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Cross-border regulation of securities markets in ASEAN

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INTRODUCTION

How does cross-border regulation of securities markets work in Association of South East Asian Nations (ASEAN)?[1] How closely are the securities markets coordinated within ASEAN from the regulatory perspective? What is the optimal regulatory model of integration of securities markets that balances the economic benefits of integration and yet minimizes the risks of contagion and advances the state's national goals? The issues posed by these questions are important against the background of strong growth of the Asian economies and Asian capital markets, and how the ASEAN states can take advantage of such growth to facilitate economic growth. According to the data and projections by the Conference Board, China's growth (measured in Gross Domestic Product) in the next decade (2019–2028) is 3.6 per cent, with India at 5.7 per cent, and the rest of Asia's emerging countries at 4.8 per cent. This is well ahead of the projections for the rest of the world at 2.9 per cent and all mature economies at 1.9 per cent.[2] Between 2007 and 2015, the ASEAN Economic Community was collectively the third largest in Asia and sixth largest in the world.[3]

The issue of deepening capital markets coordination and integration within the region has its roots in the Asian financial crisis of 1997. In particular, this crisis demonstrated that there was an urgent need to deepen the equity and debt-based financing in the securities markets, as important alternatives to bank-based financing which was seriously disrupted during the Asian financial crisis. In 2003, the ASEAN leaders agreed to form the ASEAN Economic Community (AEC) to establish ASEAN as a single market and production base by 2020, which was subsequently advanced to 2015, to take into account the competition posed by China and India.[4] The AEC Blueprint 2015, adopted by the ASEAN leaders, provided, among others, the goal of achieving freer flows of capital within ASEAN.

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[1] ASEAN comprises ten countries: Brunei, Cambodia, Indonesia, Malaysia, Laos, Myanmar, Philippines, Singapore, Thailand and Vietnam. Only Indonesia, Malaysia, Philippines, Singapore, Thailand and Vietnam have national securities markets.

[2] The Conference Board, *Global Economic Outlook 2018-2027* (2018) <https://www.conferenceboard.org/data/globaloutlook/index.cfm?id=27451> accessed 31 December 2018.

[3] ASEAN, *ASEAN Economic Community at a Glance* (2016 Rep) <http://asean.org/storage/2012/05/Binder-AEC-at-a-Glance.pdf> accessed 31 December 2018.

[4] Geert Almekinders et al., 'ASEAN Financial Integration', IMF Working Paper, WP/15/34 (2015). See also, Datuk Ranjit Ajit Singh 'ASEAN: perspectives on economic integration: ASEAN capital market integration: issues and challenges' (2009) LSE Research Online in Nicholas Kitchen (ed) SR002, *IDEAS Reports – Special Reports* <http://www.lse.ac.uk/IDEAS/publications/reports/pdf/SR002/SR002_singh.pdf> accessed 31 December 2018.

After the global financial crisis of 2008, ASEAN intensified its efforts towards capital markets integration.[5] 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 2015'.[6] The aim was to create 'a region with free movement of goods, services, investment, skilled labour, and freer flow of capital'.[7] In particular, in the following areas: (1) issuers are free to raise capital anywhere in ASEAN; (2) investors are free to invest in the securities in ASEAN; and (3) market professionals are able to provide services throughout ASEAN on the basis of their home country approval.[8]

Post-formal establishment of the AEC in 2015, the AEC Blueprint 2025, which set out the goals of the AEC for 2025, reaffirmed the importance of deepening capital markets integration. In particular, the AEC Blueprint 2025 reiterates that the AEC's aim is to create 'a more seamless movement of investment, skilled labour, business persons, and capital'.[9] Financial inclusion, which was not explicitly mentioned in the AEC Blueprint 2015, is now given a prominent role as a key pillar under ASEAN financial integration agenda in AEC Blueprint 2025.[10]

There are a number of expected benefits of capital markets integration, including lower fees and greater choice for investors (whether within or outside ASEAN) to invest in the region[11] and optimizing capital allocation to local companies.[12] By promoting ASEAN companies or their securities as an asset class, other kinds of investments into the region would be facilitated, such as infrastructural financing which will improve connectivity within the region.[13] Greater financial integration will support economic growth by helping to mobilize surplus savings more efficiently.[14] Increasing liquidity and deepening the capital markets will also serve to lessen reliance on bank borrowings and provide greater resilience to external shocks. Greater

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[5] ASEAN, *ASEAN Economic Community Blueprint 2015* (2008) <http://asean.org/wp-content/uploads/archive/5187-10.pdf> accessed 31 December 2018.

