and the General Agreement on Trade in Services (GATS).

Secondly, some ASEAN Member States need to benchmark their investment policies with international best practices. Among them is in the area of investor protection, which include four guarantees, namely, non-discrimination, protection against expropriation, guarantee of free transfer of funds and access to dispute settlement mechanisms.

Thirdly, some ASEAN Member States would need to revisit market access granted to foreign investors. A long list of investment areas in the negative list would prohibit investors' interest to invest in certain economies. Some ASEAN Member States still require long and tedious screening process which could be cumbersome on both the investors and the government. Screening is not an affective technique to allow entry of foreign investment into the ASEAN Member States.

Fourthly, some ASEAN Member States maintain non-business friendly practices, resulting in lower ranking in the World Bank's Doing Business Survey 2013. There are some evidence showing the correlations between the Doing Business ranking and the World Economic Forum Ranking on Global Competitiveness; and the percentage of the stock of foreign direct investment with the ranking of doing business.

Figure 8 below shows the ranking of different ASEAN Member States in the Doing Business Survey 2013. The highest ranked ASEAN Member State is Singapore at first place in the world, followed by Malaysia in sixth place and Thailand at 18th place. Data on the FDI inflow above shows that Singapore, Malaysia and Thailand are the three ASEAN Member States that receive the most FDI and this shows that ranking in the Doing Business survey plays an important element in the investors' investment decision-making process.

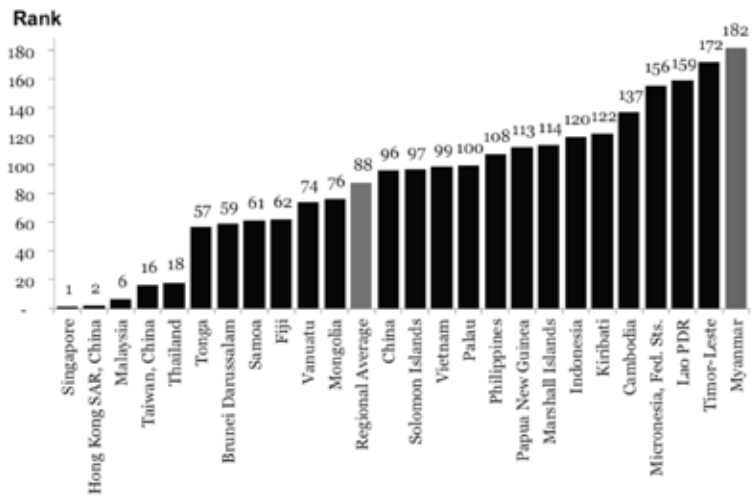

Figure 8: Doing of Business Ranking 2013
(Source: World Bank Ease of Doing Business)

ASEAN Investment Agreements

ACIA

ASEAN has developed ASEAN wide investment frameworks that will work as a tool in economic diplomacy in ensuring ASEAN becomes a single most important investment hub in the Asia Pacific region. ASEAN and ASEAN Member States have also negotiated and entered into various BIT and FTA with the aim of enhancing ASEAN and ASEAN Member States' position as attractive investment destinations.

The most important ASEAN instruments which can act as a tool in economic diplomacy for ASEAN and ASEAN Member State is ACIA.[20] ASEAN worked on a new framework leading to ACIA after the ASEAN Economic Community Blueprint called for a review of the earlier frameworks, namely, the ASEAN Investment Guarantee Agreement and the ASEAN Investment Area Agreement.

Formal negotiations on a new framework started in January 2008 and were completed in February 2009. Such a review was made necessary by several factors, such as:

a. The fragile economic conditions prevailing within ASEAN in the immediate aftermath of the global economic crisis of 1997-1998 that caused a slowdown of FDI into ASEAN; which required a new approach to increase investment and economic development.
b. The two ASEAN investment frameworks – the ASEAN IGA and the AIA – were increasingly seen as inadequate to meet the AEC's objectives of a single market and production base economy.
c. The emergence of investors from ASEAN as a significant source of outward FDI activity within and beyond the region and the commensurate need to reduce barriers to market access abroad and to ratchet up levels of protection for such investors.
d. The need for ASEAN to start competing with newly emerging and highly competitive bigger economies in Asia, notably China and India, both of which compete with ASEAN in attracting FDI into their economies.
e. The precedent set by the rising number of PTAs entered into by ASEAN as a whole as well as individual AMS with third countries (both developed and developing), the majority of which feature comprehensive investment disciplines (for example the ASEAN Australia-New Zealand Free Trade Agreement (AANZFTA); ASEAN China Free Trade Agreement (ACFTA); and ASEAN Korea Free Trade Agreement (AKFTA).

[20] ACIA is the result of an evolution in the ASEAN framework on investment. ACIA was preceded by the ASEAN Agreement on the Promotion and Protection of Investments (1987) ("ASEAN IGA") and its amending Protocol as well as by the Framework Agreement on the ASEAN Investment Area (1998) ("AIA") and its amending Protocol.

f. The fact that several AMS undertook unilateral steps to liberalise or reform national investment policies, leading to heightened intra-ASEAN competition for FDI.

As shown in Figure 9, compared to ASEAN IGA and AIA, ACIA is more comprehensive and forward looking, offering several features of modern, best practice, international investment agreements. ACIA consists of 50 articles, two annexes and a single reservation list by the AMS. The key differences between ACIA and the ASEAN IGA and the AIA are summarised below.

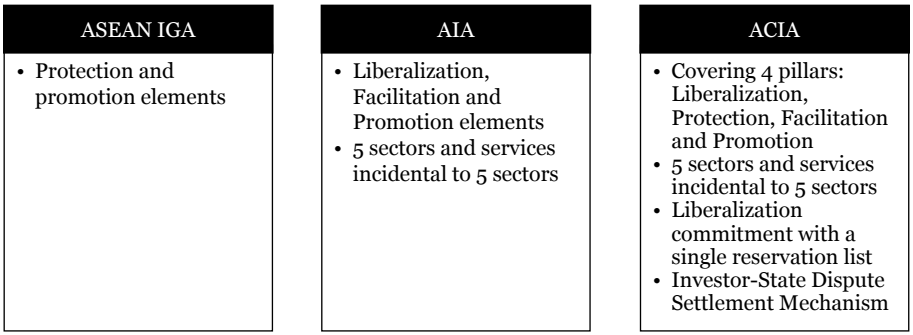

Figure 9: Comparison of ACIA with AIA and ASEAN IGA

ASEAN economic officials and trade diplomats may utilise main provisions in ACIA to attract investments into ASEAN as it contains provisions that are centrally important to businesses and investors. The provisions cover the liberalisation of investment restrictions; the protection of investors and their investments; and the settlement of investment disputes.

Investment liberalisation in ACIA responds to the needs of businesses looking to expand across national frontiers. Intra-ASEAN liberalisation facilitates the efficient deployment of capital within ASEAN. ACIA offers a platform for AMS to liberalise investment by lowering entry and post-entry barriers faced by investors. Its provisions are more liberalising compared to predecessor agreements. ACIA provides for the progressive liberalisation of investment regimes and AMS have committed to progressively lift restrictions in the ten sectors covered under ACIA in accordance with a Blueprint created to facilitate the development of the ASEAN Economic Community.

ACIA's liberalisation of investment in ASEAN covers five sectors, namely, manufacturing and services incidental to manufacturing; agriculture and services incidental to agriculture; fishery and services incidental to fishery; forestry and services incidental to forestry; and mining and quarrying and services incidental to mining and quarrying. ACIA allows each ASEAN Member State to provide reservations to the liberalisation under the Schedules.

Investment protection relates to a series of minimum guarantees ensuring that established businesses will be treated in a non-discriminatory and fair manner. Such guarantees are keys to the long-term operation and growth of commercial operations across ASEAN. ACIA adopts the international best practices in providing investment protections to the investors and investments. It provides the following protections to investors and their investments, namely, the fair and equitable treatment, prohibition against expropriations without compensation, full protection and security and free transfer of fund.

