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Cross-Border Public Offering of Securities in Fostering an Integrated ASEAN Securities Market: The Experiences of Singapore, Malaysia and Thailand

***Wai Yee WAN**

Bullet Points

- *In 2015, the ASEAN Economic Community was formally established and its aim was to achieve, among other things, an integrated securities market within ASEAN.*
- *Prior to the formal establishment of the ASEAN Economic Community, in 2009, with a view towards achieving the objective of securities integration, Singapore, Malaysia and Thailand adopted the ASEAN Disclosure Standards, a set of harmonised disclosure standards for issuers making cross-border initial public offerings ('IPOs'). These participating member states also entered into a framework for the expedited review for cross-listings. However, more than five years later, there is no documented use of the ASEAN Disclosure Standards; cross-border IPOs and cross-listings remain rare.*
- *This paper is a study of cross-border IPOs of issuers in, and cross-listings within, the participating member states during the 2010-2014 period, with a view to obtaining insights on how issuers access capital markets. These insights are relevant to the broader questions about the long-term viability of ASEAN's regulatory policies of promoting integration through harmonisation of minimum standards along with limited mutual recognition.*
- *This paper compares the ASEAN approach with the EU Prospectus Directive and the Trans-Tasman Mutual Offering Framework. This paper argues that to move to a truly pan-ASEAN equity offering, there needs to be, at a minimum, a greater supervisory and enforcement convergence.*

I. Introduction

In the wake of the Asian financial crisis of 1997, the Association of South-east Asian Nations ('ASEAN') [1] worked towards setting up the ASEAN Economic Community ('AEC') to establish ASEAN as a single market and production base by 2015, and securities market integration was identified as one of the goals. [2] After the global financial crisis of 2008, ASEAN intensified its efforts towards capital markets integration. [3] In 2009, the ASEAN Capital Markets Forum ('ACMF'), comprising securities regulators of all of the ASEAN states, spearheaded the *Implementation Plan to Promote the Development of an Integrated Capital Market to Achieve the Objectives of the AEC Blueprint* ('*Implementation Plan'*).[4] The aim was to create 'a region

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[1] Association of South-East Asian Nations ('ASEAN') comprises ten countries: Brunei, Cambodia, Indonesia, Malaysia, Laos, Myanmar, the Philippines, Singapore, Thailand and Vietnam. Only six of them, namely, Indonesia, Malaysia, the Philippines, Singapore, Thailand and Vietnam have significant national securities markets. There are very few companies listed on the securities exchanges in Cambodia and Laos. Myanmar opened the Yangon Stock Exchange in 2015 and there are three companies listed as at August 2016. Brunei does not yet have a securities exchange.

[2] Almekinders G *et al*, 'ASEAN Financial Integration' (2015) International Monetary Fund ('IMF') Working Paper WP/15/34 <https://www.imf.org/external/pubs/ft/wp/2015/wp1534.pdf> accessed 30 June 2016. See also Singh, Datuk Ranjit Ajit, 'ASEAN: Perspectives on Economic Integration: ASEAN Capital Market Integration: Issues and Challenges' (2009) IDEAS reports - special reports, Kitchen, Nicholas (ed.) SR002. LSE IDEAS, London School of Economics and Political Science, London, UK <http://www.lse.ac.uk/IDEAS/publications/reports/pdf/SR002/SR002_singh.pdf> accessed 30 June 2016.

[3] ASEAN, *ASEAN Economic Community Blueprint 2015* (2008).

[4] ASEAN Capital Markets Forum ('ACMF'), 'Implementation Plan to Promote the Development of an Integrated Capital Market to Achieve the Objectives of the AEC Blueprint' ('*Implementation Plan'*) <http://www.theacmf.org/ACMF/report/ImplementationPlan.pdf> accessed 30 June 2016.

with free movement of goods, services, investment, skilled labour, and freer flow of capital'.[5] Capital markets integration was seen as vital to reduce vulnerabilities to external shocks and market volatility post-financial crises and to provide issuers with 'liquidity, scale and capacity to complete globally'. The co-operation can result in the region having a greater voice in respect of global initiatives relating to financial stability and development.[6] The AEC was formally established in 2015 and since then, it continues to focus on deepening capital markets integration and increasing connectivity among the ASEAN markets.[7]

Although more recent literature and the global financial crisis of 2008 have pointed to the risks of total financial integration, the promotion of a single integrated securities market that is able to combine the various sources of capital has much to commend and remains supported by existing economic and financial literature.[8] Integration also means that investors will have ready access to more than 3,400 listed companies across the ASEAN exchanges with a collective market capitalisation of US$2.02 trillion.[9] Further, by cross-listing on other exchanges, in theory, issuers can gain access to new investor bases, improve their stock liquidity and gain

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5 *ASEAN Economic Blueprint*, n 3 above, 5.

6 *Implementation Plan*, n 4 above, i.

7 ASEAN, *ASEAN 2025: Forging Ahead Together* (2015). See also ACMF, *ACMF Action Plan 2016-2020* (2016).

8 Eg in the context of Europe, the European Commission, in projecting the economic benefits of a fully integrated pan-European financial market, found that the costs of capital would fall by forty basis points: see London Economics, 'Quantification of the Macro-Economic Impact of Integration of EU Internal Market' (November 2002) Final Report to the European Commission Directorate-General for the Internal Market <http://londoneconomics.co.uk/wp-content/uploads/2011/09/103-Quantification-of-the-Macro-economic-Impact-of-Integration-of-EU-Financial-Markets.pdf> accessed 30 June 2016; in the context of Asia, see C Y Park, 'Asian Capital Market Integration: Theory and Evidence' (June 2013) ADB Economics Working Paper Series No. 351 <http://www.adb.org/sites/default/files/publication/30284/ewp-351.pdf> accessed 30 June 2016. Cf. J Stiglitz, 'Risk and Global Economic Architecture: Why Full Financial Integration May Be Undesirable' [2010] Am Ec Rev 388 (pointing out the risks of full integration).

9 Statistics were obtained from World Federation of Exchanges as of December 2015.

visibility as to its products in new markets. [10] However, integration is by no means easy, due to the fact that member states of ASEAN are economically diverse and that there is no political will to create a shared sovereignty or a single currency.[11]

The *Implementation Plan* (together with the recent *ACMF Action Plan for 2016-2020*) have adopted three broad strategies towards achieving securities market integration: first, legal and regulatory convergence through the harmonisation of minimum standards and mutual recognition; secondly, the linking of securities markets infrastructure to increase connectivity; and thirdly, the promotion of ASEAN equity as an asset class through the creation of indices.[12] This article focuses on the first broad strategies of minimum harmonisation of standards and mutual recognition for issuers undertaking cross-border offerings within ASEAN and promoting cross-listings within the ASEAN exchanges. Both constitute important, though not exclusive, criteria in measuring financial integration within ASEAN.[13] The second and third strategies have been discussed elsewhere in academic literature.[14]

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[10] For the reasons for issuers undertaking cross-listings, see Dodd O, 'Why do Firms Cross-list their Shares on Foreign Exchanges? A Review of Cross-listing Theories and Empirical Evidence' (2013) 5 Rev of Behavioural Finance 77. Another reason is also discussed in the literature, which is the bonding effect; if they cross-list on exchanges that are perceived to be of higher quality, it is a signal of their commitment to achieving the best standards of corporate governance: see J Coffee, 'Racing towards the Top?: The Impact of Cross-Listings and Stock Market Competition on International Corporate Governance' (2002) 102 Colum L Rev 1757.

[11] E.g. D Piling, 'The fiction of a unified, harmonised ASEAN', *Financial Times* (10 December 2015), raising the example where Singapore has a GDP per capital of US$55,000 and Cambodia at over US$1,000.

[12] The *ACMF Action Plan for 2016-2020* includes other priorities, including the recognition of capital markets professionals across ASEAN and cross-border dispute resolution mechanism.

[13] See Cavoli, T, McIver R and Nowland J, 'Cross-listings and Financial Integration in Asia' (2011) ASEAN Economic Bulletin 28(2), 241-56; Yu I W *et al*, 'Assessing Financial Market Integration in Asia – Equity Markets' (2010) 34 J of Banking & Finance 2874.

[14] See eg Donald D, 'Bridging Finance Without Fragmentation: A Comparative Look at Market Connectivity in the US, Europe and Asia' (2015) EBOR published online (discussing the ASEAN Trading Link). See also Goyal G, Cherian J, Gupta B, Hansakul S, Santiprabhob V & Wolff P, 'Panel: Asian Financial Integration, Macroeconomics and Finance in Emerging Market Economies' (2012) 5 Macroeconomics and Finance in Emerging Market Economies 297.

There are two main approaches for using regulatory policy to promote cross-border offerings of securities and cross-listings by issuers. The first approach is harmonisation through ensuring substantial similarity of offering and cross-listing rules in multiple regulatory systems. The most extreme form of harmonisation is maximum harmonisation which puts in place common rules in place of national measures and jurisdictions are not allowed to impose additional rules. At the other end of the spectrum is minimum harmonisation where jurisdictions agree on a baseline set of rules but are free to impose their national rules. The second approach is mutual recognition, which requires the regulator of the host jurisdiction (that is, the country which the issuer is intending to make an offer into) to accept that the regime of the home jurisdiction (that is, the country which the issuer has or intends to have a primary listing) is sufficient to regulate its market participants without insisting on compliance with the host regulatory framework. Mutual recognition does not require identical standards but accepts that there is some unevenness in the playing field in view of the diverging national legal and regulatory systems.

Insofar as ASEAN is concerned, its approach has been to create 'enabling conditions for access with broad harmonisation, and supported by mutual recognition and a greater freedom for capital movements'. [15] As is explained below, this has translated to having a baseline set of common standards with limited mutual recognition. Pursuant to the *Implementation Plan*, in 2009, three countries within ASEAN, namely, Singapore, Malaysia and Thailand (collectively, 'participating member states') adopted the harmonisation of disclosure standards through the initial version of ASEAN Disclosure Standards for prospectuses used in connection with initial public offerings ('IPOs').[16] (As is explained below, although the ASEAN Disclosure Standards

[15] *Implementation Plan*, see n 4 above, p 2.

[16] The ASEAN Disclosure Standards comprise the ASEAN Debt Securities Disclosure Standards and the ASEAN Equity Securities Disclosure Standards.

underwent amendment during the 2010 to 2014 period, the core of the standards largely remains unchanged.) The ASEAN Disclosure Standards were adopted into the national rules of the respective jurisdictions.[17] Subsequently, ASEAN also adopted a framework to streamline the applications for cross-listings of companies within the participating member states. The ASEAN Disclosure Standards operate on an opt-in basis at both the country and issuer level, meaning that it is optional for the countries within ASEAN to sign up for these standards and it is optional for issuers in participating states seeking cross-border fund-raising to determine whether to use these standards. Issuers can opt not to use these standards and instead comply with the prospectus rules (or the exceptions) in the country that they are seeking to raise funds from.