[6] ASEAN Capital Markets Forum (ACMF), 'Implementation Plan to Promote the Development of an Integrated Capital Market to Achieve the Objectives of the AEC Blueprint 2015' (Implementation Plan) <http://www.theacmf.org/ACMF/report/ImplementationPlan.pdf> accessed 31 December 2018.

[7] *ASEAN Economic Community Blueprint 2015* (2008) (n 5) 5.

[8] Ibid., 41.

[9] ASEAN, *ASEAN Economic Community Blueprint 2025* (2015) 5. <http://www.asean.org/storage/images/2015/November/aec-page/AEC-Blueprint-2025-FINAL.pdf> accessed 31 December 2018.

[10] Ibid., 66. One of the key measures is 'financial inclusion to deliver financial products and services to a wider community that is under-served, including MSMEs [micro, small and medium enterprises]'.

[11] See Asian Development Bank (ADB), 'The Road to ASEAN Financial Integration: A Combined Study on Assessing the Financial Landscape and Formulating Milestones for Monetary and Financial Integration in ASEAN' (2013) 25.

[12] For example, Jeffrey Wurgler, 'Financial Markets and the Allocation of Capital' (2000) 58(1–2) *J Finan Econs* 187.

[13] Jacqueline Loh, 'Integrating Asia's Capital Markets' (ASIFMA Annual Conference, Singapore, 5 November 2014) <http://www.mas.gov.sg/News-and-Publications/Speeches-and-Monetary-PolicyStatements/Speeches/2014/Integrating-Asia-Capital-Markets.aspx> accessed 31 December 2018.

[14] Ravi Menon, 'ASEAN Financial Integration: Where Are We, Where Next?' (ASEAN Banking Council Meeting, Singapore, 12 June 2015) <http://www.mas.gov.sg/news-and-publications/speeches- and-monetary-policy-statements/speeches/2015/asean-financial-integration-where-are-we-wherenext.aspx> accessed 1 October 2019.

integration also serves as a signal to the international community that the financial regulatory architecture of the developing countries in ASEAN is in line with international standards.

As at the establishment of the AEC, ACMF has put in place a number of key initiatives in promoting freer flow of capital.[15] The main initiatives include: (1) harmonization of the disclosure standards for the raising of capital to the public in the region (established in 2009) and the related expedited review of cross-listings (established in 2012); (2) mutual recognition of cross-border offering of collective investment schemes (established in 2013); and (3) the ASEAN Corporate Governance Score Cards (established in 2001), to achieve eventual regulatory convergence on corporate governance standards among listed firms towards international best practices. A fourth initiative relates to the establishment of the ASEAN Trading Link in 2012, which allowed the licensed brokers in the member stock exchange to place orders in the stocks of all participating member exchanges. However, it was discontinued in October 2017.[16]

In this chapter, I have used the initiatives of the ACMF from inception as case examples to assess the state of securities markets coordination and integration within ASEAN, in view of the importance of these initiatives and the fact that membership of ACMF comprises all of the securities regulators. While the AEC Blueprint 2025 and the ACMF Action Plan 2016–20[17] refer to initiatives to promote regional financial inclusion for micro-, small- and medium-enterprises (MSMEs), and provide for capacity-building programmes, I have not included these initiatives or programmes in this chapter, except to refer to them where they improve upon or are enhancements of existing initiatives, given the fact that it is too early to assess whether these objectives are achieved.

