Free Trade Agreements are a result of a regulatory harmonisation between and within states; facts or fiction?

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Free Trade Agreements are a result of a regulatory harmonisation between and within states; facts or fiction?

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ABSTRACT

The paper argues that trade between nations and block of nations is conducted on several levels without interlocking regulations. The paper evaluates current practical utility of public law and private law trade harmonisation efforts in context of (i) the selected ASEAN Free Trade Agreements (FTAs), and (ii) the ASEAN and the OHADA trading blocks. The findings of such evaluation point out deficiencies of exclusively public law harmonisation approach and suggest that a broader, more methodically involved approach espousing 'behind-the-border' private law harmonisation is likely to lead to more significant utilisation of FTAs, a harmonisation of contract laws being the first step in that direction. This in turn is likely to result in greater business confidence and trading volumes between countries and trading blocks, which in itself appears as the perfectly justified normative aim driving the public policy (re)calibration.

Introduction

The architecture of world trade has been reshaped since Ernst Rabel proposed a uniform sales law in 1932. Since then many conventions and model laws have influenced various areas of laws and created harmonised approaches to legal problems such as in the areas of sale of goods and contract law in general. Conventions and model laws have been augmented by relatively new phenomena of harmonisation, namely the interregional and intraregional trade agreements. The effect is that a two tiered system is in place, namely Free Trade Agreements (FTA)¹ and conventions².

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This paper argues that trade between nations and block of nations is conducted on several levels without interlocking regulations. “Domestic law enriched by international conventions and transplantations must be understood against the backdrop of bilateral or multinational trade agreements” 1 However trade agreements and international conventions are operating on different levels, hence the approach to harmonisation processes differ.

Two possible models of trade harmonisation can be observed. The first one where harmonisation is achieved on a public laws level only, as observed in Australia’s proliferation of FTA’s. Secondly harmonisation is achieved or attempted what best could be described on a private law level as in the OHADA 4 group of nations which promulgated Uniform Laws but have not entered into bilateral or multilateral agreements with Australia.

The utility of harmonisation has been discussed at length and is not an issue in this paper. 5 However the importance of FTAs is “their increasingly comprehensive scope, which frequently includes treatment of border regulatory measures and complex behind- the- border regulatory issues.” 6 This paper argues that this is not the case and hence will investigate the question whether Australia’s parallel and separate FTAs with individual ASEAN as a block and with individual member states is a sound step in the direction of facilitating trade or simply a public policy failure? The question is justified in view that “a review of trade facilitation performance shows that there are great disparities among ASEAN countries and their FTA partners.” 8

The Problem - restated

The question is whether a trader is better served dealing with a country where commercial Uniform laws are in place but no FTAs or the reverse is applicable. There is no denying that the fundamental goal of any harmonised sales laws such as article 2 of the UCC, the CISG and the Common European Sales Law (as currently discussed in Europe) is to reduce “transaction costs imposed in cross-border sales by non-unified law in the jurisdiction whose law might potentially apply.” 9 This view is echoed by the Export Council of Australia noting in their Trade Policy Recommendations that a whole- of- government approach is required in

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1 This paper will refer to these types as public law harmonisation.
2 This paper will refer to these developments as private law harmonisations
4 OHADA stands for: Organisation pour Harmonisation en Afrique du Droit des Affaires
5 See for example Mads Andenas and Camilla Baasch Andersen (ed), Theory and Practice of Harmonisation, Edward Elgar (2011)
7 ibid at 2.
8 Marn-Heong Wong and Pelland, Marie Isobella, Trade Facilitation: The Way Forward for ASEAN and its FTA Partners, Economic Research Institute for ASEAN and East Asia, Policy Brief no 2012-04, July 2012., 1
order to reduce red and green tape, hence eliminating unnecessary duplications and therefore lower the facilitation costs associated with trade.\(^\text{10}\)

Reduction of costs as well as certainty in cases of disputes is of particular interest especially for investors where an enforcement of disputes behind the border can cause problems. As it stands currently they can enliven the dispute resolution clause in a Bilateral Investment Treaty (BIT) or a Free Trade Agreement (FTA) between Australia and the host State. This avenue allows the investor to retain a degree of bargaining power as it allows “protected entities to bargain in the shadow of the law”.\(^\text{11}\)

However this avenue is blocked as the Australian Government has not entered into any BIT’s or FTA’s with any of the OHADA nations, nor any African State for that matter. Even if the Governments would enter into an agreement in future it would not currently include investor-State dispute resolution procedures. The Gillard Government in April 2011 on the advice of the Productivity Commission announced this shift of policy.\(^\text{12}\)

As the ASEAN-Australian-New Zealand Agreement (ASEANANZ) is the most recent agreement it will be used as the “control unit” and other FTA’s and ATIGA\(^\text{13}\) will be measured against it. Another reason is that “The ASEANANZ is the agreement with the most comprehensive trade facilitation content.”\(^\text{14}\) However of equal importance and linked with the ASEANANZ is the intraregional agreements between ASEAN nations namely the ATIGA agreement. This is crucial as trade facilitation complements the reduction of transaction costs and “it is especially significant for ASEAN … given the predominante nature of intra-regional trade that is driven by regional production networks.”\(^\text{15}\) The question will be whether ATIGA merely duplicates the FTA’s Australia has concluded with the trade block or whether there are differences between the agreements.