ACIA also extends protections to non-ASEAN Member States investors by them becoming an ASEAN Investor. This can be done first by establishing a juridical entity in one of the ASEAN Member States. Then, this entity will become an ASEAN Investor by establishing another juridical entity in its target destination of investment in another ASEAN Member State. The former entity must own or control (have power to name a majority of its directors or legally direct its actions) the latter entity, and the former entity must carry out substantive business operations in the ASEAN Member States where it was established.

Dispute settlement, meanwhile, responds to instances where host country decisions, actions, inactions or the inability to make decisions may nullify or impair the value of an investment. In this case, ASEAN provides concerned investors with direct access to dispute settlement procedures such as taking action in domestic courts, conciliation, mediation or international arbitration.

ACIA also subscribes to the principles of non-discrimination which provides for National Treatment and Most Favoured Nation treatment to investors and covered investments within the ambit of ACIA. This means that, in general, ASEAN Investors and their investments are not to be discriminated against in any of the ASEAN Member States where they invest or where their investment is in. At the same time, ACIA allows investors to select senior management irrespective of any nationality, allowing investors to seek the best talents in the fields and to be able to work with people they can trust. ACIA also ensures that ASEAN Member States do not impose performance requirement which may put investors and their investment at the disadvantage over local investors or other third country investors.

As businesses and investors, especially from the small and medium enterprises, always requires transparency and facilitation, ACIA requires each ASEAN Member State to publish any international agreements to which they belong which pertain to investment, as well as all relevant measures pertaining to investment, be it laws, regulations or administrative guidelines. In order to ensure compliance with this obligation, each ASEAN Member State must establish an enquiry point to make available all the information mentioned above in response to inquiries made by potential investors or other ASEAN Member State.

Free Trade Agreements

ASEAN has developed friendly relations and mutually beneficial dialogues and relationships with several countries and regional groupings which are known as Dialogue Partners. ASEAN Dialogue Partners include Australia, Canada, China, European Union, India, Japan, Pakistan, New Zealand, Republic of Korea, Russia and United States.

ASEAN has signed several PTAs with some of the Dialogue Partners, including the PTAs with Japan, India, Republic of Korea, China, and Australia and New Zealand. Several of the PTAs feature "Investment Chapters" which regulate investment in the Parties to the PTAS and address liberalisation, protection, transfer of fund and dispute settlement matters. This shows that investment chapters or agreements between ASEAN and the Dialogue Partners and ACIA share salient similarities and they share most of the international best practices in protection of international investment.

BITs

ASEAN Member States have signed many FTAs witth various countries.[21] Figure 10 below shows that Brunei has six BITs, Cambodia has 21 BITs, Indonesia has 63 BITs, Lao PDR has 23 BITs, Malaysia has 67 BITs, Myanmar has 6 BITs, The Philippines has 35 BITs, Singapore and Thailand have 40 BITs each and Vietnam has 60 BITs.

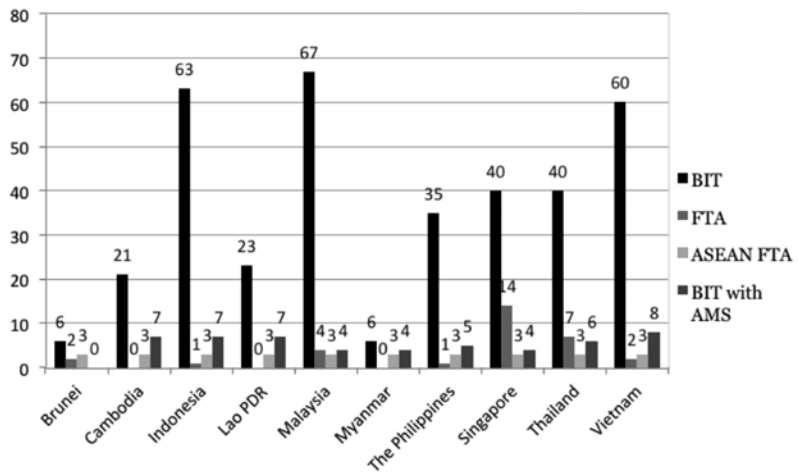

Figure 10: Bilateral Investment Treaties of ASEAN Member States

[21] This list is based on the date provided to UNCTAD and the national ministries' websites.

However, not many ASEAN member states have bilateral investment treaties with Australia or New Zealand. Australia has BITs with Indonesia, Lao PDR, The Philippines and Vietnam. This shows that not many ASEAN Member States have Bilateral Investment Treaty with Australia and New Zealand.

Compared to the Investment Chapters in the FTA, such as AANZFTA, the purpose of the BIT is not on the liberalising but providing a minimum standard of treatment based on the international best practices.

The post-establishment National Treatment under BITs provides the same guarantee under the National Treatment provision in free trade agreements. However, the host country retains the discretion to impose non-discriminatory measures to ensure investors' compliance with the national law and national policy consideration.

However, the standards of treatment accorded under the BIT have now taken a different path under the free trade agreements and to a certain extent ACIA with the adoption of the NAFTA style or US BIT Model which provides for national treatment or MFN treatment which is more favourable at both the pre-establishment and post-establishment stages.

Lawan suggests all ASEAN Member States share the same common principle that admission of foreign investment is based on the domestic laws and regulations of the host countries, so that all foreign investments may be subject to a government screening process.[22]

Generally, the objective of admission criteria for foreign investment of ASEAN Member States is to screen out the entry of investments in the negative lists and also to seek and to ensure that foreign investment which enters the ASEAN countries will continue to benefit the host countries, even after the commencement of the operation. The requirements to comply with internal laws and regulations of the host countries include compliance with planning and environmental controls and conditions for hiring local labour.

Regarding post-entry treatment of foreign investors, even though all BITs guarantee the free transfer or repatriation of profit derived from the investment, they are all subject to certain exceptions such as allowing for controls due to the balance of payment conditions or financial situation.

Even though all ASEAN BITs provide Most-Favoured-Nation treatment and some BITs even grant National Treatment, the protection is subject to or is

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[22] Lawan Thanadsillapakul, ASEAN Bilateral Investment Agreements, http://asialaw.tripod.com/articles/aseanbit2.html (last visit 14.4.2014)

under the limitation of the domestic laws of the host countries. Some agreements provided both Most Favoured Nation treatment and National Treatment but the two treatments were applied to different cases and conditions or different fields of protection.

CONCLUSION

The above discussion shows that ASEAN and ASEAN Member States are attractive investment destinations. ASEAN and ASEAN Member States seek to gain higher value of inward FDI and want to be able to invest outward by utilising the various investment agreements as a tool in the economic diplomacy practice.

The decision of ASEAN and ASEAN Member States to adopt ACIA and to pursue various forms of investment agreements must be seen against the challenging and changing investment landscapes in the region. The approach is part of a response to the significant regional intensification of locational competition affecting ASEAN Member States, most notably from China and India, both of which have attracted sustained levels of foreign direct investment in manufacturing and service industries over the past decades.

ASEAN Member States value the growth and development dividends that can flow from increased economic integration. There is a consensus, reflected in ACIA, that cross-border investment has a positive role to play in all ten ASEAN Member States and that investors should be encouraged to maintain and expand their investments throughout the region. Likewise, there is hope that more investors will emerge in the coming years. This is the background to ACIA and goes a long way towards explaining why it offers potentially significant advantages for investors doing business across the region.

ASEAN and its member states however will have to ensure that ACIA and other investment agreements are properly implemented at the national level. Whilst the more developed ASEAN Member States continue to attract high level and high quality of investment, they have to use economic diplomacy to assist the newer and the lesser developed ASEAN Member States towards adoption of the right policies and full implementation of measures in investment areas. Many of these Member States' laws and regulations require modernisation in order to comply with the international commitments and obligations. Many of them also lack technical expertise to develop and implement certain types of measures and the more developed ASEAN Member States should be willing to provide the required technical assistance.

In the context of economic diplomacy, the newer ASEAN Member States will gain by training officials in the field of international negotiation techniques. These Member States require officials who are able to negotiate and speak on their behalf.

They require officials who are conversant with international diplomacy and rule-making procedures in order to present the Member States' interests at the regional and international forums.