However, even taking into account the announced commitments of the ASEAN nations towards the AEC, the pace of capital markets integration has continued to be modest and lag significantly behind trade integration.[18] The reasons for the slower pace of capital markets integration have been attributed to a number of factors by scholars and observers. First, in general, ASEAN practices the consensus-based approach and employs agreed upon rules of engagement, preferring non-binding instruments. In the case of participation in economic agreements, ASEAN has taken the approach of 'ASEAN Minus X formula', where flexibility is given to ASEAN states to implement the AEC initiatives only when they regard themselves as ready.[19] Thus, insofar as the ACMF initiatives are under-study,

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[15] In addition to the work of the ACMF, there is the Working Committee on Capital Market Development in deepening and strengthening bond markets in the ASEAN region through greater integration of access, settlement and other arrangements. See Geert Almekinders et al., *ASEAN Financial Integration* (n 4).

[16] The ASEAN Trading Link has ceased operation in October 2017. See Andrea Tan, 'Southeast Asian Stock Markets Quietly Kill Their Trading Link', *Bloomberg* (13 October 2017).

[17] ACMF, *ACMF Action Plan 2016-2020* (2016), available at <http://www.theacmf.org/ACMF/upload/acmfactionplan2016-2020.pdf> accessed 31 December 2018.

[18] W Y Wan, 'Cross-border Public Offering of Securities in Fostering an Integrated ASEAN Securities Market: the Experiences of Singapore, Malaysia and Thailand' (2017) 12(3) *Capital Markets Law Journal* 381.

[19] ASEAN Minus X is specifically laid down in the ASEAN Charter, Art 21(2) (which provides that 'In the implementation of economic commitments, a formula for flexible participation, includ ing the ASEAN Minus X formula, may be applied when there is a consensus to do so'.) See also Y C Siow and M G Plummer, ASEAN Economic Cooperation and Integration: Progress, Challenges and Future Directions (CUP 2015).

only sub-groups of ASEAN states have signed up. For example, in relation to the harmonization of disclosure standards for the raising of capital to the public and the mutual recognition of collective investment schemes, only Singapore, Malaysia and Thailand have signed up. For ASEAN Corporate Governance Scorecard, six ASEAN states, namely, Singapore, Malaysia, Thailand, Philippines, Vietnam and Indonesia have signed up. Second, as pointed out by a policy-maker, financial integration requires a certain degree of convergence on the development of financial markets and the different ASEAN states are in different stages of development.[20] As evidenced from the Asian financial crisis of 1997 and global financial crisis of 2008, concerns over premature opening and liberalization of the market, which threatens systematic stability, have also impeded closer integration.[21]

This chapter examines the crucial questions of regulatory coordination and integration in the securities markets through analysis of the ACMF initiatives and whether the broad principles that underline such initiatives continue to be optimal in promoting greater coordination and integration. Section 1 explores the framework within which effective regulation and coordination may be achieved, using the framework of the 'Final Report of the IOSCO Task Force on Cross-Border Regulation' (IOSCO Final Report) and existing literature. Drawing from the framework in the IOSCO Final Report,[22] three fundamental models organize the way that cross-border regulation of capital markets work: (1) the national treatment principle; (2) mutual recognition framework and (3) passporting. Section 2 examines the harmonization of disclosure standards for fund raising in ASEAN. Sections 3, 4 and 5 examine the initiatives of the ASEAN Capital Markets Forum respectively, namely, the cross-border harmonization of ASEAN standards for collective investment schemes (Singapore, Malaysia and Thailand), the ASEAN Trading Link and the use of corporate governance scorecards. Their relative contribution towards the capital markets integration is assessed. I argue that the existing initiatives, which continue to remain rooted in national treatment and lack a suitable framework of supervision and enforcement, have fallen short of their avowed objectives. Section 6 argues for greater consideration to be given to supervision and enforcement, in order to broaden market linkages and to increase the pace of capital markets integration.

1. BACKGROUND AND FRAMEWORK OF CROSS-BORDER REGULATION AND REGULATORY COORDINATION

The IOSCO Final Report identifies three main tools that are used to regulate cross-border securities market activities: national treatment; recognition; and passporting. First, the

[20] Ravi Menon, 'ASEAN Financial Integration: Where Are We, Where Next?' (n 14).

[21] Ibid.