As of December 2015, while only three of the ten ASEAN jurisdictions have opted into the initial ASEAN Disclosure Standards, the three participating member states' stock exchanges comprising Singapore Exchange ('SGX'), Bursa Malaysia and Stock Exchange of Thailand, collectively have 2,310 listed companies with an aggregate market capitalisation of US$1.37 trillion.[18] Together, they account for approximately 70 per cent of the total market capitalisation of all the ASEAN jurisdictions. In the medium to long-term, the ACMF envisages that other ASEAN jurisdictions will opt into the ASEAN Disclosure Standards scheme when they are ready.[19] In particular, Philippines is consulting with stakeholders in anticipation of joining the

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17 Eg Securities and Futures (Offers of Investments) (Shares and Debentures) Regulations 2005 (Singapore); *Prospectus Guidelines* SC-GL/PG- 2012 (R1-2015) issued pursuant to s 377, para 235(1)(f) and s 237(2) of the Capital Markets and Services Act 2007 (Malaysia) ('CMSA'). As for Thailand, see Securities and Exchange Commission ('SEC'), 'Malaysia, Singapore and Thailand Implement the ASEAN and Plus Standards Scheme' (12 June 2009) <http://www.theacmf.org/ACMF/pressrelease/2-2009.pdf> accessed 30 June 2016 and SEC, 'SEC to Allow ASEAN Disclosure Standards for Thai Companies' Equity Offerings' (14 July 2014) <http://www.sec.or.th/en/Pages/News/Detail_News.aspx?tg=NEWS&lg=en&news_no=99&news_yy=2014> accessed 30 June 2016.

18 Statistics were obtained from World Federation of Exchanges as of 31 December 2015.

19 See ACMF, 'ASEAN Disclosure Standards' <http://www.theacmf.org/ACMF/webcontent.php?content_id=00015> accessed 30 June 2016.

ASEAN Disclosure Standards scheme.[20] The participating member states also agreed to a set of Streamlined Review Framework for the Common Prospectus.[21]

However, more than five years have passed since the first adoption of the ASEAN Disclosure Standards, and there is no documented usage of these standards and cross-border retail equity offerings among the participating member states remain rare.[22] Cross-listings among the stock exchanges of participating member states are also very rare.[23]

The goal of this research is to obtain insights on how issuers in these states access capital markets in IPOs, particularly internationally, over the five-year period between 2010 and 2014. In measuring the success of the ASEAN Disclosure Standards, this research examines how many cross-border offerings have been made and whether the standards have been used to facilitate such cross-border market access by issuers. 2010 is chosen as the first year post-adoption of the ASEAN Disclosure Standards. While our study focuses on offerings of equities in Singapore, Malaysia and Thailand, it also includes capital raising efforts of issuers of Real Estate Investment Trusts ('REITs'), business trusts and infrastructural funds in light of the proposed extension of the ASEAN Disclosure Standards to these securities in the *ACMF Action Plan 2016-2010*.[24]

This research also draws lessons from comparisons with other global initiatives relating to the use of a single disclosure document to make cross-border offering of securities, namely,

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[20] See Loyola J, 'SEC [of Philippines] Starts Consultation for ASEAN Integration' (8 December 2013), <http://www.mb.com.ph/sec-starts-consultation-for-asean-integration/> accessed 30 June 2016.

[21] Monetary Authority of Singapore ('MAS'), 'Streamlined Review Framework for the ASEAN Common Prospectus' (September 2015) <http://www.mas.gov.sg/~/media/resource/legislation_guidelines/securities_futures/sub_legislation/Streamlined%20Prospectus%20Review_Handbook.pdf> accessed 30 June 2016.

[22] See Part III below.

[23] See Part III below.

[24] *ACMF Action Plan 2016-2020* (2016) (referring to the possible extension to Real Estate Investment Trusts, business trusts and other infrastructural funds).

the European Union ('EU') Prospectus Directive ('Prospectus Directive')[25] and the Trans-Tasman Mutual Recognition of Securities Offerings ('MRSO') Scheme in Australia and New Zealand. The Prospectus Directive, which adopts a fully harmonised framework, offers lessons on the global institutions that are required in order to support a truly genuine single market. The MRSO Scheme, which adopts a full mutual recognition framework, offers another model of economic integration that is more modest in nature but which has benefited the issuers and investors.[26]

The research is significant for the following reasons. First, while there is prior literature showing an increase in portfolio investment as a result of the agreements and protocols signed among the ASEAN states in the wake of the 1997 Asian financial crisis,[27] there is yet no study directly measuring the level of cross-border IPO offerings among issuers in the participating member states. The most recent study by PricewaterhouseCoopers and Baker & McKenzie measures the level of primary equity offerings by foreign issuers listed on, among others, SGX, from 2002 to 2011.[28] However, that study does not contain an analysis on the value or volume of international versus retail offerings by issuers which are making multi-jurisdictional offers, nor does it examine the impact of the ASEAN Disclosure Standards (given that they would only be in force less than two years when the study was concluded). This research fills the gap.

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25 Council Directive (EC) 03/71 on the prospectus to be published when securities are offered to the public or admitted to trading and amending Directive 2001/34/EC [2013] OJ L345 ('Prospectus Directive').

26 Multijurisdictional Disclosure System ('MJDS') between the US and Canada is not included in this study because it is not applicable to initial public offerings of issuers. Securities and Exchange Act 1934, 17 CFR 240.14d-1(b). See H Scott, 'Internationalization of Primary Public Securities Markets' (2000) 63 LCP 71.

27 See also Yu I W *et al*, 'Assessing Financial Market Integration in Asia – Equity Markets', n 13 above.

28 PricewaterhouseCoopers and Baker & McKenzie, *Equity Sans Frontieres* (November 2012) <https://www.pwc.com/gx/en/audit-services/ipo-centre/assets/pwc-cross-border-ipo-trends.pdf> accessed 30 June 2016.

Secondly, even after the formal establishment of the AEC in December 2015, the question remains as to the appropriate regulatory policies for the ASEAN policy makers to develop an integrated securities market. As recent as March 2016, the *ACMF Action Plan 2016-2020* has proposed an extension of the ASEAN Disclosure Standards to REITs, business trusts and infrastructural funds. The insights gleaned from the lack of success of the ASEAN Disclosure Standards and few cross-listings are relevant to the broader question about the long-term viability of ASEAN's regulatory policies of integration using a combination of harmonisation of minimum standards and limited mutual recognition. In particular, and drawing lessons from the other global harmonisation efforts, this paper argues that where the existing harmonisation and mutual recognition measures do not extend their reach to interpretation, application, monitoring and enforcement, with such issues remaining fragmented among the participating member states and firmly within the purview of national treatment, there is little chance that the goal of promoting a genuinely single securities market will be achieved.

Thirdly, these findings from the study on how three economically significant ASEAN jurisdictions seek to raise equity on a cross-border scale may offer valuable lessons to determine the optimal regulatory coordination strategies for other similar passporting arrangements under discussion in the region such as the Asia Region Funds Passport Initiative.[29]

There are some limitations to this research: first, the data relied on in relation to the values of the IPO transactions, including the split between domestic and international tranches and between the institutional and retail portions, comes from companies' prospectuses, which do not contain information about the amounts actually raised in these offerings. The existing databases

[29] See A Godwin and I Ramsay, 'The Asia Region Funds Passport Initiative: Challenges for Regulatory Co-ordination' (2015) ICCLR 236.

that have been used do not consistently contain sufficient information on the breakdown of these amounts to conduct a meaningful analysis. Secondly, the study does not assess how issuers and their advisers perceive the additional costs and difficulties of undertaking cross-border offerings outside of their home jurisdictions. However, conversations with leading capital markets practitioners in Singapore who have participated in international offerings indicate that embarking on cross-border retail offerings in either Malaysia and/or Thailand raise significant costs and in some cases, lengthen the duration of the offerings. Third, this study is a study of the benefits of the ASEAN Disclosure Standards to issuers seeking fund-raising. The standards may also have other benefits to investors or consumers, such as an increase in their familiarity of foreign securities markets and their willingness to invest outside of their home markets.[30] The effect of the standards in reducing home state bias has to be the subject-matter of separate research.

Part II explains the background and development of the ASEAN Disclosure Standards. Part III contains the findings on IPO offerings and cross-listings in the three participating member states for the five years from 2010 to 2014. Part IV explains the reasons for the lack of success of the ASEAN Disclosure Standards in promoting an increase in cross-border issuance activities and the limitations of ASEAN's current regulatory policies in achieving a pan-ASEAN equity offering framework. Part V compares the ASEAN Disclosure Standards with the Prospectus Directive and the MRSO Scheme. Part VI discusses the lessons from the other models of prospectus offerings for the ASEAN jurisdictions and offers normative conclusions.

[30] See Coval J and Moskowitz T 'Home Bias at Home: Local Equity in Domestic Portfolios' (1999) 54 J Fin 2045.

II. Cross-Border Public Offerings and Cross-Listings

1. The background for ASEAN Disclosure Standards

In the *Implementation Plan*, the ACMF took the view that capital markets reforms should be based on international standards[31] so as to attract international investors. In respect of cross-border offering of securities, the obvious candidate to model the harmonisation of disclosure standards on was the International Disclosure Standards for Cross-border Offerings and Initial Listings by Foreign Issuers ('IOSCO Equity Disclosure Standards') promulgated by the International Organisation of Securities Commissions ('IOSCO').[32] The IOSCO, founded in 1983, is an international non-profit association of securities regulators in more than 115 jurisdictions and is recognised as one of the world's key international standard setting bodies. The IOSCO Equity Disclosure Standards facilitate cross-border offerings and listings of equity by enhancing the comparability of information disclosed and ensuring a high level of investor protection. However, they do not substitute or replace the disclosure requirements applicable to the jurisdiction's issuers.[33] The IOSCO Equity Disclosure Standards are based on the Anglo-American model of non-financial disclosures for public offerings, requiring all material information to be disclosed in the prospectus so that investors and/or their professional advisers can make informed decisions and that there should be no material omissions.

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31 *Implementation Plan*, see n 4 above, 6.

32 International Organisation of Securities Commissions ('IOSCO'), 'International Disclosure Standards for Cross-border Offerings and Initial Listings by Foreign Issuers' (September 1998) <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD81.pdf > accessed 30 June 2016 ('IOSCO Equity Disclosure Standards').

33 IOSCO Equity Disclosure Standards, see n 26 above, p 3.

Since 1998, the IOSCO Equity Disclosure Standards have received widespread acceptance and recognition globally.[34] The promulgation of the IOSCO Equity Disclosure Standards coincided with a series of influential studies led by La Porta and his team who found that that the legal framework governing financial markets and corporate governance has an important role to play in creating the conditions for economic growth in low and middle-income countries and that good disclosure requirements and their enforcement are essential to establish strong securities markets.[35] Despite the criticism in subsequent literature, the findings of La Porta were adopted by a number of global institutions including the *Doing Business* reports of the World Bank and have come to influence policy reform in many countries, including the participating member states.[36] The Asian financial crisis of 1997/1998 bolstered the arguments by La Porta and his team that a strong securities market, which reduced reliance on bank financing, was essential to financial and economic growth.

In 2009, Singapore, Malaysia and Thailand were the first (and remained the only) ASEAN jurisdictions that adopted the ASEAN and 'Plus' Standards, the predecessor of the ASEAN Disclosure Standards. The ASEAN Standards were common for all of the participating member jurisdictions and the 'Plus' Standards addressed the specific disclosure requirements in each relevant jurisdiction; in other words, an issuer making a securities offering in the host jurisdiction has to comply with a set of common standards and applicable 'Plus' standards in the host jurisdiction. The ASEAN and 'Plus' Standards went further than the IOSCO Equity

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[34] In IOSCO, *International Disclosure Principles for Cross-Border Offerings and Listings of Debt Securities by Foreign Issuers: Final Report* (March 2007), the IOSCO Equity Disclosure Standards were described as having achieved 'widespread acceptance'.