There are several areas that the more developed ASEAN Member States such as Malaysia can contribute to the development of the newer ASEAN Member States. One, Malaysia may offer its expertise in the negotiating techniques. Malaysian diplomats and negotiators are highly experienced in international, regional and bilateral negotiations, including in the trade and economic agreements. Officials from the newer ASEAN Member States may be able to learn from Malaysian officials about the intricacies of negotiations and dealing with various provisions of international agreements and treaties. Malaysia may also offer capacity building and training in specific areas such as scheduling of certain obligations and the preparation of the list of non-conforming measures in certain types of agreement.

In addition, Malaysia may assist the Member States in the implementation of international commitments at the national and sub-regional levels. For example, Malaysia may offer its expertise in central banking law on the implementation of the free transfer of funds, which is an important element in the international investment law. Malaysia could also offer its expertise in implementing intellectual property laws and policies including registration process and the enforcement of intellectual property rights.

Thirdly, Malaysia may assist the Member States on how to increase "the ease of doing business" which Malaysia is known to have implemented through the Special Task Force to Facilitate Business (PEMUDAH). The existence of PEMUDAH has contributed to the increase in Malaysia's ranking to sixth place in the "Ease of Doing Business" Ranking issued by the World Bank Group.[23]

In conclusion, Malaysia being an important and a more developed member of ASEAN has a significant role in ensuring the successful implementation of the AEC in the newer ASEAN Member States. The Ministry of Foreign Affairs through IDFR, together with other Ministries and agencies such as the Ministry of International Trade and Industry may extend their expertise to build capacity for these Member States. Capacity building programmes and other assistance extended to the newer ASEAN Member States will ensure that ASEAN and its Member States will continue to be at the forefront of the practice of economic diplomacy to achieve domestic and foreign policy objectives; and to achieve the objectives of the AEC Blueprint.

[23] See www.doingbusiness.org for more information on the ease of doing business ranking.

Significance of UNCLOS: Malaysia's Maritime Zones, Contemporary Legislations and Cases on Dispute Settlement

Jalila Abdul Jalil

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"For whatever we lose (like a you or a me),
It's always our self we find in the sea."
- e.e. cummings

ABSTRACT
Maritime issues have always been important to Malaysia as shown by her active participation in UNCLOS I, UNCLOS II and UNCLOS III since independence in 1957. The importance of establishing Malaysia's respective maritime zones is reflected in the promulgation of legislation on the continental shelf in 1966 and the territorial seas in 1969 which resulted in Notification No. 5745 of 21 December 1979 establishing a new map of the continental shelf of Malaysia. The 1979 Map, produced in large scale in two sheets, shows the territorial sea and continental shelf covering both Peninsular Malaysia, and Sabah and Sarawak. It shows Malaysia's maritime boundaries based on treaties, unilateral declarations, and a single maritime boundary line covering all its maritime sectors. The publication of the 1979 Map engendered much interest and protests especially from neighbouring states. Two disputes arising from the publication of the Map were resolved at the ICJ reflecting Malaysia's commitment in resolving disputes through peaceful means.

Keywords: Territorial Sea, Exclusive Economic Zone (EEZ), Continental Shelf, Legislation, United Nations Convention on the Law of the Sea (UNCLOS), Dispute Settlement Cases

INTRODUCTION

This commentary analyses the development of Malaysia's maritime zones as well as contemporary maritime zones legislations before and after the United Nations Convention on the Law of the Sea (UNCLOS) 1982. It also studies Malaysia's achievement in resolving disputes by means of dispute settlement mechanism as restated in UNCLOS.

The United Nations Convention on the Law of the Sea (UNCLOS) 1982, referred to as Law of the Sea Convention (LOSC), the outcome from the third United Nations Conference on the Law of the Sea (UNCLOS III), is the most comprehensive legal document relating to maritime matters. Opened for signature at Montego Bay on 10 December 1982, the Convention involved various experts i.e. diplomats, legal experts, cartographers, scientists, etc in the process of its drafting. The task in completing the draft convention was indeed challenging and when completed, represents one of the most celebrated documents to have reached consensus and universal participation.

Referred to as the "Constitution for the Oceans", it is "a package-deal" document which "recognized that the problems of ocean space are closely interrelated and need to be considered as a whole".[1] The Convention comprises 17 Parts, with 320 articles and nine annexes, covering various matters including the establishment of maritime zones, maritime boundary delimitation, navigational rights, pollution including protection and preservation of the marine environment, exploration, exploitation, conserving and managing natural resources, and dispute settlement. It also includes issues on the creation of exclusive economic zones (EEZ), outer limits of the continental shelf not exceeding 350 nautical miles (nm), legal status of archipelagic states and their waters, regime of islands, and the Area and principles governing it.

Malaysia and 119 other states signed it on that date. Fourteen years later, on 14 October 1996, Malaysia became the 107th State[2] to ratify UNCLOS coupled with its declaration signifying Malaysia as a State Party to UNCLOS. As of April 2014, there were 166 State Parties to the Convention.

HISTORICAL BACKGROUND

– MALAYSIA'S MARITIME ZONES, UNCLOS I AND II

Malaysia (then Malaya) was a participant to the first United Nations Conference on the Law of the Sea 1958 or UNCLOS I. During UNCLOS I, the issue concerning the breadth of the territorial sea was debated with various submissions proposed from 3 nm up to 200 nm but consensus on that was not reached.[3] Despite this failure, UNCLOS I was considered successful as four conventions were adopted, namely, the 1958 Convention on the Territorial Sea and the Contiguous Zone, 1958 Convention on the High Seas, 1958 Convention on the Continental Shelf,

and 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas. Malaysia acceded to UNCLOS I on 21 December 1960.

In 1960, the Second United Nations Conference on the Law of the Sea (UNCLOS II) was convened to resolve issues relating to the breadth of the territorial sea and fishery limits. Malaysia continued its participation in this Conference. However, UNCLOS II failed to reach agreement on the issues concerned.[4]

Five years after acceding to UNCLOS I, and subsequent to its formation, Malaysia established its continental shelf by enacting legislation No. 57 of 1966 (Continental Shelf Act, 1966) on 28 July 1966. The provisions of the Act (consisting of Section 1 to 6 and a schedule) relates to the exploration and exploitation of the continental shelf adjacent to the States of Malaya and for matters connected therewith.

Based on UNCLOS I's Convention on the Continental Shelf, Malaysia adopted the continental shelf Convention to the Act including the definition as stipulated in Section 2. The "continental shelf" definition in the 1966 Act mentioned the depth which is 200 metres below the surface of the sea. The Act defines "continental shelf" as "the sea-bed and subsoil of those submarine areas adjacent to the coast of the States of Malaya but beyond the limits of the territorial waters adjacent to those States, the surface of which lies at a depth no greater than 200 metres below the surface of the sea, or, where the depth of the superadjacent waters admits of the exploitation of the natural resources of the said areas, at any greater depth": provided in the case of the west coast of the States of Malaya, the extent of the continental shelf shall be determined in accordance with Article 6 of the 1958 Geneva Convention on the Continental Shelf, as set out in the Schedule of the Act. Section 3 of the Act is also important as it provides the rights with respect to the continental shelf and its natural resources and for the purpose of exploring the shelf and exploiting those resources the authority is vested with the Federation and exercisable by the Government of the Federation.

The Continental Shelf Act 1966 was amended for the first time in 1972 through Act No. 57 of 28 July 1966, as amended by Act No. 83 of 1972. The Act took into account that Malaysia is one entity, hence amended the word "States of Malaya" to "Malaysia" and also the word "adjacent to those States" to "of the States".