Of further interest are the behind-the-border trade facilitation issues. It will be argued that business-to-business policies are playing an important part in facilitating trade. This is also noted by the Australian Government’s statement that the benefits of an FTA are not just to “eliminate tariffs; they also address behind-the-border barriers.”\(^\text{16}\)

It is argued that issues of unified laws as to behind the border barriers have not been raised officially and indicate a gap in the harmonisation efforts of trade related issues. This issue is of importance as Duval argued that non-trade specific business measures such as reduction of


\(^{13}\)(ASEAN Trade in Goods Agreement)

\(^{14}\)Marn-Heongand Pellan, abobe n 8, 5

\(^{15}\)ibid, 2

\(^{16}\)See http://www.dfat.gov.au/fta/
the behind the border costs play an important role in impacting positively on trade.\textsuperscript{17} He notes specifically that “simplifying procedures for contract enforcement is found to have the highest impact on bilateral trade, as a small improvement in either of the trading country can increase bilateral trade by more than 6%.”\textsuperscript{18}

\textbf{Free Trade Agreements}

Australia has concluded four PTAs namely with Singapore\textsuperscript{19}, Malaysia\textsuperscript{20}-Thailand\textsuperscript{21} and the ASEAN-Australia-New Zealand FTA.\textsuperscript{22} It includes Australia, Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, New Zealand, Philippines, Singapore, Thailand and Vietnam.\textsuperscript{23} As it can be seen agreements with Singapore, Malaysia and Thailand run side by side with the ASEANANZ FTA.

FTA’s must be viewed in context that is their aim is to facilitate trade. However an FTA cannot maximise trade facilitation on its own, as other tools need to be set in motion which complement the FTA. It is argued that at this stage too many gaps limit the effectiveness of the FTA’s.

First, ASEAN treaties as indicated earlier are not consistent with each other and will be discussed below in relation to rules of origin (ROO) only. Secondly obvious pathways and facilitation rules have not been put into place. Several examples will illustrate this point specifically the lack of membership in the Authorised Economic Operator (AEO) program. Australia is the only developed country which is not a member and it is well known that the AEO countries are given priority and preference at customs.\textsuperscript{24}

\textbf{B. Rules of Origin}

From the perspective of practical utility for both importers and exporters, it is warranted that comparative analysis of the Rules of Origin (‘ROO’) be undertaken. These rules indicate whether and to what extent economic integration is achieved between signatories.

Three main approaches to determining origin of goods are: change of tariff heading, value-added criteria and specific manufacturing process-requirement. According to the change of tariff heading method the final product has to have a different tariff heading than the inputs used. The second main approach defines a minimum value-added to be done on the inputs in order for the final product to become originating. Finally, specific manufacturing processes

\begin{itemize}
  \item \textsuperscript{18}Ibid, 124.
  \item \textsuperscript{19} Singapore-Australia FTA
  \item \textsuperscript{20} Malaysia-Australia FTA
  \item \textsuperscript{21} Thailand-Australia FTA
  \item \textsuperscript{22} ASEAN-Australia-New Zealand FTA
  \item \textsuperscript{23} See http://www.dfat.gov.au/fta/
  \item \textsuperscript{24} Ecaabove n 10, 7
\end{itemize}
can be required to be undertaken in the production of the good to be eligible for preferences. Each of these rules has certain advantages and disadvantages with respect to other rules.25

I. Originating goods

Article 3 of ASEANANZ FTA sets out which, for the purposes of Article 2.1(a) (Originating Goods) shall be considered as wholly produced or obtained goods. These goods are listed in Article 3(a)-(f). Article 6 provides that a good which is an originating good under Article 2 and which is used in another Party as a material in the production of another good shall be considered to originate in the Party where working or processing of the finished good has taken place.

Singapore-Australia FTA in Article 3.1 provides that goods shall be deemed originating goods of a Party where they are wholly obtained goods produced in the territory of the Party and where they are goods wholly manufactured in that Party from products and materials listed in Article 3.1(b)(i)-(iii).

Thailand-Australia FTA covers Rules of Origin in Article 402, in Chapter 4 of the Agreement. Goods are deemed as originating in the territory of a Party under Article 402.1 if they are: the wholly obtained goods of that Party; or satisfy any applicable requirements of Annex 4.1 on Product-Specific Rules of Origin, as a result of processes performed entirely in the territory of one or both of the Parties by one or more producers.