[35] La Porta R, Lopez-de-Silanes F, Shleifer A & Vishny RW, 'Legal Determinants of External Finance' (1997) 52 J Fin 1131; La Porta R, Lopez-de-Silanes F, Shleifer A and Vishny R, 'Law and Finance' (1998) 106 J Pol Econ 1113.

[36] World Bank, 'Doing Business in 2004: Understanding Regulation' (World Bank and OUP 2004) xiv; La Porta R., Lopez-de-Silanes F., and Shleifer A. 'The Economic Consequences of Legal Origins' (2008) 46 J of Economic Literature 285.

Disclosure Standards, which only dealt with non-financial disclosure, in that the former also required the financial statements to be published in accordance with International Financial Reporting Standards ('IFRS') and International According Standards ('IAS').[37]

For these three jurisdictions, the adoption of the ASEAN and 'Plus' Standards for cross-border offerings in 2009 did not represent a significant change from the rules relating to domestic offerings. In Singapore, by 1998, there was already a high degree of similarity between the local prospectus requirements for issuers and the IOSCO Equity Disclosure Standards and the latter was explicitly introduced in the listing rules in 2000.[38] As for Malaysia, post-enactment of the Capital Markets and Services Act 2007,[39] the Prospectus Guidelines[40] were based on the IOSCO Equity Disclosure Standards. Likewise, Thailand had, by 2008, moved to a disclosure-based system pursuant to the Securities and Exchange Act.[41] In the IOSCO Self-Assessment in 2008, Thailand's Securities and Exchange Commission stated that the contents of the registration statement and prospectus substantially conformed to IOSCO Equity Disclosure Standards.[42]

In April 2013, the three jurisdictions agreed to eliminate the variations found in the 'Plus' Standards and have only one set of ASEAN Disclosure Standards instead,[43] with a view towards

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37 ASEAN Equity Securities Disclosure Standards, Part VIII (A)(3).

38 Corporate Finance Committee, 'The Securities Market: Final Recommendations' (1998) <http://www.mas.gov.sg/~/media/resource/publications/consult_papers/1998/21%20October%201998%20The%20Securities%20Market%20Final%20Recommendations.pdf> accessed 30 June 2016. With the enactment of the Securities and Futures Act 2001 ('SFA'), the prospectuses are required to comply with the general test of materiality and also the disclosure requirements listed in the Securities and Futures (Offers of Investments) (Shares and Debentures) Regulations 2005, whose checklist is similar to the IOSCO Equity Disclosure Standards.

39 CMSA s 236.

40 CMSA authorised the promulgation of Prospectus Guidelines, s 235(1)(f).

41 Securities and Exchange Act B.E. 2535 ('SEA') s 76.

42 IMF, 'Thailand: Financial Sector Assessment Program—Detailed Assessment on the Implementation of the IOSCO Objectives and Principles of Securities Regulation' (May 2009) IMF Country Report No. 09/148 <https://www.imf.org/external/pubs/ft/scr/2009/cr09148.pdf> accessed 30 June 2016.

43 ACMF, 'ASEAN Regulators Implement Cross Border Securities Offerings Standards' (1 April 2013) <http://www.theacmf.org/ACMF/upload/asean_standards_1_apr_2013.pdf> accessed 30 June 2016.

advancing the goals of further dismantling the regulatory barriers towards the raising of capital across ASEAN and lowering the transaction costs.[44]

2. ASEAN Disclosure Standards

With the consolidation into one set of ASEAN Disclosure Standards, there is a marked improvement over the IOSCO Equity Disclosure Standards. First, there is convergence on when and how *pro forma* financial statements (book value, comprehensive income and statement of cash flows) should be prepared by the issuers for the purpose of the prospectus and the bases of such preparation.[45] The IOSCO Equity Disclosure Standards leave it to individual countries to choose whether to require *pro forma* financial statements.

Secondly, while profit forecasts and forward-looking statements fall outside the scope of IOSCO Equity Disclosure Standards, the ASEAN Disclosure Standards provide that issuers that wish to disclose profit forecast or cash flow forecast must comply with certain specified additional disclosures to ensure that investors are able to make an informed assessment of the forecast or forward-looking statements.

However, there remain important limitations of the ASEAN Disclosure Standards in facilitating cross-border offerings. First, there is no automatic mutual recognition of the prospectuses which are in compliance with the ASEAN Disclosure Standards; an issuer which is planning to offer its securities in a host country still requires compliance with its national laws in respect of the prospectus registration and other applicable *local* regulations (for example,

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[44] P Martin, 'Regional and Global Financial Integration: An Analytical Framework' in Devereux MB *et al* (eds), *The Dynamics of Asian Financial Integration: Facts and Analysis* (Routledge, 2011), ch 1, 21.

[45] *Pro forma* financial statements are required when the issuer has acquired or disposed material assets during the period from the most completed financial year to the effective date of the prospectus.

regulations that may be specific to a particular industry).[46] Secondly, as the approval of the prospectuses still rests on the host state, national regulators may interpret and apply the ASEAN Disclosure Standards differently. Thirdly, there is no supra-national securities agency to oversee the implementation of the ASEAN Disclosure Standards. Each of these limitations will be discussed in Part IV below.

3. Cross-Listings

In 2012, pursuant to the initiative of the ACMF, the participating member states agreed on the Expedited Review Framework on Secondary Listings ('Expedited Framework').[47] This Expedited Framework provides that an issuer listed in the participating member state and which is intending to effect a cross-listing on another participating member state may file the secondary listing application and the relevant prospectus with the host regulator. The host regulator will review the submission within 35 business days. According to the ACMF, this is a 'significant reduction' compared to the normal review time-frame which may be up to 16 weeks.

This Expedited Framework is only a process for expediting the review of a secondary listing application and does not affect the substantive criteria for admission into a stock exchange. In particular, this Framework does not regulate the continuous disclosures of companies that are admitted for secondary listing, which continues to be governed by the host jurisdiction.

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[46] See ACMF, 'ASEAN Disclosure Standards, FAQs' <http://www.theacmf.org/ACMF/webcontent.php?content_id=00015> accessed 30 June 2016.

[47] ACMF, 'Frequently Asked Questions (FAQ) – Expedited Review Framework for Secondary Listings' <http://www.theacmf.org/ACMF/upload/faq_expedited_review_framework_secondary_listings.pdf> accessed 30 June 2016.

In addition to the steps that are taken to streamline the secondary listing applications, the stock exchanges of Singapore and Thailand have also recently put in place measures to promote secondary listings. SGX has put in place a new regulatory framework and will not subject an issuer, whose home exchange is from a developed jurisdiction, to additional regulatory requirements other than the requirement to release announcements simultaneously to the home exchange and SGX.[48] An issuer whose home exchange is from a developing jurisdiction may be subject to additional requirements 'to enhance shareholder protection and corporate governance standards'.[49] Likewise in Thailand, there are recent changes made to incentivise foreign firms to raise capital in Thailand.[50]

III. Study of Cross-Border Equity Offerings and Cross-Listings in Singapore, Malaysia and Thailand

As set out in Part I, the goal of this research is to develop a better understanding on how issuers in the participating member states to the ASEAN Disclosure Standards access capital markets in their home jurisdictions and internationally. While the ASEAN Disclosure Standards cover only plain equity offerings, in view of the *ACMF Action Plan for 2016-2020* to extend the standards to REITs, business trusts and infrastructural funds, the research is extended to investigate IPOs with international offerings involving not only shares but also the

[48] It is noted that Singapore Exchange ('SGX') regards both Bursa Malaysia and Stock Exchange of Thailand as developing jurisdictions, following FTSE and MSCI classifications.

[49] SGX, 'SGX Welcomes Secondary Listings with Stream-lined Rules' (30 October 2014) <http://infopub.sgx.com/FileOpen/20141030_SGX_welcomes_secondary_listings.ashx?App=Announcement&FileID=321046> accessed 30 June 2016.

[50] N Polkuamdee, 'Listing Rules for Foreign Firms to Relax: Aim is to Improve Market Competitiveness' *Bangkok Post* (15 December 2014) <http://www.bangkokpost.com/print/449852/> accessed 30 June 2016.

aforementioned securities. The IPO data and prospectuses were obtained from *SDC Platinum Securities Data Company Global New Issues ('SDC Database')* and ThomsonOne/Bloomberg databases respectively. I also supplement with prospectuses obtained from the websites of the relevant stock exchanges and the companies. The sample yielded 126 IPOs for Singapore and 96 IPOs for Malaysia, with only one exclusion due to the lack of availability of data.[51]

In the case of Thailand, due to the issues as to the accessibility of the prospectuses (all of the prospectuses are in Thai and are not translated in English except in certain cases such as those with offerings containing international tranches), I obtained from *SDC Database* a sample of issuers listed on the Stock Exchange of Thailand that had IPOs with international tranches during the period of 2010-2014. This yielded a sample size of 42 issuers. I engaged a translator to analyse the distribution of retail and institutional offerings as disclosed in the prospectuses (in Thai). Out of the sample size of 42 issuers, the translator found that only 19 IPOs had sufficient information on the distribution sizes in the prospectuses and the findings are reported below as case studies. Due to the limitation mentioned in this paragraph, it is possible that the sample size of 19 IPOs is under-inclusive and may not be generalised to all of the Thai offerings.

The findings in this Part will show that while the initial version of the ASEAN Disclosure Standards has been in place since 2009, these harmonised rules and regulations have not had any significant impact on raising capital in the three ASEAN jurisdictions to date. In fact, there is no reported case of the utilisation of the ASEAN Disclosure Standards, as this Part of the article will demonstrate.

1. The Singapore Experience

[51] I have excluded the IPO for Hutchinson Port (2011) because I was unable to determine the value of the Japanese retail offering.

Table 1 reports the total number of 126 IPOs that Singapore-listed issuers made during the 2010-2014 period, with a breakdown of the number of IPOs that are purely domestic offerings and those that have international tranches. Out of these 126 IPOs, 108 (or 85.6 per cent) involve the offerings of shares, while the remainder involves REITS and/or business trusts.

[Insert Table 1]

Table 2 reports the values of all of the IPO offerings, with the breakdown of retail offerings in Singapore, ASEAN (excluding Singapore), and the rest of the world, and institutional offerings. Figure 1, which is based on the data in Table 2, presents the data on the trend on the relative percentages of the sizes of the institutional and retail offerings.

[Insert Table 2]

[Insert Figure 1]

From Table 1, it can be seen that approximately 20 to 40 per cent of Singapore-listed issuers made IPO offerings outside Singapore during the period 2010-2014. Only one issuer made a retail offering outside Singapore to a participating member state (in this case Malaysia) during the 2010-2014 period.[52] Outside the participating member states, one IPO had a foreign retail offer component (Japan).[53]

[52] This is in fact the IPO of IHH Healthcare Berhad.

[53] This is the IPO of Accordia Trust (2014) which was a Japanese retail offering without listing. Hutchinson Port Trust also had a Japanese retail offering without listing component, but as explained above, could not be included due to a lack of data.