Following the Continental Shelf Act 1966, Malaysia also enacted Act No. 58 of 1966 (Petroleum Mining Act 1966) with regard to mining for petroleum and matters connected therewith. These legislations emphasised "Malaysia's claim for sovereign rights over the continental shelf for exclusive rights for the exploration of natural (non-living) resources"[5] keeping in mind economic considerations. NM Ali commented that "the Continental Shelf 1966, Petroleum Mining Act 1966

and two other legislations, Petroleum Income Tax Act 1967 and Petroleum Ming Rules 1968, were the results of the study done by Walter J. Levy appointed by the Malaysian government to review the Malaysian petroleum policy".[6]

Thereafter, Malaysia extended its territorial sea limit from 3 to 12 nm on 2 August 1969 through the Emergency (Essential Powers) Ordinance No. 7 of 1969 under Article 150 (2) of the Constitution. The Ordinance related to territorial sea applies throughout Malaysia.[7] Section 3(1) of the Ordinance declared the breadth of the territorial waters of Malaysia shall be 12 nm[8] and such breadth shall be measured in accordance with Articles 3, 4, 6, 7, 8, 9, 10, 11, 12 and 13 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone 1958. Section 4(2) mentioned that for the purposes of the Continental Shelf Act 1966, the Petroleum Mining Act, the National Land Code and any written law relating to land in force in Sabah and Sarawak, and any reference to territorial be construed as a reference to such part of the sea adjacent to the coast thereof not exceeding three nautical miles measured from the low water mark. The Ordinance also stated that the expression "territorial sea" shall be construed as "territorial waters" and that a large-scale map indicating the low water marks, the baselines, the outer limits and areas of the territorial waters of Malaysia shall be published from time to time.[9]

R. Haller-Trost opined that Ordinance No. 7 "was promulgated in 1969 and under special emergency powers [and] has to be viewed in context with the political developments in Malaysia at that time".[10] She further explained that "According to the preamble of Ordinance No. 7, the Yang di-Pertuan Agong was satisfied at the time that immediate action was required to promulgate the delimitation of the territorial waters of Malaysia. This urgency was imperative not only for the petroleum sector but also due to the imminent conclusion of a treaty with Indonesia with regard to the delimitation of the continental shelf between the two countries".[11]

The delimitation mentioned was in the northern part of the Straits of Malacca, in which both Malaysia and Indonesia signed the "Agreement between the Government of Malaysia and the Government of the Republic of Indonesia on the Delimitation of the Continental Shelves between the Two Countries" on 27 October 1969 which came into force on 7 November 1969.

Further to the No. 7 Ordinance, Emergency (Essential Powers) Ordinance No.11 of 1969 was promulgated on 3 November 1969. It amended Section 3(1) and Section 4(2) of the Emergency (Essential Powers) Ordinance, No. 7 of 1969. The amendment set out in the Schedule (Section 2) reads: "The breadth of the territorial waters of Malaysia shall be twelve nautical miles and such breadth shall except in the Straits of Malacca, the Sulu Sea and the Celebes Sea be measured in accordance with Articles 3, 4, 6, 7, 8, 9, 10, 11, 12 and 13 of the 1958 Geneva

Convention on the Territorial Sea and Contiguous Zone 1958, which Articles are set out in the Schedule hereto". Ordinance No.11 inserted the word "waters" after "territorial" and reads as follows: "For the purposes of the Continental Shelf Act 1966, the Petroleum Mining Act, the National Land Code and any written law relating to land in force in Sabah and Sarawak any reference to territorial waters therein shall in relation to any territory be construed as a reference to such part of the sea adjacent to the coast thereof not exceeding three nautical miles measured from the low water mark".

Ordinance No.11 states the breadth of the territorial waters of Malaysia shall be 12 nm except in the Straits of Malacca, the Sulu Sea and the Celebes Sea as these maritime areas are based on negotiation and treaties.

Malaysia enacted the Petroleum Development Act 1974 which provides "for the rights of exploration and exploitation of petroleum whether offshore or onshore and identifies PETRONAS as the national petroleum company".[12] The establishment of PETRONAS is viewed as a better proposition[13] as the entire ownership, exclusive rights, powers, liberties and privileges of exploiting, exploring, winning and obtaining petroleum whether offshore or onshore of Malaysia is managed by a national company.

Based on observations, having established its territorial sea and continental shelf, Malaysia then through Notification No. 5745 dated 21 December 1979 issued a new map of the continental shelf of Malaysia. The 1979 map defined the boundary of the continental shelf of Malaysia and has been published and deposited with the Director General of National Mapping, Directorate of National Mapping of Malaysia. The map produced in large scale in two sheets shows the territorial sea and continental shelf covering both Peninsular Malaysia, and Sabah and Sarawak. In addition, the map shows Malaysia's maritime boundaries delimitation based on treaties and by unilateral declaration, and shows a single maritime boundary line in all sectors of its maritime boundaries. The publication of the 1979 Map created a lot of interest especially among neighbouring states. Some issues relating to protests on the 1979 Map will be dealt with in the latter part of this article under the heading of dispute settlement.

The next maritime zone proclaimed by Malaysia, on 25 April 1980, is the EEZ that states that "...international law and practice now recognise that a coastal state may establish an exclusive economic zone in an area beyond and adjacent to the territorial waters up to a distance of 200 nautical miles from the baselines from which the breadth of the territorial waters is measured". In establishing the EEZ, Malaysia has the sovereign rights over the natural resources in the sea-bed and subsoil of its continental shelf and jurisdiction with regard to establishment and use of artificial islands, installations and structures, marine scientific research

including the preservation of the marine environment. At the same time, Malaysia's practice is consistent with that of other states as stated in the proclamation "...a number of States have taken action in pursuance of the existing law and practice and have made declarations in regard to their exclusive economic zones".

Further to the EEZ proclamation, "on 28 April 1980, the then Acting Minister of Law, Tan Sri Datuk Haji Abdul Kadir Yusof made an announcement asserting Malaysia's rights and responsibilities in the newly proclaimed EEZ"[14] where he stated that "[T]he proclamation over our EEZ is consistent with current State practice...We will enjoy exclusive rights over fishery resources of the zone...I would like to state here that the proclamation is only in respect of living resources, marine scientific research and preservation of the marine environment".[15]

Also, by establishing an EEZ of 200 nm means "the water column above the continental shelf within the EEZ came under the jurisdiction of Malaysia".[16] Another important point to note is that Malaysia was indeed ahead of time (before UNCLOS 1982) when it proclaimed the territorial sea, continental shelf, and EEZ in 1966, 1969, and 1980 respectively.

DEVELOPMENTS SINCE UNCLOS III AND CONTEMPORARY MALAYSIA'S MARITIME-ZONE RELATED LEGISLATIONS

During UNCLOS III, "Malaysia had supported the Group 77 position on the EEZ proposal of 200 miles"[17] and "fought hard in favour of coastal State sovereignty and sovereign rights over an expanded area of maritime zones".[18] At the same time, Malaysia's proclamation on EEZ in 1980 "fortifies Malaysia's quest to develop its management of surrounding seas and resources. ...Malaysia's policy with regard to national ocean affairs thus, its acceptance of the LOSC, reflect its national priority and requirements regarding its marine affairs".[19]

EEZ Act 1984 and Fisheries Act 1985

Two years after signing UNCLOS 82, Malaysia enacted the EEZ Act 1984. The Act pertains to the EEZ and continental shelf of Malaysia and regulation of activities in this zone. In 1985, Malaysia enacted its Fisheries Act which stated "Malaysian fisheries waters" which means "maritime waters under the jurisdiction of Malaysia over which exclusive fishing rights or fisheries management rights are claimed by law and includes the internal waters of Malaysia, the territorial sea of Malaysia and the maritime waters comprised in the exclusive economic zone of Malaysia".[20] "The adoption of 'Malaysian fisheries waters' resembles some concepts introduced by Law of the Sea albeit briefly and was consistent with the practices of many developing countries, which favoured the EEZ regime. The regime empowered coastal States with sovereign rights over resources in adjacent maritime areas of up to 200 nm".[21]

Based on UNCLOS 1982, Malaysia established its territorial sea, continental shelf and EEZ. In this regard, Malaysia's Declaration upon Ratification of the Convention of the Law of the Sea on 14 October 1996 mentioned Malaysia's adoption on single maritime boundary i.e., a single continental shelf line/EEZ boundary line and this is depicted in the 1979 map.