Malaysia-Australia FTA covers Rules of Origin in Chapter 3 of the Agreement and states in Article 3.2 that a good shall be deemed to be an originating good of a Party if it: (a) is a wholly obtained or produced good of one or both of the Parties; (b) is produced entirely in the territory of one or both of the Parties; (c) satisfies all applicable requirement of Annex 2 (Product Specific Rules Schedule), as a result of processes performed entirely in the territory of one or both of the Parties by one or more producers; or (d) otherwise qualifies as an originating good under the Chapter, and meets all other applicable requirements of Chapter 3. Article 3.3 defines for purposes of Article 3.2 a good that is wholly obtained or produced in the territory of one or both of the Parties.

It can be deduced that ASEANANZ FTA (by operative provisions of Article 2, Article 3 and Article 6) has broadest and most liberal provisions on originating goods. Singapore-Australia FTA (Article 3.1) sets limitations by restricting the scope of originating goods. Similar regulatory restrictions are imposed in Thailand-Australia FTA, by virtue of the requirement that 'goods not wholly obtained' must satisfy 'any applicable requirements' in Annex 4 of the Agreement. Malaysia-Australia FTA resembles Singapore-Australia FTA and Thailand-Australia FTA but provides an additional alternative (Article 3.2(d)) for deeming a good to be an originating good: a good may 'otherwise qualify' as an originating good under Chapter 3. In context of further trade liberalisation in the region, ASEANANZ FTA provisions

on originating goods appear to have greater regulatory utility than any corresponding provisions in the three alternative Free Trade Agreements.

**IV. Observations**

From the preceding, it is evident that there is no consistency between rules of origin between the different free trade agreements so to ensure unhindered operational efficiency and relatively unchallenged trade certainty.

Provisions on: originating goods; goods to be treated as originating goods; cumulation; *De Minimis* provision; regional value content; calculation of the value of a good or material; claims for preferential treatment; and origin verifications are either *substantially divergent* or *evidently lacking corresponding provisions* between the different free trade agreements, to be deemed equivalent or, at least *substantially similar* for purposes of intraregional trade certainty, trade utilisation and enterprise compliance. This situation is clearly not conducive to the justified normative (yet at times merely declaratory) aims of greater economic integration in the region.

Manchin and Pelkmans-Baloing articulated a normative balancing act for transcending the present lack of consistency and certainty in ROO provisions under the different free trade agreements:

> [T]he formulation of the ROOs should have both simplification and liberalization elements. At the same time, however, there should be adequate provisions that would control for potential abuse.\(^{26}\)

Some further suggestions for future reform of ROO frameworks included a more extensive usage of the *De Minimis* provision as well as self-certification for purposes of simplification and cost-reduction balanced by some monitoring system (and least burdensome verification process) that would keep importers honest.\(^ {27}\)

A further suggestion was the use of special and Differential Treatment: devising ROO by taking into account the different levels of development of countries in the East Asia region.\(^ {28}\) Arguably therefore if the ROO are not consistent between the various FTA’s other rules conceivably would also not be consistent. It is beyond the scope of this paper to compare at other rules such as an example “Exporting party obligations.”

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26 Ibid, 35
27 Ibid, 34.
28 Ibid, 34
Intraregional Agreements – ATIGA

Within the ASEAN countries several multinational agreements have been formed of which ATIGA is of interest. ASEAN countries adopted ATIGA in 2009 which marked a further step in the economic integration. The agreement entered into force on 17 May 2010.

The preamble notes that the purpose of ATIGA is to realise the goals of ASEAN namely to establish a single market “and production base characterised by free flow of goods.” The goal of ATIGA has been reaffirmed in article 1 which states:

The objective of this agreement is to achieve free flow of goods in ASEAN as one of the principle means to establish a single market and production base for the deeper economic integration of the region.

One would be forgiven to assume after reading article 1 that a free flow of goods would not only include at the border agreements but would also include behind the border agreement on private law issues such as a single commercial code as it is found in the OHADA group of nations. However the agreement in essence operates in the shadow of WTO/GATT agreements and operates on the same level as all the FTA’s introduced by ASEAN with other States. Article 12 as an example notes that “Article X of GATT 1994 shall be incorporated into and form an integral part of this Agreement, mutatis mutandis.”

It must be noted that ATIGA has included articles which specifically facilitate trade between the ASEAN countries. Article 13 as an example established the Trade Repository ‘where trade and customs laws and procedures of all Member States shall be ... made accessible to the public through the internet.” The article in subsection (2) is very specific – but not exhaustively - by describing the content of the Repository which is maintained by the ASEAN Secretariat. Of interest is that article 13(2) includes amongst the usual information such as rules of origin also includes information such as “best practices applied by each Member State; and (ix) list of authorised traders of Member States.”