As shown in Table 2, the smaller proportion of institutional offerings in 2012 and 2014 (and correspondingly the larger proportion of retail offerings) was due to the issuers having made retail offerings outside Singapore (in Malaysia and Japan respectively for these two years).

Table 3 shows the IPO offerings with international tranches; these tend to be the larger offerings, constituting more than 70 per cent in value of the total IPO offerings. Based on data in Tables 1 to 3, the value of average IPOs with an international offering was SGD639.5 million whereas the value of an average pure domestic offering was only SGD30.3 million.

[Insert Table 3]

The research has not shown any Singapore-listed issuer taking advantage of its ability to have mutual recognition of their prospectuses under the ASEAN Disclosure Standards to make public offerings of equity securities in another participating member state.

2. The Malaysian Experience

Tables 4 and 5 are the equivalents of Tables 1 and 2 respectively. Table 4 reports the total number of IPOs that Malaysian-listed issuers made during the 2010-2014 period, with a breakdown of the number of IPOs that were purely domestic offerings and those that had international tranches. Out of 96 IPOs for Malaysia, 92 (or 96 per cent.) relate to equity offerings, with the remaining are offerings of REITS. Table 5 reports the value of the IPO offerings, with the breakdown of retail offerings in Malaysia, ASEAN (excluding Malaysia) and the rest of the world, and institutional offerings.

[Insert Table 4]

[Insert Table 5]

The experience of IPO offerings in Malaysia is similar to that of Singapore. Very few (only one) (IHH Healthcare Berhad, 2012) had concurrent retail offerings in Singapore and Malaysia. As in the case of Singapore, though the number of IPOs that have international tranches is small, the value of these IPOs is significant (constituting between 70-90 per cent of the total value of the IPOs per year). Figure 2, which is based on the data in Table 5, presents the data on the trend on the relative percentages of institutional and retail offerings.

[Insert Figure 2]

Table 6 is the equivalent of Table 3. Table 6 presents the data on value of the IPO transactions that were undertaken by Malaysian-listed issuers that had international or sophisticated offerings, including a breakdown on the value of retail offerings requiring prospectuses and institutional or sophisticated offerings that do not require prospectuses.

[Insert Table 6]

As seen from Tables 4, 5 and 6, Malaysian-listed issuers were likewise not keen in tapping into the retail market outside of their home jurisdiction. In the case of IPOs with international offerings, a significant proportion in value (in 4 out of 5 years, it was more than 85 per cent) was offered to the institutional or sophisticated investors.

3. The Thai experience

[Insert Table 7]

Table 7 presents the case studies of Thai IPOs which have undertaken international offerings. None of the IPOs reported in Table 7 included a retail offering outside of Thailand. The value of the institutional tranche was between 60 and 90 per cent of the total value of IPOs in the five years surveyed. While the Thai domestic retail sector appears (from these 19 IPOs) to be slightly more important than the Singaporean or Malaysian retail sectors, the targets of capital raising still are institutional investors. It therefore appears that the Thai issuers do not engage in foreign retail offerings.

4. Cross-listings in participating member states

Table 8 shows the companies that are cross-listed on the participating member states as at 31 December 2014. For companies that are cross-listed on SGX and either Bursa Malaysia or Stock Exchange of Thailand, particularly those that have undergone IPO and/or listing in the 2010-2014 period, none of them has utilised the mutual recognition processes in the ASEAN Disclosure Standards in their offerings. For example, in the case of IHH Healthcare Berhad which held simultaneous public offerings in Singapore and Malaysia in 2012, the prospectuses for the concurrent offers made in Malaysia and Singapore had Malaysian and Singapore 'wrap-around' respectively.[54] The ASEAN Disclosure Standards were not used. In the case of Malaysia Smelting Corporation Berhad, the company was already listed on Bursa Malaysia before an IPO was held in Singapore. Thus, the public offering only occurred in Singapore and was not made to the public in Malaysia.[55]

[54] Prospectus of IHH Healthcare Berhad dated 2 July 2012, copy on file with author.
[55] Prospectus of Malaysia Smelting Corporation Berhad dated 21 January 2011, copy on file with author.

[Insert Table 8]

The evidence also shows that cross-listing in the participating member states has not always led to improved stock liquidity. For example, in the case of Sri Trang Agro-Industry plc, it was converted from a primary to a secondary listing in 2014 due to a lack of liquidity.[56]

IV. The Reasons for the Lack of Success with the ASEAN Disclosure Standards and Cross-Listings

There are two main explanations why few issuers take advantage of the ASEAN Disclosure Standards. First, issuers are able to arbitrage the constraints of having to make public offers by utilising the exemptions to the public offers, including offers to institutional and sophisticated investors. The research findings in Part III shows that issuers in the participating member states do raise capital outside their home states and the larger offerings tend to include international offerings. Secondly, quite apart from investor demand and notwithstanding the costs savings and reduction of barriers promised by the harmonisation of the ASEAN Disclosure Standards, the responsibilities of interpretation, application, monitoring and enforcement remain fragmented across the member states, significantly undermining the benefits that may be achieved by having a common set of disclosure standards.

1. Availability of exemptions to public offerings

[56] Invitation Notice of the Annual General Meeting of Sri Trang Agro-Industry dated 25 March 2014 convening the 2014 Annual General Meeting of the shareholders, copy on file with the author. It was reported that as of 2013, 93.79 per cent of the shares traded on the Stock Exchange of Thailand, with the remaining trading on SGX. Low trading volume has persisted since 2011 when the company was dual listed on SGX.

Issuers planning to offer equity in the participating member states do not have to utilise the ASEAN Disclosure Standards. They can choose to comply with the prospectus rules in that jurisdiction (such as IHH Healthcare's offering in 2012). More commonly, however, issuers can arbitrage around the requirement of a prospectus by using the alternative exemptions for making offers to institutional investors in that participating member jurisdiction. For example, in Singapore, offers to institutional and accredited investors in Singapore under section 274 or 275 of the Securities and Futures Act 2001 ('SFA') respectively do not require prospectuses. Alternatively, issuers can use private placement exemptions under section 272B of the SFA.[57] Likewise, in Malaysia, under the Capital Services Markets Act 2007, a prospectus is not required if the securities are sold to persons listed in Schedules 6 and 7, which include sophisticated or professional investors.[58] An issuer seeking an IPO retail offering may make the offers into Malaysia using a 'wrap' that is targeted at those persons who do not require a prospectus. Similarly, in Thailand, there exist similar exemptions from the requirement to file the registration statement and draft prospectus for an offer for sale of shares to among others, institutional shareholders.[59]

Tables 3 and 6 show that almost all of the offerings outside Singapore and Malaysia (with very few exceptions) are made using the equivalent of the institutional investor or

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[57] Section 272B of the SFA allows for offers to be made up to 50 offerees within a 12-month period without a prospectus. However, the reference to 50 offerees is to 50 persons who have received the offer and not 50 acceptances, so that would limit the number of offers that can be made.

[58] Capital Markets and Services Act 2007, ss 229 and 230; read with Schedules 6 and 7. Schedules 6 and 7 exempt, among others, the following investors and transactions: (1) a unit trust scheme; (2) a holder of a capital markets services licence dealing in securities or fund management; the aggregate consideration is not less than RM250,000; (4) a high net worth individual whose personal assets exceed RM3 million; and (5) banks and insurers.

[59] Securities and Exchange Act B.E. 2535, s 33, read with Notification of the Securities and Exchange Commission No. KorChor. 18/2551 (Re Exemption from Filing of Registration Statement for the Offer for Sale of Securities) <http://capital.sec.or.th/webapp/nrs/nrs_search_en.php?chk_frm=1&ref_id=72&cat_id=4&topic_desc=Securities Issuance> accessed 30 June 2016.

accredited/sophisticated investor exemptions. In the offerings in Singapore, Malaysia and Thailand, in all of the cases, the retail offering portion does not constitute the majority of the overall offering, lending support to the proposition that the retail offering in the host jurisdiction is used only to ensure that the shareholding spread is met. Thus, issuers in the participating member states do not appear to have the need to tap into the retail markets of the other participating member states.

The question then arises is whether limiting the placement of the securities only to institutional or sophisticated investors results in significant disadvantages. In Singapore, there are resale restrictions; if the sophisticated investor (or accredited investor) exemption is invoked for a person to subscribe for securities, they would not be able to sell to retail investors within six months from the date that they were first acquired unless a prospectus is prepared in connection with such a sale.[60] Thus, there are restrictions on these institutional investors in freely trading the shares post-IPO. In New Zealand, the MRSO (discussed below) was significant in encouraging issuers to make cross-border retail offerings into the Australian market that required a prospectus so as to meet the demand from Australian institutional investors requiring an Australian Stock Exchange listing without having to impose restrictions on resales.[61]

It is argued here that there is room to expand the retail participation in the securities markets in the participating states, particularly in Singapore and Malaysia, so as to deepen the capital markets and promote liquidity.[62] The reported statistics show that while retail investors

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60 SFA s 276.

61 See Chapman Tripp, 'A Strong Run for New Zealand's Equity Capital Markets' (11 September 2013) <http://www.chapmantripp.com/publications/Pages/A-strong-run-for-New-Zealand's-equity-capital-markets.aspx> accessed 30 June 2016.

62 Eg SGX, 'Public Consultation on Proposed Initiatives in Relation to Offer Structure of Initial Public Offers' (October 2012) <http://www.mondovisione.com/_assets/files/20121001_sgx_consultation_paper_initiatives_in_relation_to_offer_st

constitute 9 per cent of the investors in Malaysia, they account for around 27 per cent of the trading volume.[63] In Thailand and Singapore, retail investors account for approximately 55 per cent and 30-35 per cent of the trading volumes respectively.[64] Recent regulatory initiatives in the area of retail investor education point towards the direction in favour of more retail participation.[65]

2. ASEAN's Regulatory Policies

In the absence of demand, imposing regulatory policies will not in itself result in a dramatic increase of issuers in the participating member states undertaking cross-border equity issues. However, the question remains as to whether law and regulation, which is available at ASEAN's disposal, can continue to have some role in reducing the regulatory barriers and costs. This Part identifies the impediments to achieving greater regulatory convergence in cross-border equity offerings that continued to be posed by the ASEAN Disclosure Standards.

(i) Host country continues to have the responsibility of oversight of prospectuses

The ASEAN Disclosure Standards consist of a set of harmonisation of minimum standards and there is limited mutual recognition. While issuers may opt to use the ASEAN Disclosure Standards for cross-border offerings, issuers must still comply with the local disclosure rules. The local securities regulator of the host country must still approve the

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ructures_of_ipos_final.pdf> accessed 30 June 2016; Securities Commission, 'Capital Markets Masterplan 2' (2011) <http://www.sc.com.my/wp-content/uploads/eng/html/cmp2/cmp2_final.pdf > accessed 30 June 2016.

63 The figures for Malaysia are as of 2010. See IOSCO, 'Development and Regulation of Institutional Investors in Emerging Markets' (June 2012) FR04/12 <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD384.pdf> accessed 30 June 2016.

64 Goyal *et al*, see n 14 (for Thai data). For Singapore data, see Wong WH, 'Smaller Lot Size 'May Not Result in Trading Surge' *Straits Times* (17 January 2015).