Malaysia's position under paragraph 7 of the Declaration reads:

> The Malaysian Government interprets article 74 and article 83 to the effect that in the absence of agreement on the delimitation of the exclusive economic zone or continental shelf or other maritime zones, for an equitable solution to be achieved, the boundary shall be the median line, namely a line every point which is equidistant from the nearest points of the baselines from which the breadth of the territorial sea of Malaysia and of such other States is measured.
>
> Malaysia is also of the view that in accordance with the provisions of the Convention, namely article 56 and article 76, if the maritime area is less [than] or to a distance of 200 nautical miles from the baselines, the boundary for the continental shelf and the exclusive economic zone shall be on the same line (identical).[22]

Malaysian Maritime Enforcement Agency Act 2004

Malaysia enacted its Malaysian Maritime Enforcement Agencies (MMEA) Act 2004 in relation to enforcement functions for ensuring the safety and security of the Malaysian Maritime Zone for the protection of maritime and other national interests in the related zone and for matters necessary or connected therewith.

The coverage of the MMEA includes the Malaysian Maritime Zone from the internal waters, territorial sea, continental shelf, exclusive economic zone and the Malaysian fisheries waters and the air space over the Zone, as well as extends to the high seas.

Each maritime zone has been defined as follows:

i) internal waters means any areas of the sea that are on the landward side of the baselines from which the breadth of the territorial sea of Malaysia is measured;
ii) territorial sea means the territorial waters of Malaysia as determined in accordance with the Emergency (Essential Powers) Ordinance, No.7 of 1969;
iii) exclusive economic zone means the exclusive economic zone of Malaysia as determined in accordance with the Exclusive Economic Zone Act 1984;
iv) continental shelf means the continental shelf of Malaysia as defined under section 2 of the Continental Shelf Act; and

v) Malaysian fisheries waters means Fisheries waters as defined under section 2 of the Fisheries Act 1985.

The functions of the MMEA are: to enforce law and order under any federal law; to perform maritime search and rescue; to prevent and suppress the commission of an offence; to lend assistance in any criminal matters on a request by a foreign state as provided under the Mutual Assistance in Criminal Matters Act 2002; to carry out air and coastal surveillance; to provide platform and support services to any relevant agency; to establish and manage maritime institutions for the training officers of the Agency; and generally to perform any other duties ensuring maritime safety and security to all matters incidental thereto.

Baselines of Maritime Zones Act 2006

This act is another important legislation and provides for the declaration of geographical co-ordinates of base-points for the purpose of determining the baselines of Malaysia and for other matters connected therewith.

Section 5 of the act states that "the baselines for the purpose of determining the maritime zones of Malaysia shall be: (a) the low-water line along the coast as marked on large scale charts; (b) the seaward low-water line of a reef as shown by the appropriate symbol on charts; or (c) the low-water line on a low-tide elevation that is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island. Section 5(2) also mentions that "in respect of any area for which geographical coordinates of base points have been declared under Section 4, the method of straight baselines interpreted as geodesics joining the consecutive geographical coordinates of base points so declared may be employed for determining the maritime zones of Malaysia".

As for maps and charts, Section 7(2) of the Act states that they shall be those prepared and issued by the Director General of Survey and Mapping, Malaysia or by the Director General of the Royal Malaysian Hydrographic Department respectively. The maps show any matter relating to the geographical coordinates of base points, the baselines, the outer limit lines and the lines of delimitation of the maritime zones of Malaysia; or the low-water line along the coast delineated on large-scale charts or maps.[23]

Amendments to Continental Shelf Act 1966

Further to the abovementioned, in 2009 Malaysia amended its Continental Shelf Act 1966 to provide for Malaysia's preparation for the extended continental shelf claim. Under UNCLOS, a coastal state may extend its continental shelf beyond 200 nm. Article 76 and Annex II and Article 4 of UNCLOS 1982, declare that coastal states which wish to establish an outer limit of its Continental Shelf beyond the 200 nautical mile limits need to submit scientific and technical data for its claim to the Commission on the Limits of the Continental Shelf (CLCS).

The amendment to the Continental Shelf Act 1966 includes the definition for "continental shelf". As mentioned, the definition amended Act No. 57 of 28 July 1966 by Act No. 83 of 1972 and defined "continental shelf" as "the sea-bed and subsoil of submarine areas adjacent to the coast of Malaysia but beyond the limits of the territorial waters of the States, the surface of which lies at a depth no greater than two hundred metres below the surface of the sea, or, where the depth of the superadjacent waters admits of the exploitation of the natural resources of the said areas, at any greater depth".

The Continental Shelf Act 1966 was amended to be in line with the continental shelf provisions of UNCLOS 1982. The 2009 amendment defines "continental shelf" as "sea-bed and subsoil of the submarine areas that extend beyond the territorial sea –

a) throughout the natural prolongation of the land territory of Malaysia to the outer edge of the continental margin as determined in accordance with Section 2B; or

b) to a distance of two hundred nautical miles from the baselines from which the breadth of the territorial sea is measured in accordance with the Baselines of Maritime Zones Act 2006 where the outer edge of the continental margin does not extend up to that distance,

but shall not affect the territory of the States or the limits of the territorial waters of the States and the rights and powers of the States Authorities therein.

The 2009 amendment incorporated Section 2A in relation to the delimitation of the continental shelf between Malaysia and a country with opposite or adjacent coasts and reads, "Where there is an agreement in force relating to the delimitation of the continental shelf between Malaysia and a country with an opposite or adjacent coast, any question relating to the delimitation of the continental shelf shall be determined in accordance with the provisions of that agreement". Section 2B refers to continental shelf limit and continental margin and reads:

1) The continental shelf of Malaysia shall not extend beyond the limits provided for in subsections (3), (4), (5) and (6).

2) The continental margin comprises the submerged prolongation of the land mass of Malaysia and consists of the sea-bed and subsoil of the shelf, the slope and the rise but does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.

3) Wherever the continental margin extends beyond two hundred nautical miles from the baselines from which the breadth of the territorial sea is measured, the outer edge of the continental margin shall be established by either –

a) a line delineated in accordance with subsection (7) by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least one per cent of the shortest distance from such point to the foot of the continental slope; or

b) a line delineated in accordance with subsection (7) by reference to fixed points not more than sixty nautical miles from the foot of the continental slope.

4) For the purpose of subsection (3), in the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

5) The fixed points comprising the line of the outer limits of the continental shelf on the sea-bed, drawn in accordance with subsection (3), either shall not exceed three hundred and fifty nautical miles from the baselines from which the breadth of the territorial sea is measured or shall not exceed one hundred nautical miles from the two thousand and five hundred metre isobath, which is a line connecting the depth of two thousand and five hundred metres.

6) Notwithstanding subsection (5), on submarine ridges, the outer limit of the continental shelf shall not exceed three hundred and fifty nautical miles from the baselines from which the breadth of the territorial sea is measured but does not include submarine elevations that are natural components of the continental margin such as its plateaux, rises, caps, banks and spurs.

7) The outer limits of the continental shelf shall be delineated, where that shelf extends beyond two hundred nautical miles from the baselines from which the breadth of the territorial sea is measured, by straight lines not exceeding sixty nautical miles in length, connecting fixed points, defined by coordinates of latitude and longitude.

8) This section shall be without prejudice to the question of delimitation of the continental shelf between Malaysia and its neighbouring countries with opposite or adjacent coasts."

Another important amendment pertaining to Section 3 of the principal Act is amended by inserting a subsection, Section 3(2), which states: "If Malaysia does not undertake to exercise the rights with respect to the exploration of the continental shelf or the exploitation of its natural resources, no one or no other country may exercise such rights except with the express consent of Malaysia".

Finally, Section 4 was also amended by inserting Section 4A in terms of financial obligations. It states that, "Any financial obligation for the purposes of the exploitation of the non-living resources of the continental shelf beyond two hundred nautical miles will be in accordance with Part VI of the 1982 United Nations Convention on the Law of the Sea".

Territorial Sea Act 2012

The latest Act enacted is the Territorial Sea Act 2012 in relation to the territorial sea of Malaysia and for connected matters and which came into force on 22 June 2012. In this regard, the Act annulled the Proclamation of Emergency issued by the Yang di-Pertuan Agong on 15 May 1969 under Article 150 of the Constitution and the Emergency (Essential Powers) Ordinance, No. 7 of 1969 pertaining to territorial waters which will no longer be applicable.