[22] International Organisation of Securities Commissions, 'IOSCO Task Force on Cross-Border Regulation: Final Report' (IOSCO Final Report) (September 2015) <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD507.pdf> accessed 31 December 2018.

national treatment is one end of the spectrum where the host jurisdiction has its own rules and supervisory approach which will be imposed on all foreign persons and products in the same manner as domestic ones in relation to market access and ongoing requirements.[23] In other words, national treatment is one of non-discrimination, that is, foreign and local persons are treated alike. Foreign persons and products must obtain the appropriate licences for distribution and comply with the same rules of offering as domestic persons and products. In certain cases, there may be limited exemptions and accommodations granted to foreign persons. The challenge of utilizing national treatment is that the regulator lacks the capability to have access to or share information across different jurisdictions, although this difficulty is partially mitigated by being signatories to multi-lateral agreements, such as the cooperation of enforcement via the 'IOSCO Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and Exchange of Information' (IOSCO MMoU), which represents a common understanding among its signatories of how securities regulators should consult, cooperate, and exchange information for the purpose of regulatory enforcement regarding securities markets.

Second, under a recognition framework, recognition can be unilateral or mutual, where the domestic regulator permits activities of persons and entities of products from recognized foreign jurisdictions to take place within the domestic region.[24] It recognizes the foreign legal framework, usually in instances where the framework of the foreign jurisdiction is similar to the domestic jurisdiction. Thus, the host jurisdiction relies on, to varying extents, the supervisory oversight of the foreign persons and products in their home jurisdictions. The challenges in the recognition framework include the resource constraints in ensuring supervisory and enforcement cooperation and in particular, for unilateral recognition, there is the lack of access of information for supervisory purposes. Examples of fairly successful models of recognition framework in the context of financial services integration include the Trans-Tasman Mutual Regulation of Securities Offering Scheme between Australia and New Zealand[25] and the Multijurisdictional Disclosure System between the United States and Canada.[26]

Third, the passporting framework represents the other end of the spectrum, where there is a common set of rules applicable to the jurisdictions participating in the passport arrangement. The home authority is the only single authorization or registration which approves the services and products to be distributed throughout the participating jurisdictions. This requires a common coordinating body to supervise and ensure compliance of the supervision practices. There needs to be a mechanism to share information among the regulators for the purpose of supervisory oversight. Currently, there is only one arrangement which has the passporting framework under treaty, namely, the European Union Prospectus Directive. [27]

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[23] Ibid., 7.

[24] Ibid., 13.

[25] 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 31 December 2018.

[26] Securities and Exchange Act 1934, 17 CFR 240.14d-1(b). See H Scott, 'Internationalization of Primary Public Securities Markets' (2000) 63(3) *LCP* 71.

[27] (2003/71/EC).

While the framework outlined by the IOSCO Final Report provides a useful framework on the models of dealing with cross-border regulatory issues, it should be noted that the framework is merely a convenient form of reference but is by no means exhaustive. It is possible that there are variants or hybrids. For example, a passporting arrangement may take the form of a maximum harmonization framework which puts in place common rules in place of national measures and jurisdictions are not allowed to impose additional rules (such as the European Union Prospectus Directive). This ensures the greatest form of uniformity among the participating states. However, at the other end of the spectrum is minimum harmonization where jurisdictions agree on a baseline set of rules but are free to impose their national rules.

2. THE HARMONIZATION OF DISCLOSURE STANDARDS FOR FUND-RAISING AND EXPEDITED REVIEW OF SECONDARY LISTINGS

An important indicator of an integrated regional market is how easily and freely issuers can access the capital markets in the region.[28] In ASEAN, equity market offerings are a major source of alternative financing in the region (the others being bank borrowings and bond market offerings). Cross-border offerings and cross-listings are also informative as a measure of financial integration within ASEAN.[29]

2.1 Background to the ASEAN Disclosure Scheme

In 2009, Singapore, Malaysia and Thailand were the first (and remain the only) sub-group of ASEAN states to enter into the ASEAN Disclosure Scheme. Under the ASEAN Disclosure Scheme then in force in 2009, the ASEAN Standards were common and the 'Plus' Standards addressed the specific disclosure requirements in each relevant jurisdiction: an issuer in a member jurisdiction has to comply with a set of common standards and certain 'plus' standards that apply particularly to the offering in the host jurisdiction. In 2013, the three jurisdictions consolidated the ASEAN and Plus Standards into a common set of ASEAN Disclosure Standards. By facilitating cross-border offering of securities across participating member jurisdictions, it is believed that it would lead to an increase in demand of the securities and a lowering of the transaction costs,[30] thereby deepening the securities markets.