65 Eg SGX, 'SGX Says More Retail Investors in Stock Market; Launches 2014 Edition of StockWhiz Contest' (30 June 2014) <http://www.btinvest.com.sg/markets/news/88567.html?source=si_news> accessed 30 June 2016, see n 119 below.

prospectus and applies its own time-lines, though this is set to improve with the Streamlined Review Framework for the ASEAN Common Prospectus.[66] Even though the prospectus that is to be used in the home and host jurisdictions must be in English, the host jurisdiction may impose its own language requirements, leaving issuers with the onerous burden of translation.[67]

By way of comparison, there has been greater success with the ASEAN Collective Investment Scheme ('CIS') Framework in promoting cross-border offering of securities (in the form of CIS) even though there are at least three other recent schemes in Asia to promote pass-porting of funds.[68] Since the adoption of the ASEAN CIS Framework in August 2015, the CIS Framework has been reported to be utilised in 13 CIS offerings.[69]

Unlike the ASEAN Disclosure Scheme, the ASEAN CIS Framework is premised on strong mutual recognition. A qualified CIS operator of a member state may take advantage of the process if its home regulator first approves the CIS prospectus for offer to the public in the home jurisdiction, assesses that the CIS is suitable and meets any additional requirements in respect of compliance with the host jurisdiction's laws and regulations (including the language in which the prospectus should be prepared).[70] Once the home regulator issues the approval letter, the foreign qualifying CIS operator may submit the letter of approval to the host regulator, together with the prospectus that complies with the host requirements, for the host regulator to approve the

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66 Streamlined Review Framework for the ASEAN Common Prospectus (2 September 2015). This was entered into pursuant to the Memorandum of Understanding entered into among the MAS and SGX, the Securities Commission Malaysia and the Securities and Exchange Commission, Thailand in March 2015.

67 Streamlined Review Framework for the ASEAN Common Prospectus, n 66, Box 3.

68 They are (1) the APEC Asia Regions Funds Passport initiated by Australia, which has initially four participating countries, Australia, New Zealand, Korea and Singapore; (2) the mutual recognition of collective investment funds between Hong Kong and China under the Mutual Recognition Platform; (3) the Undertakings for Collective Investments in Transferable Securities.

69 See *ACMF Action Plan 2016-2020*.

70 ACMF, 'Handbook for CIS Operators of ASEAN CIS' ('CIS Handbook') (25 August 2014) <http://www.theacmf.org/ACMF/upload/asean_cis_handbook.pdf> accessed 30 June 2016.

prospectus under a streamlined authorisation process. The *Standards of Qualifying CIS* do not state the time-frame under the streamlined authorisation process, except in the case of Thailand where the time-line is stated to be 30 days.[71]

(ii) Fragmentation in respect of interpretation, application, supervision and enforcement

The current framework does not centralise the interpretation, application, supervision and enforcement of the ASEAN Disclosure Standards, which remain fragmented across the member states.

First, in respect of interpretation and application, one of the main criticisms levied against the IOSCO Equity Disclosure Standards, which also applies to the ASEAN Disclosure Standards, is that they do not contain materiality thresholds in respect of a number of key disclosures, including material agreements, risk factors affecting the issuer's financial position and results and business operations and investments by shareholders of the issuer.[72] Materiality often involves a two-fold assessment, namely, qualitative and quantitative. The concept of materiality will vary across the jurisdictions, resulting in the uneven application of a key aspect of the disclosure standards.

Second, supervision and enforcement remains fragmented. While all of the participating members are signatories to the cooperation of enforcement via the IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and Exchange of

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[71] See ACMF, 'Standards of Qualifying CIS' <http://www.theacmf.org/ACMF/upload/standards_of_qualifying_cis.pdf> accessed 30 June 2016, 48.

[72] ASEAN Disclosure Standards, Part E.

Information ('IOSCO MMoU'), there are only limited successful attempts to coordinate the supervisory and enforcement cooperation. The *Implementation Plan* refers to one of the goals as enhancing 'information-sharing and cooperation mechanisms between home and host regulators to enforce home country laws applying to ASEAN provider of cross-border products or services in host country'.[73] However, beyond the IOSCO MMoU, this goal has not been achieved by the time the AEC was in force.

Further in respect of enforcement, again, the *Implementation Plan* refers to one of the goals as building bilateral relationships to ensure 'investor protection for mutual recognition arrangements for cross-border provisions of products' and that to 'strengthen investor protection, ACMF members consider ensuring the existence of a home country liability regime for compensating investors'.

There is no question that enforcement of securities laws plays an important role. The process of compiling a prospectus is also driven by the threat of public enforcement by the regulator or criminal authorities and civil liability to investors who have suffered losses. From the investors' perspectives, while there is ongoing debate in the law and finance scholarship as to whether private enforcement of securities laws,[74] in itself, leads to strong securities markets, there is no reason to doubt that a combination of private and public enforcement will boost investor confidence and are important aspects towards the building of strong securities markets.[75]

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73 See *Implementation Plan*, see n 4 above.

74 R La Porta, F Lopez-de-Silanes and A Shleifer, 'What Works in Securities Laws' (2006) 61 J Fin 1. Cf. MS Siems 'What Does Not Work in Comparing Securities Laws: A Critique on La Porta et al's Methodology' (2005) ICCLR 300.

75 Coffee J, 'Law and the Market: The Impact of Enforcement' (2007) 156 U Pa L Rev 229.

While the aim to achieve convergence in respect of investor protection through a civil liability framework is laudable, in the context of Singapore and Malaysia, the history shows that enforcement in respect of prospectuses has largely been in the public sphere. While both jurisdictions have statutory provisions in their securities legislation which explicitly provide for the ability of investors to bring civil actions against, among others, the issuers and their directors and advisers for false or misleading statements or non-disclosures in the prospectuses,[76] there is no reported case law of investors looking to the Singapore or Malaysian courts for redress. The evidence suggests that private enforcement is not as significant as public enforcement, at least in Singapore and Malaysia.

In Singapore, three cases have been reported where enforcement / regulatory actions were taken or where criticism was made in connection with incomplete or inaccurate prospectuses since the enactment of the SFA. The first was *Auston International Group v PP*,[77] where criminal proceedings were brought against the issuer for false and misleading statements in the prospectus; the prospectus had over-stated the pre-tax profits of the company.

The second was Global Logistics Properties (GLP) which undertook an IPO in 2010. While the Monetary Authority of Singapore ('MAS') did not find that GLP was in breach of the SFA, GLP was criticised by the MAS for not disclosing that it had a non-compete agreement with ProLogis (from whom it acquired certain assets in China) which prevented ProLogis from

[76] For Singapore, see s 254 of the SFA. For Malaysia, see s 248 of CMSA (providing specifically for the right to recover for losses or damage resulting from false or misleading statement in, or material omission, from the prospectus).

[77] [2008] 1 SLR(R) 882.

competing in China and that arrangement came to an end in February 2011.[78] GLP argued unsuccessfully that the non-compete arrangement was not material.

The third was New Century (2010), which was reprimanded by MAS for, among other things, failing to disclose an arbitration claim from its client in the prospectus, even though the company argued that, if the claim was successful, it would result in the impairment of 1.5 per cent of its net assets and 4.2 per cent of its cash balance.[79]

In Malaysia, between 2008 and 2011, the Securities Commission reported that it took action in two cases involving the making of false or misleading statements in, among other things, prospectuses.[80] A further instance occurred in 2013, Ranhill Energy and Resources Berhad was fined RM200,000 by the Securities Commission for failing to disclose a material update to the prospectuses, that is, the suspension of Petronas licence of its affiliate in its prospectus, to the Securities Commission after the close of the public offering but prior to the allotment of the shares.[81]

The ASEAN disclosure standards do not attempt to harmonise public or private enforcement framework in connection with prospectuses. Issuers which are contemplating cross-border share issuances will have to familiarise themselves with the different prospectus liability

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78 MAS, 'MAS Statement on Global Logistics Properties Limited' (22 July 2011) <http://www.mas.gov.sg/news-and-publications/media-releases/2011/mas-statement-on-global-logistics-properties-limited.aspx> accessed 30 June 2016.

79 See Chan F, 'MAS Raps Firm Over IPO Info' *Straits Times* (1 September 2010).

80 IMF, 'Malaysia: Publication of Financial Sector Assessment Program Documentation— Detailed Assessment of Implementation of IOSCO Objectives and Principles of Securities Regulation' (March 2013) <https://www.imf.org/external/pubs/ft/scr/2013/cr1359.pdf > accessed 30 June 2016, 67.

81 See Securities Commission, 'SC Fines Ranhill Energy and Resources Berhad and Tan Sri Hamdan Mohamad' (8 November 2013) <http://www.sc.com.my/post_archive/sc-fines-ranhill-energy-and-resources-berhad-and-tan-sri-hamdan-mohamad/> accessed 30 June 2016.

regimes in the different states (including administrative and civil liabilities). Also, investors investing outside their home state will need to be wary that liability regimes in host states differ.

V. Comparisons with other forms of harmonisation or mutual recognition schemes

Part V examines two other models of harmonisation or mutual recognition schemes relating to the use of a single disclosure document to make cross-border securities offerings to promote capital markets integration, which are the Prospectus Directive in the EU and the MRSO Scheme. The former is a fully harmonised securities framework while the latter adopts a full mutual recognition framework. It is acknowledged that either model, in its unmodified form, is not necessarily a template for ASEAN; the EU Prospectus Directive builds on the experience of harmonisation of securities standards over a decade and takes place in the context of achieving of a genuine single market and economic union, and the political will for such union is not present in ASEAN. The MRSO occurs in the context of two jurisdictions which are developed jurisdictions and share similar legal traditions, which could not be more different in the context of ASEAN where its member states are in vastly different stages of economic development. Nevertheless, both models provide useful case studies on the key institutions, regulatory coordination and policies that account for the success of these schemes.

1. EU Prospectus Directive

The evolution of the Prospectus Directive has a long history. Prior to the adoption of the Financial Services Action Plan in 1999, there were two phases of development.[82] The first phase, which occurred between 1979 and 1982, saw the adoption of EU laws which required issuers seeking to raise finance by offering their securities in the officially listed segment of the securities market to make mandatory disclosures in the form of listing particulars.[83] The second phase, which occurred between 1985 and 1995, saw the promulgation of EU laws and regulation extending to unlisted offers. [84] The Public Offers Directive 1989 also provided for the mutual recognition of prospectuses produced and approved by competent authorities to be used for admission applications and public offers in other member states in the EU.

However, in practice, participating member states were free to, and did indeed, set their own additional requirements such as local income tax, paying agency arrangements and publishing notices to investors.[85] The result was that the original prospectus directives were hardly used; fewer than two to three issues a year attempted to use the regime.[86] There was also inconsistency in the implementation of the EU framework on prospectuses and supervisory cooperation was weak.[87]

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82 For a discussion on the history pre-Financial Services Action Plan, see N Maloney, *EU Securities and Financial Markets Regulation* (3rd ed, OUP, 2014), at pp 22-24.

83 Directive 79/229/EEC coordinating the conditions for the admission of securities to official stock exchange listing (Admissions Directive 1979) [1979] OJ L66/21; Directive 80/390/EEC coordinating the requirements for the drawing up, scrutiny and distribution of the listing particulars to be published for the admission of securities to official stock exchange listing (Listing Particulars Directive 1980) [1980] OJ L100/1;

84 Directive 89/298/EEC coordinating the requirements for the draw up, scrutiny and distribution of the prospectus to be published when transferable securities are offered to the public (Public Offers Directive 1989) [1989] OJ L124/8.