Among the important provisions is Section 3(2) which states that the baselines from which the breadth of the territorial sea is to be measured shall be in accordance with Section 5 of the Baseline of Maritime Zones Act 2006. Section 3(3) states that for the purposes of the Continental Shelf Act 1966, the Petroleum Mining Act 1966, the National Land Code [Act56/65] and any written law relating to land in force in Sabah and Sarawak, any reference to territorial sea therein shall in relation to any territory be construed as a reference to such part of the sea adjacent to the coast thereof not exceeding 3 nm measured from the low-water line.

Section 4 stipulates that the sovereignty in respect of the territorial sea, and in respect of its bed and subsoil, is vested in and exercisable by the Yang di-Pertuan Agong in right of Malaysia. Section 5 states that maps and charts relating to the limits of the territorial sea showing the low-water line along the coast delineated on large-scale charts or maps may be prepared and issued.

PROVISIONAL MEASURES PENDING DELIMITATION

The provisions under UNCLOS 1982 specifically Article 83(1) relating to delimitation mentions that "the delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution".

Nonetheless, Article 83(3) mentions that "Pending agreement as provided for in paragraph 1, the States concerned, in a spirit of understanding and cooperation, shall make every effort to enter into provisional arrangements of a practical nature and, during this transitional period, not to jeopardize or hamper the reaching of the final agreement. Such agreements shall be without prejudice to the final delimitation".

Raudin Anwar opines that "Bilateral agreements on the continental shelf usually stipulate the provision or clause concerning the resource deposits which

straddle in the overlapping boundary. This provision is important since the resource deposits on one side could be exploited by the other side and under this provision each coastal state could explore and exploit the natural resources. Such a provision can be found in agreements".[24]

Malaysia has, in this regard, practised these options by embarking on exploration and exploitation of hydrocarbon resources pending delimitation. The first agreement between Malaysia and Thailand, on 21 February 1979, was a Memorandum of Understanding on the Establishment of the Joint Authority for the Exploitation of the Resources of the Sea Bed in a Defined Area of the Continental Shelf of the Two Countries in the Gulf of Thailand. The MoU amongst others allowed for the establishment of a joint authority for the purpose of exploring and exploiting the non-living resources of the sea-bed and subsoil in the overlapping area. On 22 August 1990, the Malaysia-Thailand Joint Authority Act 1990 was enacted for that purpose.

The MTJA allows for the exploration and exploitation of hydrocarbon resources in the overlapping area known as the "Joint Development Area" (JDA). A Malaysian government statement on 23 January 2013 noted that "The Malaysia-Thailand Joint Authority or MTJA was established some 23 years ago.... [It] marked yet another milestone to the bond of traditional link between the two neighbouring countries of ASEAN. Indeed the formation of MTJA reflects the great wisdom and foresight as well as goodwill of leaders of both countries to jointly initiate new opportunities for peace, stability, cooperation and mutual benefits".[25]

The second agreement, the "Memorandum of Understanding between Malaysia and the Socialist Republic of Vietnam for the Exploration and Exploitation of Petroleum in a Defined Area of the Continental Shelf Involving the Two Countries" was signed on 5 June 1992. It stipulated that both parties agree, pending final delimitation of the boundary lines of their continental shelves pertaining to the Defined Area, through mutual cooperation, explore and exploit petroleum in that area. Malaysia and Vietnam agreed to nominate their national oil companies PETRONAS and PETROVIETNAM, to undertake the exploration and exploitation of petroleum in the Defined Area. Both companies agreed to enter into a commercial arrangement on 25 August 1993 which "envisages the establishment of a Coordination Committee to provide policy guidelines for the management of petroleum operations in the Defined Area, operating on the principle of a unanimous vote. The Coordination Committee consists of eight members (of whom four members shall be appointed by PETRONAS and PETROVIETNAM respectively) with equal voting rights".[26]

DISPUTE SETTLEMENT CASES RELATING TO MALAYSIA

Although issues concerning sovereignty do not fall within the ambit of UNCLOS, the mechanism of settlement of disputes is restated under Part XV of UNCLOS

1982. In fact Malaysia had twice experienced dealing with cases before the International Court of Justice (ICJ) and once with the International Tribunal for the Law of the Sea (ITLOS).

As stated by The Permanent Representative of Malaysia to the United Nations at the Plenary Meeting of the General Assembly in commemoration of the thirtieth anniversary of the 1982 United Nations Convention on the Law of the Sea on 11 December 2012, "Malaysia had demonstrated and made use of the provisions under UNCLOS 1982 for settlement of disputes. Our clear adherence to the arbitration processes in settling disputes was evident in the case of Ligitan and Sipadan, and in the case of Batu Puteh/Pedra Branca, Middle Rocks and South Ledge before the International Court of Justice (ICJ). In both cases, Malaysia have respected the decisions of the Court, irrespective of whether the decisions favoured Malaysia or otherwise".[27]

In addition, Malaysia also referred the case concerning land reclamation by Singapore in and around the Straits of Johor to the International Tribunal for the Law of the Sea (ITLOS) in 2003.

Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan between (Indonesia/Malaysia)

The dispute between Malaysia and Indonesia over Pulau Ligitan and Pulau Sipadan sovereignty "became an issue in 1969 during negotiations on the delimitation of the continental shelf boundaries".[28] The two countries "mutually agreed to peacefully resolve the dispute through the involvement of a third party, on the basis of international law".[29] In 1996, Indonesia and Malaysia agreed the case be submitted to the ICJ and that any decision of the ICJ should be accepted as final and binding. "The peaceful resolution …was not only unprecedented for Southeast Asia but it also established a good model for the pacific settlement of disputes. The best solutions for problems between nations are normally secured through friendly negotiations".[30]

The court in this case held that neither Indonesia nor Malaysia had a treaty-based title to the islands in dispute and later resorted to examine whether any of the parties could hold the title to the islands based on *effectivités*, or acts constituting a "relevant display of authority which leave no doubt as to their specific reference to the islands in dispute as such".[31]

The Court held that Indonesia's claimed based on *effectivités* "were not of a legislative or regulatory character" and rejected Indonesia's argument. The court then considers the evidence of *effectivités* submitted by Malaysia. The court found "that the measures Malaysia had taken to regulate and control the collection of turtle eggs in Ligitan and Sipadan and the establishment of a bird reserve on Sipadan "were sufficient administrative to "show a pattern revealing an intention

to exercise State functions in respect of the two islands in the context of the administration of a wider range of islands".[32] Hence, the Court awarded the case to Malaysia on the basis of the *effectivités* referred to above and that "sovereignty over Pulau Ligitan and Pulau Sipadan belongs to Malaysia".[33]

The ICJ was only to resolve the issues of sovereignty over the two islands and not delimitation. Therefore, following the post-ICJ decision, negotiations between Malaysia and Indonesia are currently ongoing in relation to the maritime boundary delimitation in these areas to discuss matters pertaining to baselines, basepoints and establishment of the respective maritime zones (i.e., territorial sea, exclusive economic zone (EEZ) and continental shelf).

Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)

The dispute arose when Malaysia published its "Territorial Waters and Continental Shelf Boundaries of Malaysia" known as the 1979 Map which indicated Batu Puteh as being within Malaysia's territorial waters. Singapore protested the inclusion of Batu Puteh in the 1979 Map on 14 February 1980, and during bilateral negotiations in February 1993 she included the other two marine features, namely, Middle Rocks and South Ledge in its claim on Pedra Branca/Batu Puteh. In 1994, both Malaysia and Singapore agreed to refer the case to the ICJ for peaceful adjudication by a third party. Malaysia chose to resolve the issues through adjudication as "Adjudication by the ICJ was the best assurance of securing a credible, lasting solution that would be respected by both parties".[34]

Throughout the case, Malaysia's argument that it had original title to Batu Puteh was accepted by the Court which noted that "throughout the entire history of the old Sultanate of Johor, there is no evidence that any competing claim had ever been advanced over the islands in the area of the Straits of Singapore. The Court hence concluded that the Sultanate of Johor had original title to Pedra Branca/Batu Puteh".[35] The "continuous and peaceful display of territorial sovereignty" was seen through the relationship between the Sultanate of Johor and the Orang Laut ("the people of the sea"). Contemporary official reports by the British described the nature and level of relationship between the two parties and confirmed the ancient original title of the Sultanate of Johor to those islands, including Pedra Branca/Batu Puteh.