Arguably the window to facilitate increased behind the border harmonisation has been slightly left ajar as Article 45 introduces the “Work Programme on Trade Facilitation and its Objectives.” The point made in article 45 is of importance as it states that the Work program needs to create a

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29 ASEAN’s bid to create a common regional market – a process that started as early as 1992 with the launching of the ASEAN Free Trade Area – Common Effective Preferential Scheme (AFTA-CEPT). While the CEPT focused mostly on tariffs, the ATIGA, contains broader and more specific provisions on rules of origin, non-tariff measures, trade facilitation, and Sanitary and Phytosanitary measures (SPS), among others.

30 Marn-Heong and Pellan, above n 8, 2.


32 Article 13(2).

“… predictable environment for international trade transactions that increases trading opportunities and help businesses, including small and medium sized enterprises (SME’s) to save time and reduce costs.”

What must be said is that trade facilitation provisions are increasingly used in trade agreements since 2005 in contrast to agreements signed before 2004. Duval argues that this is so as governments realised that further trade expansion depends on “whether non-tariff barriers can be effectively tackled.” However article 46 describing the scope of the Trade Facilitation Work Program (TFP) notes mainly a classification consistent with WTO classifications except that the article includes “other areas as identified by the AFTA council,” but chapter 5 does not include specific TFP measures instead “they are in line with what is found in many of the bilateral trade agreements.”

It can be observed that ATIGA has gone beyond the simple declaration of unified public law issues and attached practical regulations to facilitate trade. Article 58 introduces rules to facilitate a seamless trade specifically by creating a regional single Window system. Article 49 reads:

Member States shall undertake necessary measures to establish and operate their respective National Single Windows and the ASEAN Single Window in accordance with the provisions of the Agreement to Establish and Implement the ASEAN Single Window and the Protocol to Establish and Implement the ASEAN Single Window.

In sum it can be argued that ATIGA has established a regime of harmonised public law in order to facilitate trade but has not seriously attempted to go the extra step and harmonise private laws as well. However in addition the issue is whether ATIGA is in step with the ASEAN-ANZ FTA in relation to ROO.

(i) ATIGA and ASEAN-ANZ FTA – Rules of Origin

For purposes of examining trade ramifications flowing from the operative frameworks of ATIGA and ASEANANZ, some comparative observations can be made.

Article 26 (ATIGA) specifies the requirements for deeming a good to be an originating good. It refers to ‘wholly produced or obtained good’ or a ‘good not wholly obtained or produced’, provided additional requirements to have been met. This provision is replicated in Article 2 (ASEANANZ). The Articles defining ‘wholly obtained or produced goods’, Article 27 (ATIGA) and Article 3 (ASEANANZ), are virtually identical.

The process for treating ‘Goods not wholly produced or obtained’ as originating goods is virtually identical in ATIGA and ASEAN-ANZ, ‘Goods not wholly produced or obtained’

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34 Article 45(1)
36 Ibid, 3.
37 Article 46.
38 Duval above n 35, 6.
are almost identically defined in Article 28 (ATIGA) and Article 4 (ASEANANZ), imposing the same level of regional content of not less than 40%. Article 29 (ATIGA) and Article 5 (ASEAN-ANZ) use the identical formulae for calculation of Regional Value Content. Cumulative rules of origin are covered in Article 30 (ATIGA) and Article 6 (ASEAN-ANZ) and would have been identical, but for the additional Regional Value Content criterion in Article 30.2 (ATIGA), for instances where RVC of the material is less than 40%. Article 31 (ATIGA) and Article 7 (ASEANANZ) on Minimal Operations and Processes are substantially similar, however Article 7 (ASEAN-ANZ) imposes some additional minimal operations and processes by virtue of Article 7(d)-(f). De Minimis provision is substantially similar in both Agreements, found in Article 33 (ATIGA) and Article 8. (ASEANANZ)

Articles 38 (ATIGA) stipulates that a claim that a good shall be accepted as eligible for preferential tariff treatment shall be supported by a Certificate of Origin, whilst for purposes of ASEANANZ, its Annex on Operational Certification Procedures contains rules on issuance and verification of Certificates of Origin.

From the above it is observed that provisions on Rules of Origin in ATIGA and ASEANANZ are harmonious, bordering on being identical. Such state of affairs is not unexpected, given that both Agreements are resulting regulatory outcomes of the broader regional (multilateral) commitment on trade. ATIGA and ASEANANZ are clearly going beyond and above of any existing bilateral free trade agreements in the region.

**Behind the Border harmonisation**

**OHADA Uniform Acts**

In contrast with ASEAN, the Australian Government has not entered into any BIT’s or FTA’s with any of the OHADA\(^{39}\) nations, nor any African State for that matter. Hence the legal landscape differs greatly for any business attempting to conduct trade with African States. However OHADA stands out. It was formally created in 1993 with the signature of the Port-Louis Treaty in 1993. In 2008 the original treaty was amended by the Treaty of Quebec and came into force in 2010. The meeting in Québec aimed to reinforce the OHADA and to perpetuate its actions by improving its institutions and its financing.