While only three of the ten ASEAN jurisdictions have opted into the ASEAN Disclosure Scheme, the participating member jurisdictions' stock exchanges comprising Singapore Exchange (SGX), Bursa Malaysia (Bursa) and Stock Exchange of Thailand (SET), collectively have 2,357 listed companies with an aggregate market capitalization of

[28] ASEAN, *ASEAN Economic Community Blueprint 2015* (2008) (n 5).

[29] See T Cavoli, R McIver and J Nowland, 'Cross-listings and Financial Integration in Asia' (2011) 28(2) *ASEAN Economic Bulletin* 241–56.

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

1.6 trillion United States dollars (USD).[31] Together, they account for approximately 66 per cent of the total market capitalization of all the ASEAN jurisdictions. However, the enforcement of the ASEAN Scheme remains strictly within the purview of the national states. In other words, there is no harmonization of the liability framework in connection with the breach of the ASEAN Disclosure Standards. The ASEAN Disclosure Standards also do not harmonize on-going reporting or continuous disclosure obligations.

The ASEAN Disclosure Scheme has its roots in the International Disclosure Standards for Cross-border Offerings and Initial Listings by Foreign Issuers (IOSCO Equity Disclosure Standards) and the Objectives and Principles of Securities Regulation, both of which were adopted in 1998. The IOSCO Equity Disclosure Standards were aimed at facilitating cross-border offerings and listings of equity and plain debt by enhancing comparability of information and ensuring a high level of investor protection. It was intended that the IOSCO Equity Disclosure Standards would not substitute or replace the disclosure requirements applicable to the jurisdiction's domestic issuers but provide an alternative standard for the preparation of a single disclosure document by foreign issuers. The IOSCO Equity Disclosure Standards were based on the Anglo-American model of prospectus disclosures for public offerings, requiring all material information to be disclosed in the offering document and with no material omissions.

For these three jurisdictions, the adoption of the ASEAN and Plus Standards for cross-border offerings did not represent a significant change from the rules relating to domestic offerings. Mandatory disclosure by issuers undertaking initial public offerings has already been a feature of the three jurisdictions' securities laws and adapting to these disclosure rules was relatively straightforward. In Singapore, as noted by the Corporate Finance Committee in 1998, there was already a high degree of similarity between the local prospectus requirements for domestic issuers and the IOSCO Equity Disclosure Standards.[32] When the Securities and Futures Act 2001 (SFA) and its subsidiary legislation were enacted, the SFA entailed the general requirement of disclosure of all material information (and no material omission) and its subsidiary legislation contained a checklist for prospectus offerings which was substantially based on the IOSCO Equity Disclosure Standards.[33]

As for Malaysia, it adopted the disclosure-based regime for domestic offerings of its securities with the enactment of the Capital Markets and Services Act 2007.[34] There is a mandatory rule of disclosure imposed by the Capital Markets and Services Act 2007[35]

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[31] Statistics are obtained from World Federation of Exchanges, as at 31 December 2018.

[32] Corporate Finance Committee, 'The Securities Market: Final Recommendations' (1998) <http://www.mas.gov.sg/~/media/resource/publications/consult_papers/1998/21%20October%2019 9 8 %20The%20Securities%20Market%20Final%20Recommendations.pdf> accessed 31 December 2018.

[33] Securities and Futures (Offers of Investment) (Shares and Debentures) Regulation 2005.

[34] Capital Markets and Services Act 2007, s 236. The CMSA requires the prospectus to contain all the information that investors and their professional advisers would reasonably require and expect to find in a prospectus for the purpose of making an informed assessment of (1) assets and liabilities; (2) financial position; (3) profits and losses; (4) prospects of issuer and scheme; (5) rights attaching to the securities; and (6) merits of investing in the securities and the extent of the risks involved in doing so.