85 Maloney N, *EU Securities and Financial Markets Regulation* (3rd ed OUP, 2014) 65.

86 See H Jackson and E Pan, 'Regulatory Competition in International Securities Markets: Evidence From Europe in 1999' (2001) 56 Bus L 653. The exception was the 1999 and 2000 Deutsche Telecom pan-EU offering. See Maloney N, see n 85, 72.

87 Maloney N, see n 85, 24.

The overhaul of EU securities regulation began in 1999 through the Financial Services Action Plan, whose objective was to create a single, integrated market. Since 1999, a series of EU Directives has been issued, including the Prospectus Directive, the Market Abuse Directive, the Takeover Bids Directive and the Transparency Directive.[88] The Prospectus Directive sets out the framework under which issuers may use a single prospectus in connection with the public offer of securities (or application for admission of securities to trading in a regulated market) in any member state in the EU and the prospectus need only be approved by one competent authority. This requirement only applies to public offers of securities and there is harmonisation on the derogations and exemptions possible from the operation of the Prospectus Directive.[89] Once the prospectus is approved, it is valid for public offers or the admission of securities to trading on a regulated market in any member state within the EU; all it requires is that a notification procedure in the host state where the offering takes place.[90] There are inflexible rules on the issuer's supervisory authority over the regulation of prospectuses.[91]

The Prospectus Directive also regulates the publication of supplements where material factors arise or if there are material mistakes or inaccuracies after the initial approval of the prospectus but before the closing of the offer or commencement of trading.[92]

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88 The other directives include: Council Directive (EC) 02/1606 on the application of international accounting standards [2002] OJ L 243; Council Directive (EC) 04/39 on markets in financial instruments amending Council Directives 85/611/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC [2004] OJ L145 ('Markets in Financial Instruments Directive')

89 The Prospectus Directive contains exemptions from the requirement to publish a prospectus if the offers are made solely to qualified investors (defined in art 2(1)(e), which is defined as persons that are classified as professional clients and eligible counterparties in Markets in Financial Instruments Directive) or are private placements (where the offer is made to less than 150 persons, other than qualified investors) under art 3(2).

90 Prospectus Directive, art 18. The home competent authority must notify the issuer of the certificate of approval of the prospectus at the same time as it notifies the host competent authority.

91 See R Panasar and P Boeckman (eds) *European Securities Laws* (2nd edn, OUP, 2014), 405.

92 Prospectus Directive, art 16.

The Prospectus Directive provides for maximum harmonisation,[93] that is, the prospectus disclosure regime applies across the board with member states not being able to insist on compliance with additional national requirements so as to ensure a level playing field.[94] This is the case even if the offering is made in a single member state that has no cross-border element.[95] Where an offer to the public is made or admission to trading is sought in the home member state, the prospectus must be drawn up in the language accepted by the home competent authority. If an offer is also made in the host member states, it is to be made in a language acceptable by the host member states or in a language that is 'customary in the sphere of international finance'; host states may require translation of *only* the summary of the prospectus into their official language and cannot impose additional requirements.[96]

(i) Maximum versus minimum harmonisation measures

The Prospectus Directive was drafted based on the IOSCO Equity Disclosure Standards. In this respect, the Prospectus Directive can be contrasted with the ASEAN Disclosure Scheme; the ASEAN Disclosure scheme imposes minimum disclosure standards while in the case of the Prospectus Directive, EU member states cannot impose more stringent requirements beyond what is in the Directive. Similar to the ASEAN Disclosure Scheme which only applies to public offerings, the Prospectus Directive only applies to admission to trading on a 'regulated market'.[97] The prospectus requirements do not apply to offers made to qualified investors or private

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93 Prospectus Directive, art 17. See Enriques L *et al,* 'Is There a Uniform EU Securities Law After the Financial Services Action Plan' (2008) 14 Stan J L Bus Fin 43.

94 Prospectus Directive, art 3 (second para) and 22(I) (second sub-para). Admittedly, there are some exceptions such as disclosures in issuers in certain industries such as mineral, property and investment companies, scientific research companies and start-ups. See art 23(1).

95 E Ferran, *Building an EU Securities Market* (CUP, 2004) 142.

96 Prospectus Directive, art 19.

97 A regulated market is a securities market that is recognised by a member state for the purposes of the Council Directive (EC) 93/22 on investment services in the securities field [1993] OJ L 141 . It includes the London Stock Exchange and most of the major EU stock exchanges.

placements, which have been the norm for cross-border offerings pre-Financial Services Action Plan.[98]

While the Prospectus Directive is a maximum harmonisation measure, the Prospectus Directive does not harmonise civil liability for information included in the prospectus. It merely provides that EU member states should ensure that responsibility for the contents of the prospectus must be taken at least by the issuer or its board, the offeror, the person requesting admission to trading or the guarantor, while leaving the issue of the standard of liability to the member states.[99]

(ii) Regulatory coordination and institutions

In terms of regulatory coordination, the EU passporting mechanism places the responsibility of the approval of the prospectus on the home jurisdiction. Irregularities found by the host jurisdiction must be referred to and addressed by the home jurisdiction. To ensure consistency in the interpretation of the Prospectus Directive, the European Securities and Markets Authority ('ESMA') has the responsibility to promulgate guidelines, recommendations and standards[100] with the aim of achieving convergence on common supervisory approaches and practice.[101]

(iii) Success of the EU Prospectus Directive

98 Ferran E, see n 95 above, 200.

99 Prospectus Directive, art 6.

100 Eg European Securities and Markets Authority ('ESMA'), 'Update of the CESR Recommendations: The Consistent Implementation of Commission Regulation (EC) No 809/2004 Implementing the Prospectus Directive' (20 March 2013) ESMA/2013/319 <http://www.fme.is/media/leidbeiningar/2013-319.pdf> accessed 30 June 2016. It also maintains the Q&A: see ESMA/2014/179 (October 2014).

101 See ESMA/2014/179, para 7.

How successful has the Prospectus Directive been in Europe in achieving the goal of fostering an integrated securities market? [102] The evidence appears to be mixed.[103] There is evidence showing a dramatic increase in the prospectuses passported, sent and received between 2004/2005 (before the implementation of the Prospectus Directive) and 2005/2006 (after the implementation of the Prospectus Directive), from 206 to 1150 prospectuses passported and sent and 81 to 2837 for prospectuses passported and received.[104] However, the 2008 study conducted by the Centre for Strategy & Evaluation Services ('CESR') on the impact of the Prospectus Regime on EU Financial Markets[105] reported that on the equity side, passporting is mainly used for secondary fund raising or for employee shareholders rather than for IPOs. The reasons given are (i) companies tend to focus only on the most liquid market to list their shares; (ii) the availability of using exemptions to make cross-border retail offerings; (iii) the presence of well-developed equity markets which reduces the incentive for making cross-border offerings; and (iv) the lack of retail investor demand due to the difficulties in obtaining information on foreign companies and the transaction costs involved in the trading in these securities. The CESR also cautioned that the number of passports do not reflect the actual cross-border retail offerings as larger issuers may obtain the passport "just in case" that the retail offerings in the relevant jurisdiction is made.

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102 See T Morris & J Machin, 'The Pan-European Capital Market – is the Prospectus Directive a Success or Failure?' (2006) 1 CMLJ 205; see C Gerner-Beuerle, 'United in Diversity: Maximum versus Minimum Harmonization in EU Securities Regulation' (2012) 7 CMLJ 317.

103 Maloney N, see n 85, 125.

104 The Committee of European Securities Regulators, 'CESR's Report on the Supervisory Functioning of the Prospectus Directive and Regulation' (June 2007) CESR Report <http://www.esma.europa.eu/system/files/07_225.pdf> accessed 30 June 2016.

105 Centre for Strategy & Evaluation Services, 'Framework Contract for Projects Relating to Evaluation and Impact Assessment Activities of Directorate General for Internal Market and Services: Study on the Impact of the Prospectus Regime on EU Financial Markets: Final Report' (June 2008) <http://ec.europa.eu/finance/securities/docs/prospectus/cses_report_en.pdf> accessed 30 June 2016.

The fact that the Prospectus Directive may not be as widely used in primary offerings, as compared with secondary offerings, does not necessarily mean that the Prospectus Directive has not been useful. Even if issuers choose to opt-in and obtain the passport but not make the actual cross-border offering, it shows that the costs involved in obtaining the passport are not so prohibitive. A later study by CRA International[106] pointed out that the Prospectus Directive has made access to foreign markets easier though it may not be the only contributing cause.[107] More recent data published by the ESMA demonstrate that majority of the prospectuses are for non-equity securities rather than equity securities;[108] though a limitation of the data from ESMA is that it does not show a breakdown of the use of passporting prospectuses for secondary fund-raising activities and IPOs. However, it could be argued that the fact that the Prospectus Directive is used in secondary offerings is a positive development as it brings down the barriers for secondary fund-raising by issuers once they are listed.

2. Trans-Tasman Mutual Recognition of Securities Offerings Scheme

The MRSO, formed pursuant to the *Agreement between the Government of Australia and the Government of New Zealand in relation to the Mutual Recognition of Securities Offerings* signed in 2006 by Australia and New Zealand, came into force in June 2008. This is an example of two countries moving towards economic union, where the securities regulators in both

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106 CRA International, 'Evaluation of the Economic Impacts of the Financial Services Action Plan' (2009) CRA Project No. D12460 <http://ec.europa.eu/internal_market/finances/docs/actionplan/index/090707_economic_impact_en.pdf> accessed 30 June 2016

107 The CRA study pointed out other possible explanations for the increase in the use of passports including taxation and round-tripping (a prospectus is approved in a member state that is efficient in dealing with prospectuses and then securities are sold back in the home member state).

108 Eg ESMA, 'Report: EEA Prospectus Activity in 2014' (23 July 2015) ESMA/2015/1136 <https://www.esma.europa.eu/system/files_force/library/2015/11/2015-1136_eea_prospectus_activity_in_2014.pdf?download=1> accessed 30 June 2016 (showing that for the distribution of prospectuses approved and passported in the EU in 2014, 75 per cent and 25 per cent are in respect of non-equity and equity securities respectively).

jurisdictions work closely together, without the presence of a supra-securities regulator. The aims of the MRSO are, among others, to reduce costs of raising capital for issuers offering securities in both countries and enable the investors to have a wider range of investment products to choose from.[109] Even as early as the first year after it came into force, the MRSO was described as having achieved these objectives.[110] From 30 June 2008 to 12 November 2013, it was reported that were 80 New Zealand issuers making offers to Australia and 1035 Australian issuers making offers to New Zealand.[111] As can be seen from the statistics, there are significantly more offers by Australian issuers made to New Zealand than vice versa.

MRSO operates by way of a mutual recognition framework that is implemented in the national legislation.[112] An Australian or a New Zealand issuer who wants to offer financial products (including shares and debentures) both in its home jurisdiction and the host jurisdiction needs to prepare only one disclosure document if it wishes to take advantage of the mutual recognition framework. (Otherwise, any issuer wishing to offer its securities into the host jurisdiction will have to comply with all of the domestic requirements in the host jurisdiction.) In the MRSO, there are only limited additional requirements for the disclosure document imposed

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109 Financial Market Authority ('FMA') and Australian Securities and Investment Commission ('ASIC'), 'Offering Securities in New Zealand and Australia under Mutual Recognition' (2014) RG 190 <http://download.asic.gov.au/media/2637663/rg190-published-19-december-2014.pdf> accessed 30 June 2016.