The idea was generated by the political will to strengthen the legal system which was driven by the aim to harmonise business laws of the signatory states and to establish common rules which are simple, modern and are adaptable to be introduced in all Member States.\(^{40}\) Indeed the preamble to the Treaty states the aim as:

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\(^{39}\)OHADA stands for: *Organisation pour Harmonisation en Afrique du Droit des Affaires*. 16 mostly French speaking nations created the Organisation for the Harmonisation of Business Law in Africa (OHADA) and introduced supranational uniform laws. Bissau-Guinea is Portuguese speaking, Equatorial-Guinea, Spanish and Cameroon speaks French and English. French is though the official language.

making progress toward African unity and creating a climate of trust in economic systems of the contracting States with a view to creating a new centre of development in Africa.\footnote{Preamble of the Treaty of 1993.}

It is beyond doubt that the ensuing Uniform Acts are the core of the OHADA project.\footnote{Beauchard, R and Vital Kodo, M.J, Can OHADA increase Legal Certainty in Africa? Justice and Development Working Paper (2010) the World Bank 15.} As of today nine Uniform Acts have been introduced and adopted by the Council of Ministers,

The Uniform Acts are directly applicable and override domestic laws of the individual countries\footnote{Article 10 of the OHADA Treaty adopted at Quebec 2008/10/17.} It should also be noted that OHADA regulations sit on top of an already complex set of regional organisations forming other cooperative law initiatives to which OHADA adheres to.\footnote{Beauchard, R and Vital Kodo, M.J above n 42, 13.} These groupings are not always composed of all the OHADA states as individual states can form their own alliances. As an example, the West African Economic and Monetary union (UEMOA) has six of the OHADA group of nations as members and the Economic Community of West African States (ECOWAS) is comprised of nine OHADA states and six non OHADFA members. As one would suspect, the regulatory power of all the organisations can easily overlap if not directly being in conflict especially if OHADA extends its reach of Uniform Acts.\footnote{Ibid 14.}

Simply put it is a well-recognised fact that uniform laws reduce the risks posed by variations in sales legislations within a trading block or for that matter of jurisdictions whose law might potentially apply. Within this context it should also be noted that besides the OHADA uniform laws regime article 2 “of the UCC, the CISG, and the CESL all share the same fundamental goals, which is to reduce the transaction costs imposed on cross-border sales by non-unified law in the jurisdiction whose law may potentially apply”\footnote{Flechtner above n 9 ,5} As an example Professor Lehn argued that cost savings though the introduction of uniform laws is impressive.\footnote{See Lehn, K. The CISG: Perspectives from an Economist. In Flechtner, Brand & Walter eds) Drafting Contracts Under the CISG, Oxford Press, (2007) 261-268.}

A further point needs to be considered, namely that uniform laws facilitate and strengthen the competiveness of the internal market as it creates a single window in relation to trade laws. This competiveness will flow onto the international markets hence increasing international competiveness. The theory behind the utility of uniform laws has been put succinctly by the European Parliament in their proposal for a Common European Sales Law.

Differences in contract law between Member States hinder traders and consumers who want to engage in cross-border trade within the internal market. The obstacles which stem from these differences dissuade traders, small and medium-sized enterprises (SME) in particular, from entering cross border trade or expanding to new Member
States' markets. Consumers are hindered from accessing products offered by traders in other Member States.

Currently, only one in ten of Union traders, involved in the sale of goods, exports within the Union and the majority of those who do only export to a small number of Member States. Contract law related barriers are one of the major factors contributing to this situation. Surveys show that out of the range of obstacles to cross-border trade including tax regulations, administrative requirements, difficulties in delivery, language and culture, traders ranked contract-law-related obstacles among the top barriers to cross-border trade.

The need for traders to adapt to the different national contract laws that may apply in cross-border dealings makes cross-border trade more complex and costly compared to domestic trade, both for business-to-consumer and for business-to-business transactions.

Additional transaction costs compared to domestic trade usually occur for traders in cross-border situations. They include the difficulty in finding out about the provisions of an applicable foreign contract law, obtaining legal advice, negotiating the applicable law in business-to-business transactions and adapting contracts to the requirements of the consumer's law in business-to-consumer transactions.

[ …]

In cross-border transactions between traders, parties are not subject to the same restrictions [as in consumer law contracts] on the applicable law. However, the economic impact of negotiating and applying a foreign law is also high. The costs resulting from dealings with various national laws are burdensome particularly for SME. In their relations with larger companies, SME generally have to agree to apply the law of their business partner and bear the costs of finding out about the content of the foreign law applicable to the contract and of complying with it. In contracts between SME, the need to negotiate the applicable law is a significant obstacle to cross-border trade. For both types of contracts (business-to-business and business-to-consumer) for SME, these additional transaction costs may even be disproportionate to the value of the transaction.