The most important issue which the Court finally examined was the conduct of the claimants after 1953 in support of Singapore's claim. These included the absence of reaction from Malaysia to the flying of the Singapore ensign on the island, the installation by Singapore of military communication equipment, the investigation of shipwrecks by Singapore within the island's territorial waters, and the permission granted or not granted by Singapore to Malaysian officials to

survey the waters surrounding the island, which may be seen as conduct *à titre de souverain*. Hence, the Court concluded that sovereignty over Pedra Branca/Batu Puteh belongs to Singapore.

In relation to Middle Rocks, "the Court held that the original title remains with Malaysia as the successor to the Sultan of Johor".[36] As for South Ledge, the Court held that it fell within the overlapping territorial waters generated by the mainland of Malaysia, Pedra Branca/Batu Puteh and Middle Rocks.[37]

The ICJ decision in 2008 awarded Pedra Branca/Batu Puteh to Singapore and Middle Rocks to Malaysia while South Ledge is to be determined to belong to the State in whose territorial waters it is located. The Court was to resolve the issues of sovereignty and not delimitation. As such, negotiations are currently ongoing on the maritime boundary delimitation in this area in regard to baselines and basepoints for both Malaysia and Singapore in the respective maritime zones (territorial sea, exclusive economic zone (EEZ) and continental shelf).

Case Concerning Land Reclamation by Singapore In and Around the Straits of Johor (Malaysia v. Singapore)

Malaysia referred the case to ITLOS on 5 September 2003 under Annex VII of the United Nations Convention on the Law of the Sea 1982. The dispute pertains to land reclamation activities carried out by Singapore which impinged on Malaysia's rights in and around the Straits of Johor which separates the island of Singapore from Malaysia.[38]

Malaysia requested for provisional measures stating that Singapore's action in engaging in land reclamation around Pulau Tekong and Tuas was causing serious and irreversible damage to the marine environment and seriously prejudicing the rights of Malaysia. The land reclamation activities by Singapore were seen as producing major changes to both the flow regime and sedimentation and effecting coastal erosion. As such, Malaysia sought to preserve its rights relating to the maintenance of the marine and coastal environment and the preservation of its rights of maritime access to its coastline, as guaranteed under UNCLOS. Malaysia also relied upon the precautionary principle which, under international law, must direct any State Party in the application and implementation of its obligations under the Convention.

On 26 April 2005, Malaysia and Singapore submitted to a Settlement Agreement which, among others, stated it is in full and definitive settlement of the dispute with respect to land reclamation and all other issues related thereto. The Parties agree that the issue pertaining to the maritime boundaries be resolved through amicable negotiations, without prejudice to the existing rights of the Parties under international law to resort to other pacific means of settlement.

The Tribunal in this case unanimously agreed for Malaysia and Singapore to cooperate and enter into consultations by establishing a group of independent experts with the mandate to conduct a study, on terms of reference to be agreed by both countries within one year from the date of the order which was 1 September 2005. The study was to propose appropriate measures to deal with any adverse effects of the land reclamation activities. In addition, the study seeks to prepare an interim report on the subject of infilling works in Area D at Pulau Tekong. The Tribunal also stated that Malaysia and Singapore should exchange on a regular basis information on and assess risks or effects of Singapore's land reclamation works.

The Tribunal unanimously directed Singapore not to conduct its land reclamation in ways that might cause irreparable prejudice to the rights of Malaysia or serious harm to the marine environment, taking especially into account the reports of the group of independent experts.

CONCLUSION

Maritime issues have always been important to Malaysia and this is indeed proven as after gaining its independence in 1957, Malaysia actively participated in UNCLOS I in 1958 and UNCLOS II in 1960 and promulgated its legislation on the continental shelf in between the two years and the territorial seas in 1969. Indeed the establishing of both territorial sea and continental shelf complemented its national laws and reflects their importance especially for exploration and exploitation of resources.

The importance and securing of the respective maritime zones and areas is reflected in the publication of the official 1979 Map. Signing and ratifying UNCLOS 1982 shows the importance and appreciation of maritime issues to Malaysia. At the same time, it also shows Malaysia's commitment to resolving disputes through negotiations and peaceful means as evidenced in the three cases in the ICJ and ITLOS.

CHRONOLOGY OF MALAYSIA'S MARITIME ZONES RELATED LEGISLATION		
NO.	LEGISLATION	DATE ENACTED
1.	Continental Shelf Act 1966	28 July 1966
2.	Petroleum Mining Act 1966	1 December 1966 - Peninsular Malaysia 8 November 1969 - Sabah and Sarawak
3.	Emergency (Essential Powers) Ordinance, No.7 of 1969	2 August 1969
4.	Emergency (Essential Powers) Ordinance, No.11 of 1969	3 November 1969
5.	Petroleum Development Act 1974	30 July 1974
6.	Exclusive Economic Zone Act 1984	24 December 1984
7.	Fisheries Act 1985	22 May 1985
8.	Baselines of Maritime Zones Act 2006	29 December 2006
9.	Territorial Sea Act 2012	22 June 2012

ENDNOTES

[1] Text of the United Nations Convention on the Law of the Sea (UNCLOS) 1982 at pp.3.

[2] See the status of the chronological lists of ratifications, accessions and successions of the United Nations website, under the Oceans and Law of the Sea www.un.org/Depts/los/reference_files/chronological lists_of_ratifications. htm

[3] See Doc. A/CN.4/90 and Add.1 – 6, Regime of the Territorial Sea. Comments by Governments on the Draft Provisional Articles Concerning the Regime of the Territorial Sea. Adopted by the International Law Commission at its Sixth Session. Vol. 11, 1955.

[4] Churchill, R.R and Lowe, A.V (1999). *The Law of the Sea, 3rd Edition*, Manchester University Press.

[5] Phiphat Tangsubkul. (1982). Chapter 2, Individual Approaches and Claims of ASEAN Countries On The Emerging Trends In The Law of The Sea, *ASEAN and the Law of the Sea*. Institute of Southeast Asian Studies (ISEAS), at p. 11.

[6] Ali, NM. Sustainability of Petroleum and Environmental Control in the Malaysian Petroleum Law, at pp 1. Retrieved from http://ddms.usim.edu. my/bitstream/handle/123456789/1549/SUSTAINABILITY%20OF%20 PETROLEUM%20AND%20ENVIRONMENTAL%20CONTROL%20IN%20 THE%20MALAYSIAN%20PETROLEUM%20LAW.pdf?sequence=1

[7] See Section 2 of the Emergency (Essential Powers) Ordinance No.7, 1969.

[8] The breadth of the Federation of Malaya was previously 3 nautical miles. See Document A/CONF.19/4, Second United Nations Conference on the Law of the Sea, Official Records, Summary Records of Plenary Meetings and of Meetings of the Committee of the Whole, at p. 159.

[9] See Section 3(2) and 5(1) of the Emergency (Essential Powers) Ordinance No.7, 1969.

[10] Haller-Trost, R. (1998). The Contested Maritime and Territorial Boundaries of Malaysia. An International Law Perspective. International Boundary Studies Series. Kluwer Law International Publication, at p. 13.

[11] Ibid. Pp. 13 - 14.

[12] Hamzah, B.A. MIMA Report, *Implementing The United Nations Convention on the Law of the Sea*, 1982, Maritime Institute of Malaysia (MIMA).

[13] Ali, NM. Sustainability of Petroleum and Environmental Control in the Malaysian Petroleum Law, at pp 1. Retrieved from http://ddms.usim.edu. my/bitstream/handle/123456789/1549/SUSTAINABILITY%20OF%20 PETROLEUM%20AND%20ENVIRONMENTAL%20CONTROL%20IN%20 THE%20MALAYSIAN%20PETROLEUM%20LAW.pdf?sequence=1

[14] Ramli, Juita. (1998). A New Maritime Legal Regime for Malaysia Within the Context of Ocean Governance. MIMA National Conference on Ocean Governance in conjunction with The Year of the Ocean, Maritime Institute of Malaysia (MIMA), Kuala Lumpur, Malaysia, 16 – 17 June 1998, at p. 8.