[35] Ibid.

and the Prospectus Guidelines,[36] which set out the detailed prospectus requirements and were based on the IOSCO Equity Disclosure Standards.

Likewise, in the case of Thailand, which reportedly started with a merits-based system, moved to a disclosure-based system pursuant to the Securities and Exchange Act by 2008, with limited element of merit review.[37] In the IOSCO Self-Assessment in 2008, the Thai SEC is reported to state that the contents of the registration statement and prospectus substantially conforms to IOSCO Equity Disclosure Standards, but with certain four deviations: (1) only three years of audited financial statements, not five years; (2) executive compensation to the top five executives is provided as an aggregate amount; (3) major shareholders are defined as holding 10 per cent of the company's stock; and (4) 12 months of historical share price are included.

2.2 ASEAN Disclosure Scheme

The ASEAN Disclosure Scheme for offering of securities harmonizes the disclosure regime for companies looking at cross-bordering offerings of equity and debt within the member states, and the rules are benchmarked against the IOSCO Equity Disclosure Standards. In certain ways, it goes further than the IOSCO Equity Disclosure Standards. The ASEAN Disclosure Standards adopt the International Financial Reporting Standards and the International Accounting Standards, both of which represent an important improvement since the IOSCO Equity Disclosure Standards do not include accounting standards.[38] They include how pro-forma financial statements (book value, comprehensive income and statement of cash flows) are to be prepared and the basis of such preparation. While profit forecasts and forward-looking statements fell outside the IOSCO Equity Disclosure Standards, in the ASEAN Disclosure Standards, issuers wishing to disclose profit forecast or cash flow forecast must comply with certain additional disclosures to ensure that investors are able to make an informed assessment of the forecast or forward-looking statements.

2.3 Assessment of ASEAN Disclosure Scheme Based on Framework

The ASEAN Disclosure Standards consist of a set of minimum harmonization rules. While the common prospectus may be used in the participating member states, an issuer must still comply with the local disclosure rules. The local securities regulator of the host country must still approve the prospectus, its registration and the listing of the equity or debt securities, including regulations that may be specific to a particular industry.[39]

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[36] CMSA 2007, authorised the Prospectus Guidelines, s 235(1)(f).

[37] Securities and Exchange Act, B.E. 2535, s 76.

[38] The IOSCO standards are expressed to 'relate to non-financial statement disclosure requirements and do not address the issue of which bodies of accounting or auditing principles may be followed by the issuer in preparation of its financial statements'. See International Disclosure Standards for Cross-Border Offerings and Initial Listings by Foreign Issuers (IOSCO Standards) (Sep 1998) <http://www.iosco.org/library/pubdocs/pdf/IOSCOPD81.pdf> accessed 31 December 2018, Part 1, Introduction.

[39] See ACMF, ASEAN Disclosure Standards, FAQs <http://www.theacmf.org/ACMF/webcontent.php?content_id=00015> accessed 31 December 2018.

The prospectus must also be prepared in English, with the possibility that the host authority may require the prospectus to be translated to the official language of the host jurisdiction.[40] The only difference is that there is a more streamlined approval process as set out below.

Under the Streamlined Review of Prospectuses prepared under the ASEAN Disclosure Scheme, the review time will be cut to three to four months.[41] The authority in the home jurisdiction will coordinate the review process with its counterpart in the host jurisdiction and issue consolidated disclosure-related comments to the issuer and its advisers. The relevant regulator will communicate non-disclosure related comment to the issuer and its advisers directly.