These additional transaction costs grow proportionately to the number of Member States into which a trader exports. Indeed, the more countries they export to, the greater the importance traders attach to differences in contract law as a barrier to trade. SME are particularly disadvantaged: the smaller a company's turnover, the greater the share of transaction costs.

Traders are also exposed to increased legal complexity in cross-border trade, compared to domestic trade, as they often have to deal with multiple national contract laws with differing characteristics.
Dealing with foreign laws adds complexity to cross-border transactions. Traders ranked the difficulty in finding out the provisions of a foreign contract law first among the obstacles to business-to-consumer transactions and third for business-to-business transactions. Legal complexity is higher when trading with a country whose legal system is fundamentally different while it has been demonstrated empirically that bilateral trade between countries which have a legal system based on a common origin is much higher than trade between two countries without this commonality.

Thus, differences in contract law and the additional transaction costs and complexity that they generate in cross-border transactions dissuade a considerable number of traders, in particular SME, from expanding into markets of other Member States. These differences also have the effect of limiting competition in the internal market. The value of the trade foregone each year between Member States due to differences in contract law alone amounts to tens of billions of Euros.

The missed opportunities for cross-border trade also have a negative impact upon European consumers. Less cross-border trade, results in fewer imports and less competitiveness between traders. This can lead to a more limited choice of products at a higher price in the consumer's market.48

In sum it can be observed that the behind the border system of uniform supranational laws is workable and deserves attention by law makers. As noted by the European Parliament:

“Surveys show that out of the range of obstacles to cross-border trade including tax regulations, administrative requirements, difficulties in delivery, language and culture, traders ranked contract-law-related obstacles among the top barriers to cross-border trade.”49

ASEAN behind the border harmonisation

As stated above the two trade blocks approached the harmonisation efforts differently. ASEAN relies on FTA’s dealing not only with other trading partners but also within the group as discussed above. OHADA on the other hand relies on behind the border regulations and as noted above has not entered into any FTA’s.

The issue is that a harmonisation process in any region is always subject to diverse and pluralistic legal backgrounds. This is not only true in the OHADA group of nations but specifically so in the ASEAN group. The establishment of an ASEAN free trade area though ATIGA bolstered with ASEAN + agreements are the result of the ASEAN countries to steer the community into the global economic world. Arguably there are attempts in this direction

especially in ATIGA though the creation of an ASEAN single Window. However the efforts have stopped short of creating a supranational authority to guarantee the functioning of a uniform regime. Furthermore in 1997 the concept of ASEAN VISION 2020 was launched which had the purpose of forging closer economic integration within ASEAN but the process has stalled.

This paper argues that an absence of a supranational body seems to imply “that member countries’ commitment to ASEAN goes no further that a form of open regionalism.” The result is that each country still views their interests as being paramount. Hardjowahono argues that:

“Regional unification or harmonisation of transnational legal issues depends on interplay among diverse national interests and values promoted by each participating country. Unfortunately ASEAN’s loose regionalism leaves each member State a high degree of freedom to pursue its unique national legal development agenda and place any scheme tending towards regional integration well within the bounds of such a domestic agenda.”

Arguably the creation of a supranational body can be the stumbling block in introducing behind the border harmonisation which is understandable as the ASEAN countries due to their colonial past either are common law or civil law based. OHADA on the other hand belongs to a great extent to the same legal family namely the civil law. However it must also be recognised that many if not all efforts to harmonise transnational law is a compromise between civil and common law traditions anyway and hence arguably acceptable to all.

As an example the CISG has been ratified by 79 nations and the only exception of a developed major country is the United Kingdom. Singapore is the only country in the ASEAN group who has ratified the CISG whereas the important ASEAN + trading partners such as China, Japan, Australia the EU and New Zealand are all CISG countries.

Furthermore the UNIDROIT Principles though being a model law are widely known and used frequently in arbitrations. It is exactly in this area where comprehensive legal unification should start as the blue prints are already in existence. The disparities in the legal and economic systems cannot be overcome by attempting to harmonise the “local” laws but taking the existing harmonised commercial laws as a starting point could be very useful. The OHADA commercial code is an example where the sales law is closely modelled on the CISG. Understanding that all of the partner countries in the ASEAN+ group are signatories to the CISG would suggest that transaction costs by the developed partner countries would be decreased if they could operate through a legal system which is relatively familiar to all

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52 Ibid 1007.
53 Cameron is different as both systems common and civil laws operate in the country and so are the languages French and English.
concerned. This issue has not gone unnoticed and the UNCITRAL secretariat receives regular updates on the progress made by various ASEAN States towards the adoption of the CISG.54

Specifically the UNIDROIT principles being soft law are eminently suitable to bridge the gap within the culturally and legally diverse systems. The UNIDROIT principles as well as the CISG is not a rigid regime it allows for variations and reservations which could accommodate legal differences and issues which are uniquely ASEAN.