[15] Ibid, at p.10.

[16] Phiphat Tangsubkul. (1982). Chapter 2, Individual Approaches and Claims of

ASEAN Countries On The Emerging Trends In The Law of The Sea, *ASEAN and the Law of the Sea*. Institute of Southeast Asian Studies (ISEAS), at p. 11.

[17] Hussain, Dr. Rajmah. (2009). *Malaysia At The United Nations. A Study of Foreign Policy Priorities, 1957 – 1987.* Ministry of Foreign Affairs Malaysia Publication, at p. 237.

[18] Ramli, Juita. (1998). A New Maritime Legal Regime for Malaysia Within the Context of Ocean Governance. MIMA National Conference on Ocean Governance in conjunction with The Year of the Ocean, Maritime Institute of Malaysia (MIMA), Kuala Lumpur, Malaysia, 16 – 17 June 1998, at p. 10.

[19] Ibid, at p. 10.

[20] See Section 2 of the Fisheries Act 1985.

[21] Ramli, Juita. (1998). A New Maritime Legal Regime for Malaysia Within the Context of Ocean Governance. MIMA National Conference on Ocean Governance in conjunction with The Year of the Ocean, Maritime Institute of Malaysia (MIMA), Kuala Lumpur, Malaysia, 16 – 17 June 1998, at p. 10.

[22] Malaysia's Declaration Upon Ratification of the Convention of Law of the Sea, 14 October 1996. Retrieved at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm

[23] Refer to Section 7(2) of the Baselines of Maritime Zones Act 2006.

[24] Raudin Anwar. (2009). Joint Development Zone: An Alternative Solution in Solving the Ambalat Case Between Indonesia and Malaysia. Journal Diplomatic, Vol. 1, No.2, Sept. 2009 at p. 104.

[25] Malaysia – Thailand Joint Authority Launching Ceremony: Coffee Table Book: Strength In Collaboration. Welcoming Remarks by Y.Bhg. Tan Sri Nor Mohamed Yakcop, Minister In The Prime Minister's Department. Intercontinental Hotel, Kuala Lumpur. 29 January 2013.

[26] Nguyen Hong Thao. (1999). Joint Development in the Gulf of Thailand. IBRU Boundary and Security Bulletin, Autumn 1999.

[27] Statement by H.E. Ambassador Hussein Haniff, Permanent Representative of Malaysia to the United Nations, at the Plenary Meeting of the General Assembly, devoted to the commemoration of the thirtieth anniversary of the opening for signature of the 1982 United Nations Convention on the Law of the Sea, New York, 11 December 2012, retrieved from www.un.int/malaysia/GA/67/2012-12-11 UNCLOS.pdf

[28] Kadir Mohamed, (2009). *Malaysia's Territorial Disputes – Two Cases at the ICJ*, Institute of Diplomacy and Foreign Relations (IDFR) Publication, at p. 36.

[29] Ibid, at p. 35.

[30] Ibid, at p. 49.

[31] Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment of the International Court of Justice (ICJ), 17 December 2002. See also International Law in Brief. The American Society of International Law. January 29, 2003. [http://www.asil.org/ilib/ilib0602.htm (12/02/1008)]

[32] International Law in Brief. The American Society of International Law. January 29, 2003. [http://www.asil.org/ilib/ilib0602.htm (12/02/1008)].

[33] Case Concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Judgment of the International Court of Justice (ICJ), 17 December 2002. See also International Law in Brief. The American Society of International Law. January 29, 2003. [http://www.asil.org/ilib/ilib0602.htm (12/02/1008)].

[34] Kadir Mohamed, (2009). *Malaysia's Territorial Disputes – Two Cases at the ICJ*, Institute of Diplomacy and Foreign Relations (IDFR) Publication, at p. 6.

[35] Tanaka, Yoshifumi. (2008). Passing of Sovereignty: The Malaysia/Singapore Territorial Dispute Before The ICJ. *Hague Justice Journal. Volume 3, No.2, 2008* at pg. 7. See also to Case Concerning Sovereignty Over Pedra Branca/ Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008 at paragraph 69.

[36] Ibid, at pg. 11. Refer also to Case Concerning Sovereignty Over Pedra Branca/ Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008 at paragraph 289 and 290.

[37] Kadir Mohamed, (2009). *Malaysia's Territorial Disputes – Two Cases at the ICJ*, Institute of Diplomacy and Foreign Relations (IDFR) Publication, at pg. 18. Refer also to Case Concerning Sovereignty Over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore), Judgment of 23 May 2008 at paragraph 297.

[38] See Order in the Case Concerning Land Reclamation by Singapore In and Around the Straits of Johor (Malaysia v. Singapore), Award on Agreed Terms, 1 September 2005.

The Contest of the Century

By Geoff Dyer
Review by Mohamed Ariff Mohamed Ali

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In his writings, Geoff Dyer has managed to provide an in-depth analysis of the continuous and emerging new age rivalry between China and the United States that has been destined to shape world politics in the 21st century. *The Contest of the Century* provides arguments that both juggernauts are currently embarking on a great power struggle that is seen and expected to continue for years to come.

The author views that the contest between both nations will take place on every international platform, namely, military, politics and economics. The book also highlights that the rise of China seeks to provide somewhat an effort at rebalancing of power with the United States, which is and still continues to be the most important nation in the world despite its inability to take dominant control like it used to. Throughout his writings, Dyer chooses to focus on China's efforts in making constructive and calculative efforts towards being a global player with ambitious global agendas.

The book first tackles the issue of military dominance whereby the author built his case by citing three events in recent times that have shaped China's current strategic predicament. These events that he quoted were the issue of the 'nine-dash line' communiqué that was addressed to United Nations Secretary-General Ban Ki-moon in May 2009, and followed by two events in 2010 whereby China did not respond to North Korea's attack on a South Korean warship that killed 46 sailors, and China's act to impose an embargo on the export of rare earths to Japan after the latter detained the captain of a Chinese trawler that had collided with two Japanese military vessels in Japanese-controlled waters. The book continues to emphasise and closely relates military power with that of economic and political might. He visualises that it is only with China's strong presence in all three areas will it become the world's main global actor surpassing the United States.

The author nevertheless also provides perspective on how China would struggle to unseat the United States as the main mover in world politics. He chooses to focus on the idea that China's new ambitions provide a sense of anxiety towards others especially in Asia region while the United States on the other hand have a continuous strong

hold on global influence despite China providing a strong challenge to the United States as a whole.

In reviewing this book, it is observed that the Chinese are also expanding is territorial claim and it is unwise to have a tendency to view China's policies as part of its long term strategic design to restore its centrality in Asia and to eventually displace the United States as the world premier superpower. This is in view of China's efforts to continuously improve and outdo itself. However, this book provides an alternative insight whereby it is viewed that given China's rapid economic growth in recent times, the country continues to adopt a more expansive vision of its national interests and modernising its military to match its vision. The challenge now is to distinguish between those policies of China that any other rising power would develop and those that could significantly and fundamentally alter the current global pecking order.

The book also emphasises that the United States must establish "a convincing long-term economic agenda" that binds the American economy to that of China. This is why the author views that stagnation in negotiations over the Trans-Pacific Partnership (TPP) would inadvertently be an enormous setback to the U.S' efforts to demonstrate that it has more to offer Asia than just its navy and military might. However, the catch is that China's neighbours would conclude that the U.S will protect them no matter what contingency arises. In sum, they may opt to free-ride on U.S security guarantees rather than develop their own capabilities.

Ideally, the real prize in the United States-China competition would be the "new model of great power relations" that President Obama and President Xi have proposed. It is hoped that both sides would be able to compete and collaborate in service of the global interest. Current leadership of both countries tend to lead towards stronger cooperation between both sides. However, this does not mask the fact that both countries will do whatever it is within their means to outdo each other in all international platforms.

Overall, I found this book to be a good additional piece of reading that is a useful need in our efforts to understand United States and China's mentality much better. The layout of the book is clearly documented and easy to understand from start to finish for everyone. The author's analysis on three main areas, mainly military, politics and economics well covers the issue on the future of China's bilateral changes to the lineup. The writing of this book intends to shed some light of the recent rise of both the United States and China on the international platform.

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