However, despite the efforts of the ACMF, the ASEAN Disclosure Scheme has not been popular with the issuers seeking to raise equity offerings within ASEAN. Research on whether the prospectuses for equity and debt offerings have been issued in the five-year period between 2010 and 2014 has revealed that the ASEAN Disclosure Scheme has not been used, even though it has been in existence since 2009. Issuers seeking to raise capital outside their home jurisdiction within ASEAN do so by utilizing the exemptions to the requirement of prospectuses by offering securities to institutional investors, such as private placements.[42] The main obstacle that the ASEAN Disclosure Standards entail minimum harmonization remains, as ASEAN participating states are free to impose their own regulatory requirements for the prospectuses. Thus, the ASEAN Disclosure Standards do not amount to a passport and nor is there mutual recognition of the approval processes of the home or host jurisdictions. There is no uniformity in what some of the standards mean, such as 'materiality'. The significant advantages appear to be confined to the fact that the time frame for the review of the prospectuses by the approving authorities is reduced to three–four months,[43] and the coordination undertaken by the issuer or advisers with the home and host regulators is streamlined.[44]

The inaccessibility of using the prospectuses to market retail public offerings outside the home jurisdiction has the following drawbacks, even though in theory issuers are still able to raise capital from institutional investors via private placement. First, public offerings are often used to raise the profile of the issuer's products and services outside the home jurisdictions, and it would be a missed opportunity for the promotion of such services. Second, relying on private placement exemptions often has limitations on the resale ability of these securities. For example, in Singapore, if the investors had acquired the securities via such exemptions, they would not be able to sell to retail investors within

[40] See ACMF, 'Handbook for Issuers Making Cross-border offers using the ASEAN Disclosure Standards under the Streamlined Review Framework for the ASEAN Common Prospectus' (2 September 2015) <http://www.theacmf.org/ACMF/upload/streamlined_handbook.pdf> accessed 31 December 2018, 13. However, based on Appendix V of the Handbook, Singapore, Malaysia and Thailand do not require the prospectus to be translated into the official language which is not English.

[41] Ibid., 9.

[42] For a discussion on the non-use of the ASEAN Disclosure Standards for equity offerings, see W Y Wan (n 18).

[43] See, ACMF, Handbook (n 40).

[44] Ibid. The home jurisdiction will be the single form of contact and will coordinate the comments from the host jurisdiction(s).

six months from the date of the first acquisition unless a prospectus is prepared in connection with such a sale.[45] Thus, there are restrictions on these institutional investors in freely trading the shares post-initial public offering.

In addition, the ASEAN Disclosure Standards focus only on the disclosures in the prospectuses. Other aspects of the regulatory framework surrounding offerings of securities, such as the liability regimes for false or misleading statements or non-disclosures in the prospectuses and the use of pre-offering marketing materials remain firmly rooted in national treatment.

Despite the lack of success of the ASEAN Disclosure Standards for equities, there is no lack of enthusiasm in fine-tuning or extending the framework. In 2015, the securities regulators in Singapore, Malaysia and Thailand have signed the Streamline Review Framework that would be complemented by a prospectus prepared in accordance with the ASEAN Disclosure Standards, whereby issuers planning to offer equities and plain debt securities can expect a shorter time-to-market and faster access to capital across signatory countries through a streamlined review process.[46] The 'ACMF Workplan 2016–2020' states that the ACMF is looking at extending the Disclosure Standards to other medium-term notes to facilitate cross-border private placement regimes.[47] Indonesia, another ASEAN state with significant stock markets, has amended its regulations on public offering of securities in accordance with the ASEAN Disclosure
Standards.[48]

2.4 Expedited Framework of Cross-listing

There are many potential benefits of cross-listing. By cross-listing on other exchanges, in theory, issuers can gain access to new investor bases, improve their stock liquidity and gain visibility as to its products in new markets.[49] Following their adoption of the ASEAN Disclosure Standards, Singapore, Malaysia and Thailand agreed on the Expedited Review Framework on Secondary Listings (Expedited Framework) in 2012.[50]

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[45] See, W Y Wan (n 18).

[46] ACMF, Handbook (n 40).

[47] This was in fact extended in March 2019. See ACMF, Handbook (13 March 2019).

[48] OJK (Indonesia Financial Services Authority), 'Registration Statement Documents for Public Offerings of Securities in the form of Equity, Debt and/or Sukuk' No. 7/POJK 04/2017; OJK, 'Form of Prospectuses' No. 8/POJK/04/2017. (Titles are translated from Bahasa Indonesia). See also OJK, *Indonesian Financial Services Sector Masterplan 2015-2019* (2016) <https://www.ojk.go.id/en/beritadan-kegiatan/publikasi/Documents/Pages/Indonesian-Financial-Services-Sector-Master-Plan-2 0152019/MPSJKI%20OJK%20Final_Eng.pdf> accessed 31 December 2018.