However Bell argues that Islamic law poses challenges in the creation of a common uniform commercial law and he specifically notes:

“… the CISG as it stands, is incompatible with many aspects of Islamic commercial law and particularly with the requirements of the law of Islamic finance … [and] that many Asian countries may have values that are different from the Western values embodied in both the civil and common law …”55

The statement on its own arguably could be correct however considering that in most ASEAN countries commercial law is based on either the common law or civil law due to the colonisation process a transplantation process has already taken place. As this is the case adoption of at least an international law could not be too difficult if it is accepted that domestic law harmonisation must take account of regional differences as Goode noted “the law of contract is responsive to the social, cultural and economic background of a country.”56

It appears obvious that ASEAN has recognised that once a single market is created and the business transactions become borderless specifically in view of the FTA,s at the border regulations, within the border harmonisation follows. As a result commercial law needs to be harmonised and to that end clear contract rules need to be created. As noted above ASEAN contract law simply put is in the main influenced by civil and common law rules and hence different approaches can be produced. This paper will only look at contract law as noted above because it sets the course of commercial transactions especially when international trade is concerned. The problem is that internal ASEAN trade as well as trade by individual ASEAN countries with say Australia is classed as being international in character.

(i) ASEAN contract law

The ASEAN charter explicitly stipulates that a unified legal tradition will become an important issue.57 However as noted above there is no evidence that the ASEAN leaders are contemplating to create a supranational court to deal with intra ASEAN commercial matters. If harmonisation of commercial law and specifically contract law is attempted by ATIGA as an intra-ASEAN body, three paths are open for discussion.

54 Sorieul, R. Secretary, UNICTRAL in the Foreword Schwenzer and Spagnolo, above n 3, 9.
55 Bell, G., New Challenges for the Uniformisation of Laws: How the CISG is Challenged by ‘Asian Values’ and Islamic Law.”. Schwenzer and Spagnolo above n , 12.
57 Hutabarar above n 50, 219
First a discussion should be centred on the possibility to introduce a model dispute resolution clause into ATIGA; this could assist in opening possible avenues of harmonisation. It should be remembered that BIT’s and some FTA’s have done so.

Secondly any harmonisation must be driven by individual states or an ASEAN summit reaches consensus that each state will modernise their commercial laws that is contract law perhaps on the lines of the UNIDROIT Principles as many countries have done. Thirdly ASEAN States adopt a convention such as the CISG which governs international contracts.

Arguably therefore two paths can be taken; first the harmonisation of contract law applies to both domestic and international sales or the second option would be to introduce an international sales law which like the CISG only governs international sales. This option can be refined by a clause indicating that intra ASEAN sales are not considered to be international. Such a solution would not require a rewrite or change to the national laws and hence could be deemed to be more palatable and easier to implement. China is an example as not only the domestic sales law was modernised in 1999, they also include the CISG as the law governing international sales. Furthermore Australia a Federation is another example, where the CISG was adopted by all States after the Federal government became a signatory to the Convention without abandoning the contract law as in force in each individual Australian State.

It is of interest to note that in East Asia a private initiative by scholars trying to harmonize rules of contract law has gathered momentum. The aim is to create a model law called Principles of Asian Contract Law (PACL). 58

Considering that there is no “Asian law” as such and that the ASEAN countries belong to the civil law or common law tradition is not correct to argue that:

As the international principles might not serve the common interests of ASEAN member states, regional principles will be more suitable for regional contracting parties. 59

This fact alone would suggest that compromises must be sought and hence it would be easy to look seriously at the UNIDROIT Principles which are a product of civil and common law compromises. However Bell and Professor Han argued that “For East Asian people, it is still necessary for Asian scholars to produce an Asian voice.” 60 That might be true but history shows a different picture.

It is not the first time that a country adopted segments of the UNIDROIT Principles or the CISG such as Estonia, Germany and Russia. Estonia as an example relied heavily on the

58 SHIYUAN HAN, PRINCIPLES OF ASIAN CONTRACT LAW: AN ENDEAVOR OF REGIONAL HARMONIZATION OF CONTRACT LAW IN EAST ASIA, VILLANOVA LAW REVIEW [Vol. 58], 589.
59 AZIMON 62
60 Han, S. above n 58, 591.
CISG as well as OHADA which formed the basis not only of sales contracts but was also an important source to draft the general provisions. Varul however cautions as he notes:

“… it is natural that differences between countries and regions persist, arising first and foremost from different cultural and ethnic backgrounds. Harmonisation of contract law fosters international integration and co-operation; however, the levelling out of different cultures and traditions should not be the objective.”