110 See ASIC, 'Effects of the Australia–New Zealand Mutual Recognition Regime for Securities Offering' (2009) Report 174 (interviews reveal that the cost-savings for some firms who were able to quantify them varied from approximately 55% to 95%). There does not appear to have been more updated reports.

111 See IOSCO, 'IOSCO Task Force on Cross Border Regulation: Final Report' (September 2015) <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD507.pdf> accessed 30 June 2016, 15.

112 In the case of Australia, the MRSO was implemented via Ch 8 of the Australian Corporations Act 2001 and the Australian Corporations Regulations. In the case of New Zealand, the MRSO was first implemented via the New Zealand Securities (Mutual Recognition of Securities Offerings – Australia) Regulations 2008. There have been certain recent changes to the New Zealand framework; with effect from 1 December 2016, the Financial Markets Conduct Act 2013 and Financial Markets Conduct Regulations 2014 will solely govern offers by Australian issuers into New Zealand, and the former New Zealand securities regulation will cease to be in force. (There are transitional requirements for offers made between 1 December 2014 and 30 November 2016.) Notwithstanding these changes, the substantive concepts of mutual recognition have been maintained.

by the host jurisdiction such as including the appropriate warning statement that the offer is prescribed by the home jurisdiction's securities laws.[113] The issuer must lodge with the home securities regulator and give notice to the host securities regulator of its intention to make the offer under the mutual recognition scheme.[114] If there is a breach of an offering condition in the host jurisdiction, the host securities regulator can investigate and take remedial actions, including banning the issuer from making an offer under the mutual recognition scheme.[115]

The Australian Securities and Investment Commission ('ASIC') and New Zealand Financial Markets Authority ('FMA') have a Memorandum of Understanding ('MOU') relating to the exchange of data and information concerning the supervising of, assessing of and securing compliance with the securities laws of each jurisdiction.[116] In this respect, the MOU goes further than the IOSCO MMoU, of which ASIC and FMA are signatories, in that the MOU covers not only the provision of non-public information for enforcement purposes but also supervisory cooperation in respect of ongoing supervision and oversight of regulated persons.[117] Further, ASIC, NZCO and FMA have protocols for cooperation in administering the mutual recognition scheme.[118] There is also no doubt that the extensive cooperation envisaged can be attributed to the fact that both jurisdictions share a common language and a common legal tradition, and both are developed economies, which make it easier for mutual recognition to be practicable.

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113 FMA and ASIC, see n 109 above, RG 190.35 (assuming the offers take place after November 2016); RG 190.56.

114 FMA and ASIC, see n 109 above, RG 190.31-33 (assuming that the offers take place after November 2016); RG 190.54-55.

115 FMA and ASIC, see n 109 above, RG 190.44 (assuming that the offers take place after November 2016); RG190.62.

116 Memorandum of Understanding between ASIC and New Zealand FMA in relation to Assistance and Mutual Cooperation dated 28 August 2012 ('MOU') <http://fma.govt.nz/assets/MOU/120828-memorandum-of-understanding-between-asic-and-fma-august-2012.pdf> accessed 30 June 2016 [5].

117 MOU, para 4.2.

118 RG 190, 2014.

In relation to civil enforcement, an aggrieved investor in the host jurisdiction could bring civil proceedings for remedies in the (i) host jurisdiction by serving the proceedings at the address for service that is specified in the notice filed by the issuer with the host jurisdiction as well as (ii) the home jurisdiction.[119] In relation to (i), this is possible because an issuer seeking to make an offering in the host jurisdiction must, in the filing submitted to the host jurisdiction regulator, specify the address for service in the host jurisdiction[120] and confirmation that it submits to the jurisdiction of the court of the host jurisdiction.[121] In the case of a New Zealand issuer offering into Australian market interests in a managed investment scheme, the issuer must comply with the dispute resolution process that satisfies the Australian requirements, though an Australian issuer's dispute resolution process is not available in New Zealand.[122] As the issuer is also required to comply, on an on-going basis, with the requirements of the home jurisdiction's securities laws in respect of the offerings, a breach of the disclosure requirement will constitute a breach of such home country compliance requirement under the laws of the host country.

In relation to (ii), a disclosure document that fails to contain such information required in the home jurisdiction will constitute breach of the home jurisdiction's laws and will entitle the investor to institute civil proceedings in the home jurisdiction.

The MRSO did not deal with the issue of enforceability of civil pecuniary orders or criminal fines, with the result that such orders or fines made in one jurisdiction are not enforceable across the Tasman. However since the MRSO came into force, Australia and New Zealand entered into the Agreement between the Government of Australia and the Government

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119 RG 190, 2014, 18.
120 RG 190, para 85; 111.
121 See RG 190 2014, para 65 (Australian issuers submitting to the jurisdictions of the New Zealand courts).
122 RG 190, para 69.

of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement[123] and had enacted legislation to give effect to the Agreement, which came into force in 2013.[124] Under the legislation, civil pecuniary orders and certain criminal fines (including incurred in breach of the securities laws of Australia and New Zealand) are enforceable across the Tasman.[125]

VI. Lessons from EU and MRSO and Normative Conclusions

Where considering the optimal model for the promotion of integration of the securities markets, this paper demonstrates that issuers in the participating members do access capital markets internationally. However, from the issuers' perspective, there does not appear to be a significant need to tap into the retail market for IPOs of issuers in these participating countries, despite the existence of a set of harmonised minimum regulatory initiatives (in the case of retail offerings).

While this paper does not make the claim that changing the law and regulation to foster an integrated securities market will lead to a dramatic increase in demand for cross-border offering and by extension advance towards the goal of securities market integration, the lower relative participation of the retail investors in the participating member states suggests that there is scope to expand their participation in the securities market.[126] The experiences of EU and Australia/New Zealand suggests that at least, a passporting or strong mutual recognition

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123 'Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement <http://www.justice.govt.nz/policy/international-justice/trans-tasman-court-proceedings/documents/TTCP_signed_treaty.pdf> accessed 30 June 2016.

124 Trans-Tasman Proceedings Act 2010 (New Zealand); Trans-Tasman Proceedings Act 2010 (Australia).

125 See Trans-Tasman Proceedings Act 2010 (New Zealand) read with Trans-Tasman Proceedings (Regulatory Regime Criminal Fines) Order 2013; Trans-Tasman Proceedings Act 2010 (Australia) read with Trans-Tasman Proceedings Regulation 15.

126 Eg SGX, 'SGX Says More Retail Investors in Stock Market; Launches 2014 Edition of StockWhiz Contest' (30 June 2014) <http://www.btinvest.com.sg/markets/news/88567.html?source=si_news> accessed 30 June 2016 (reporting that retail participation in Singapore lags the developed economies of Australia and Hong Kong).

framework, has been associated with an increase in cross-border offerings of retail securities, though it may be difficult to establish a definitive causal relationship.

In this regard, in determining whether greater mutual recognition of the prospectus framework is warranted, consideration has to be placed on the burdens and benefits to both the market participants as well as the regulators. The passporting model adopted in EU's fully harmonised framework provides the highest benefits in achieving integration, followed by the mutual recognition framework in MRSO, for the market participants. However, passporting has a number of disadvantages, not only in respect of the difficulties in establishing a passporting regime but also the fact that markets are in different stages of development and passporting is very unlikely to be achieved in the absence of an unified regional financial system and political consensus. Mutual recognition within the MRSO regime requires specific protocols and supervisory arrangements and strong form of mutual recognition effectively requires the domestic regulator to determine that the foreign regulatory regime is equivalent to the domestic regulatory regime. Further, as pointed out above, the success of the MRSO regime can be attributed to the fact that they involve two developed economies which share the same common legal tradition.

In the context of ASEAN specifically, it is a challenge for the regulators and regulatory institutions to meet the requirements for coordination to reach equivalence or mutual recognition as the different participating member ASEAN jurisdictions are in different stages of economic development with very different legal traditions.[127] This challenge is particularly acute if the

[127] Singapore and Malaysia are common law countries and Thailand is a civil law country.

proposal for harmonisation initiatives is intended to be extended beyond the participating member states to the other ASEAN jurisdictions with stock exchanges.[128]

However, it is argued that there remains considerable scope for the member states within ASEAN to reduce the regulatory burdens placed on issuers seeking to undertake cross-border fund raising within ASEAN. Further, a commitment by the region to a set of baseline disclosure standards goes some way to promote stronger securities markets within the region.[129] This article argues that in the absence of political will to achieve full harmonisation or mutual recognition, there are nevertheless other proposals that can be adopted to move towards regulatory convergence. They are: (1) putting in place a supervisory framework mechanism to unify the interpretation of and application the disclosure standards; and (2) the harmonisation of enforcement regimes through administrative sanctions for breaches of the prospectus requirements against participants in the securities markets, including issuers, directors and issue managers.

1. Supervisory framework for interpretation and application

While there is currently no political will within ASEAN to create a supra-national securities agency akin to the EMSA in EU, one of the roles that the ESMA undertakes, which is that of standard-setting concerning prospectuses, could be usefully adopted within the scope of the framework for ASEAN Disclosure Standards. Even though there is a scarcity of offerings

[128] See n 20 above. The other countries within ASEAN with stock exchanges are Philippines (a hybrid of common law and civil law), Indonesia (a civil law country) and Vietnam (a civil law country).

[129] Eg Black B, 'Legal and Institutional Pre-conditions for Strong Securities Markets' (2000) 48 UCLA L Rev 781.

pursuant to the ASEAN Disclosure Standards, these standards are similar to the disclosure standards in the participating member states.[130] The regulators in these participating member states can promulgate guidelines on how their respective jurisdictions have interpreted and applied important aspects of disclosure-based standards, including the materiality thresholds. For example, in the case of the EMSA or CESR, it has promulgated guidelines on the items of disclosures under the Commission's Prospectus Directives, including further amplification on operating and financial review.[131] Such a framework pre-empts fragmentation before it occurs and ensures uniformity in the implementation of the Prospectus Directive.

In respect of implementation of the proposal, it is suggested that the guidance for the interpretation and application of the ASEAN Disclosure Standards needs to be 'soft' law rather than strictly binding on the parties. This has a likelihood of getting the buy-in from the participating member states and also ASEAN member states which are currently not participants.

2. **Enforcement convergence**

In the *Implementation Plan* as well as the ACMF's strategic direction, it was stated, among other things, that the ACMF will take steps 'to establish cross-border information-sharing mechanisms and cooperation arrangements to ensure effective and robust enforcement' and that 'efforts to create cross-border dispute resolution mechanisms for investors are also underway'.[132] These targets have not yet been achieved and the *Implementation Plan 2015-2020*

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130 See Part II(1) above.

131 ESMA, 'Update of the CESR Recommendations: The Consistent Implementation of Commission Regulation (EC) No 809/2004 Implementing the Prospectus Directive' (20 March 2013) ESMA/2013/319 <http://www.fme.is/media/leidbeiningar/2013-319.pdf> accessed 30 June 2016.

132 ACMF, 'Strategic Direction' <http://www.theacmf.org/ACMF/webcontent.php?content_id=00040> accessed 30 June 2016.

refers to a cross-border dispute resolution mechanism being discussed among the ACMF working group to improve the investor protection regime.

This Part focuses on the prospect of convergence of an enforcement framework. Investors will be more confident of the fairness of the markets if they know that there are enforceable sanctions against those who engage in breaches of the prospectus disclosure rules. Judging from the EU experience which has not imposed a harmonised civil liability framework, in the context of ASEAN, the harmonising of civil liability in connection with breaches of prospectuses is not realistic at this stage of ASEAN development, not least in part due to the different stages of development.

However, similar to the Prospectus Directive,[133] it is suggested that the participating member states with ASEAN (and prospective member states) should agree to use uniform administrative sanctions against specified categories of participants (the issuer, director and the issue manager), though states are free to impose criminal liabilities additionally to these sanctions. This will give the investors some assurance of the consequences in relation to a breach of the disclosure standards. A more difficult question is the degree of granularity of the administrative sanctions. For instance, even the Prospectus Directive does not define the administrative sanctions to be imposed on the issuer or its administrative, management or supervisory bodies, but the ESMA publishes the survey on the different enforcement strategies in the various member states.[134] It has been argued that this creates a form of peer influence to attempt to get the member states to reach convergence eventually.[135] At the same time,

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133 Prospectus Directive, art 6.2.

134 ESMA, 'Comparison of Liability Regimes in Member States in Relation to Prospectus Directive' (30 May 2013) ESMA/2013/619 <https://www.esma.europa.eu/sites/default/files/library/2015/11/2013-619_report_liability_regimes_under_the_prospectus_directive_published_on_website.pdf> accessed 30 June 2016.

135 See Chiu I, *Regulatory Convergence in EU Securities Regulation* (Kluwer Law International, 2008), p 152.

supervisory convergence should also be prioritised and supervisory convergence in theory will minimise the need for enforcement convergence. A treaty or agreement would be required to give effect to mutual assistance to the exchange of data and information relating to supervising, assessing and securing compliance with the securities laws of each jurisdiction (beyond the MMOU), similar to the MRSO.

In conclusion, the lack of success of the ASEAN Disclosure Standards in promoting cross-border IPOs has broader implications on the viability of ASEAN's strategies on regulatory convergence of the securities markets post-AEC in respect of the tools of minimum harmonisation and limited mutual recognition. This article identifies some of the areas which will remain impediments towards achieving a pan-ASEAN offering of equity offerings and suggests that more emphasis should be placed on achieving a greater degree of convergence in supervision and enforcement.

Cross-Border Public Offering of Securities in Fostering an Integrated ASEAN Securities Market: The Experiences of Singapore, Malaysia and Thailand: Tables and Figures

Wai Yee Wan

Tables

Table 1: *Summary of IPOs by Singapore-Listed Issuers by Number of Transactions*

Year	All IPOs	IPOs that are purely domestic offerings		IPOs with international tranches	
	Number	Number	%	Number	%
2010	30	21	70.0%	9	30.0%
2011	21	17	81.0%	4	19.0%
2012	21	14	66.7%	7*	33.3%
2013	26	16	61.5%	10	38.5%
2014	28	20	71.4%	8+	28.6%

* *Includes one retail offering in Malaysia.*
+ *Includes one retail offering in Japan*

Table 2: *Summary of IPOs by Singapore-Listed Issuers by Value of Transactions*

Year	Total value of IPOs (million, SGD)	Total value of retail offerings within Singapore		Total value of retail offerings within ASEAN (outside Singapore)		Total value of retail Offerings outside ASEAN (rest of the world)		Total value of institutional/placement offerings	
		Value (million, SGD)	%	Value (million, SGD)	%	Value (million, SGD)	%	Value (million, SGD)	%
2010	7106.9	458.8	6.5%	0	0%	0	0%	6648.1	93.5%
2011	3280.9	224.1	6.8%	0	0%	0	0%	3056.8	93.2%
2012	5483.2	334.3	6.1%	245.6	4.5%	0	0%	4903.3	89.4%
2013	7246.6	558.7	7.7%	0	0.0%	0	0%	6688.5	92.3%
2014	3853.0	283.7	7.4%	0	0%	627.3	16.3%	2941.9	76.4%

Table 3: Summary of IPOs by Singapore-Listed Issues with International Tranches by Value of Transactions

Year	Total value of IPOs with international tranches	Total value of retail offer portion (requiring a prospectus)		Total value of institutional or sophisticated portion (which does not require a prospectus)	
	Value (million, SGD)	Value (million, SGD)	%	Value (million, SGD)	%
2010	6383.7	439.2	6.9%	5944.5	93.1%
2011	2771.3	209.4	7.6%	2562.0	92.4%
2012	5033.0	569.1	11.3%	4463.9	88.7%
2013	6690.0	544.3	8.1%	6145.7	91.9%
2014	3422.8	891.4	26.0%	2531.4	74.0%

Table 4: *Summary of IPOs by Malaysian-Listed Issuers by Number of Transactions*

Year	Total number of IPOs	IPOs that are purely domestic offerings		IPOs with international tranches	
		Number	%	Number	%
2010	33	27	81.8%	6	18.2%
2011	22	18	81.8%	4	18.2%
2012	15	11	73.3%	4*	26.7%
2013	15	10	66.7%	5	33.3%
2014	11	8	72.7%	3	27.3%

[*] *Includes one retail offering in Singapore.*

Table 5: *Summary of IPOs by Malaysian-Listed Issuers by Value of Transactions*

Year	Total value of IPOs (million, RM)	Total value of retail offerings within Malaysia		Total value of retail offerings within ASEAN (outside Malaysia)		Total value of retail offerings outside ASEAN (rest of the world)		Total value of institutional/placement offerings	
		Value (million, RM)	%	Value (million, RM)	%	Value (million, RM)	%	Value (million, RM)	%
2010	22052.61	2524.6	11.5%	0	0.00%	0	0	19528.0	88.5%
2011	6259.541	732.7	11.71%	0	0.00%	0	0	5526.8	88.3%
2012	23869.82	3062.9	12.8%	399.1	1.7%	0	0	20407.8	85.5%
2013	5831.509	1290.5	22.1%	0	0.00%	0	0	4541.0	77.9%
2014	5428.728	1406.4	25.9%	0	0.00%	0	0	4022.4	74.1%

Table 6: Summary of IPOs by Malaysian-Listed Issuers with International Tranches by Value of Transactions

Year	Total value of IPOs with international tranche	Total value of retail offer portion (requiring a prospectus)		Total value of institutional or sophisticated portion (which does not require a prospectus)	
	Value (million, RM)	Value (million, RM)	%	Value (million, RM)	%
2010	20221.1	2174.9	10.8%	18046.3	89.2%
2011	5242.5	544.2	10.4%	4698.3	89.6%
2012	22561.7	3244.2	14.4%	19317.4	85.6%
2013	4748.4	1032.0	21.7%	3716.4	78.3%
2014	3851.5	404.0	10.5%	3447.5	89.5%

Table 7: *Case Studies of Thai IPOs with International Offerings*

Year	Number of IPOs with international tranches	Total value of IPOs with international tranches	Total value of retail offering within Thailand		Total value of institutional/placement offerings	
		Value, (million, Bhat)	Value (million, Bhat)	%	Value (million, Bhat)	%
2010	1	3978	428	10.8%	3549.6	89.2%
2011	4	1266.5	403.4	31.9%	863.1	68.1%
2012	8	8896.7	2724.9	30.8%	6171.9	69.4%
2013	5	13557.7	4048.4	29.9%	9509.3	70.1%
2014	1	14500	5474.4	37.8%	9025.6	62.2%

Table 8: *Cross-listings in the Participating Member States as at 31 December 2014*

Issuer	Stock Exchange of Primary listing	Year of Primary Listing/Offering	Dual or cross-listings*
Sri Trang Agro-Industry Plc	Stock Exchange of Thailand	1993	SGX(2011); convert to secondary listing in 2014
Malaysia Smelting Corporation Berhad	Bursa Malaysia	1994	SGX (2011)
IHH Healthcare Berhad	Bursa Malaysia	2012	SGX (2012)

Source: www.sgx.com; company websites

* As at 31 December 2015, there is no company that is dual-listed on Bursa Malaysia and Stock Exchange of Thailand, though there are reports of companies which have obtained approvals of dual listings on Bursa Malaysia and Stock Exchange of Thailand but ultimately did not proceed with the dual listing.

Figure 1: *Percentage of Value of Offerings by Singapore-Listed Issuers*

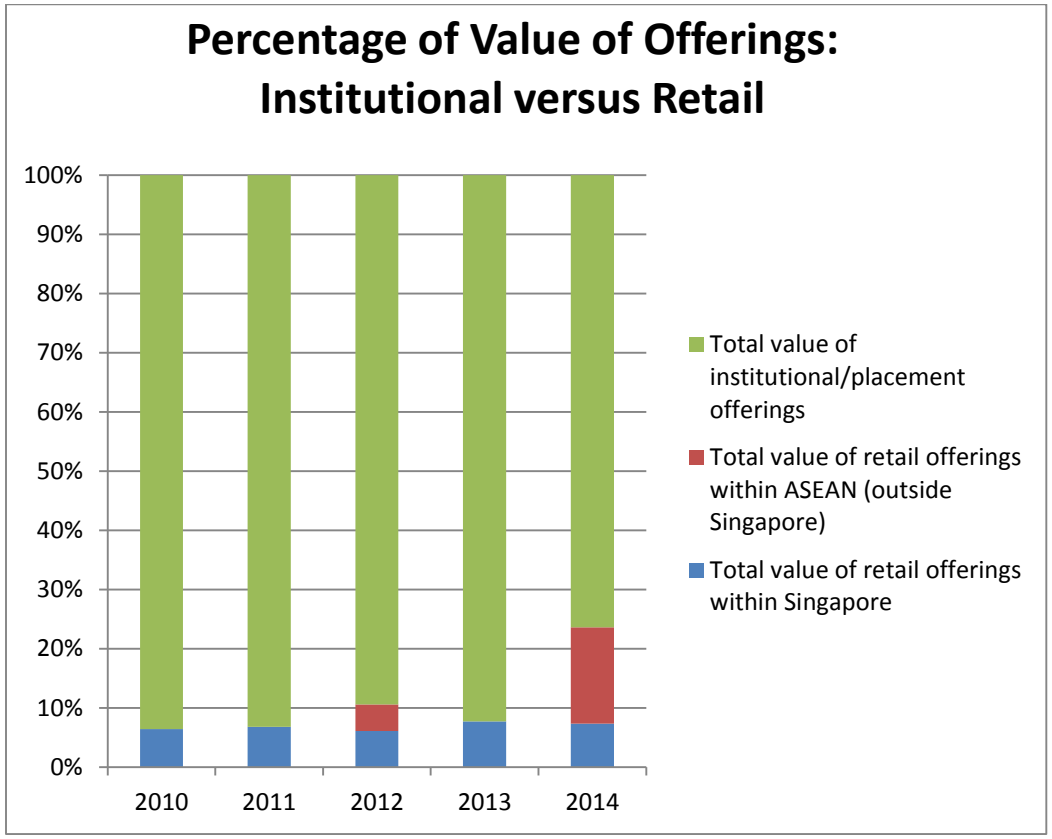

Figure 2: *Percentage of Value of Offerings by Malaysian-Listed Issuers*