Such a view conforms to the idea of ASEAN values and it conforms to their ambitions. However it has been argued that:

[ASEAN] is affected by a lasting inability to promote a regional legal integration in the absence of common political good-will of the foundation in this direction. It thus appears a priori difficult to identify a block of general principles of rights and obligations common to these countries of Southeast Asia.

An analysis of the ASEAN FTA’s suggests that the primary objective was primarily a political and economic one which is in contract with OHADA where the political legal objective drove the economic integration. However at the heart of every transaction in goods and services is a contract hence an ASEAN “obligational identity” would enhance the economic development in ASEAN countries. Bell in an earlier article argued strongly that as there is nothing particular Asian about the laws of sale there is no good reason not to try to harmonise sales laws regionally. He specifically notes:

Does it make sense to have a set of harmonised laws governing contracts between Asian merchants (a new Asian harmonised law of sale) and a potentially different harmonised law (the CISG) for contracts between Asian and non-Asian merchants?

It is interesting to note that “since the CISG, the PECL, the PICC, and the Draft Common Frame of Reference (DCFR) already exist, the PACL, as a latecomer, should have a distinguishing feature to demonstrate its necessity.” Thinking regionally the statement has some merits however from a global point of view it does not make sense. It makes more sense if global traders have their affairs governed by a uniform law as was envisaged by Rabel in 1932. Unfortunately regional unification attempts are still looking for the elusive golden flies.

In sum it is argued that a unique ASEAN law does not make sense as there are no distinct ASEAN values and to introduce a new contract system into the workings of the exiting FTA’s would not reduce translation costs, on the contrary the costs would increase.

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62 Ibid 210
64 Bell, GH., Harmonisation of Contract Law in Asia – Harmonising Regionally or Adopting Global Harmonisations – The Example of the CISG. Singapore Journal of Legal Studies (2005), 362, 368.
65 Han, above n 58 591.
Bell is absolutely correct by noting that:

It remains therefore that for the international sale of goods within Asia, we should probably try to harmonise, not our different and diverse cultural values, but our formal, Western-based laws of sale. The CISG does just that.\(^{66}\)

The proliferation of FTA’s should indicate that it is time that behind the border harmonisation is long overdue.

**Conclusion**

There is no doubt that the CISG and the UNCITRAL Model law have played an important part in the modernisation and harmonisation of sales laws. Trade facilitation is not only driven by at the border legislations but it must reach behind the border. A harmonisation of contract laws would be the first step in that direction. It is correct to argue that the CISG might not be the ideal instrument as it is not complete and only deals with sale of goods. Arguably the UNIDROIT Principles are an advance of the CISG but they are only a model law and hence do not have the force of law unless it is incorporated into a contract.

It is not within the power of Australia to force or suggest changes to domestic laws in another country. The ASEAN countries most likely working though ATIGA would need to introduce a common contract law. Unfortunately there is no evidence that Australia or any country for that matter has worked towards an inclusion of a model clause as to the governing law into FTA’s.

As the OHADA group of nations has shown where there is political will the creation of a harmonised sales law is possible. However to create a mandatory sales law within an FTA is simply unattainable. The fact that few countries within ASEAN have even ratified the CISG is an indication that a harmonised sales law is a far off dream despite the clear knowledge that transactions costs would be reduced. It is interesting to see whether China, Japan and Korea all CISG countries can agree in the creation of a harmonised sales law. If it only takes on the mantle of a model law it is already a step forward. However its success is rather doubtful as the frequent exclusion of the CISG in standard form contracts does not indicate that the business world is yet ready to be weaned from the application of domestic laws.

Uniformity of laws is of importance as the discussion of the ROO demonstrates that there is not even a consistency of at the border rules. There is a clear contrast between the intra-regional "single approach" and the Australian outcomes.

On another aspect of the FTA's, is it worth speculating that the "safeguard" (exclusive) approach in ROO is amplified because of a lack of integration of normal commercial rules (OHADA)? Perhaps the precursor to simpler ROO (and Customs administration of those rules) is the ability to rely on strong consistent transaction arrangements in cross-border trade. INCOTERMS have tried to achieve this but can't get the depth.

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\(^{66}\) Bell above n 64, 368
It appears rather symptomatic that such complex, conflicting and divergent provisions on ROO would not be assisting enterprises that are not in position to ensure compliance, without incurring either a risk or a considerable opportunity cost. Medalla and Balboa, arguing that the region should work towards a Harmonized System of Customs Classification, state: Another challenge is to craft a system of ROO that would be SME friendly. One aspect of this is capability building to enable SMEs to comply with ROO requirement.\textsuperscript{67}

It appears that the harmonisation effort must start with a whole of government approach to the drafting and implementation of FTA’s followed by discussions with our FTA partners to embrace a desire to also harmonise behind the border regulations. No doubt the competitiveness of the ASEAN + region will be enhanced.