[49] For the reasons for issuers undertaking cross-listings, see O Dodd, '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(7) *Colum L Rev* 1757.

[50] ACMF, 'Frequently Asked Questions (FAQ) – Expedited Review Framework for Secondary Listings' <http://www.theacmf.org/ACMF/upload/faq_expedited_review_framework_secondary_list ings.pdf> accessed 31 December 2018.

The Expedited Framework provides that an issuer listed in the participating member state and which is intending to effect a cross-listing in another participating member state may file the secondary listing application and the relevant prospectus with the host regulator.

In addition to streamlining secondary listing applications, the stock exchanges of Singapore and Thailand have also put in place measures to promote secondary listings. The 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.[51] An issuer whose home exchange is from a developing jurisdiction may be subject to additional requirements 'to enhance shareholder protection and corporate governance standards'.[52] Likewise in Thailand, there are recent changes made to incentivize foreign firms to raise capital in Thailand.[53]

Despite the changes to the regulatory framework, cross-listings on the participating states' exchanges remain rare, even though the Expedited Review Framework has existed since 2012. Very few companies are cross-listed on the SGX and Bursa and/or SGX and SET,[54] there is also no cross-listed firm on Bursa and SET. While the reasons have not been officially documented by the regulatory authorities, the fact remains that the Expedited Framework 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. There is also the concern that splitting the trading venue on more than one exchange may not lead to improved liquidity and there are costs to be borne in maintaining secondary listings.[55] However, as is the case of the ASEAN Disclosure Standards, ACMF has proposed to extend cross-listing of equities to real estate investment trusts, and business trusts in the ACMF Workplan 2016–2020.

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

[52] SGX, 'SGX Welcomes Secondary Listings with Streamlined Rules' (30 October 2014) <http://infopub.sgx.com/FileOpen/20141030_SGX_welcomes_secondary_listings.ashx?App=Announcement&FileID=321046> accessed 31 December 2018.

[53] N Polkuamdee, 'Listing Rules for Foreign Firms to Relax: Aim is to Improve Market Competitiveness' *Bangkok Post* (Thailand, 15 December 2014) <http://www.bangkokpost.com/print/449852/> accessed 31 December 2018.

[54] See, W Y Wan (n 18) (Table 8, listing a total of three companies. As at 31 December 2016, one additional company is cross-listed on SGX and Bursa (Top Glove)).

[55] 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. See 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.

3. MUTUAL RECOGNITION FRAMEWORK FOR CROSSBORDER OFFERING OF FUNDS

The ASEAN CIS Framework is an example of a mutual recognition framework in promoting cross-border offering of collective investment schemes (CIS), of which Singapore, Malaysia and Thailand are currently the only participants. The ASEAN CIS Framework adds to the three other recent schemes which promote passporting of funds in Asia.[56] Since the adoption of the ASEAN CIS Framework in August 2014, the CIS Framework has been reported to be utilized in CIS offerings.[57]

Unlike the ASEAN Disclosure Standards which rely on national treatment, the ASEAN CIS Framework is a mutual recognition of prospectuses for CIS. A qualified CIS operator of a member state takes 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 compliance with the host jurisdiction's laws and regulations (including the language in which the prospectus should be prepared).[58] Once the home regulator issues the approval letter, the foreign qualifying CIS operator may submit the letter of approval of the host regulator, together with the prospectus that complies with the host requirements, for the host regulator to approve the prospectus under a streamlined authorized process. The 'Standards of Qualifying CIS' set out the qualifications of the CIS operator,[59] trustee/ fund supervisor[60] and requirements of qualifying CIS.[61] There are also requirements that assets should be deposited with an

[56] First, there is the APEC Asia Region Funds Passport initiated by Australia, which has participating countries, namely Australia, New Zealand, Korea, Japan and Thailand. See APEC, 'Next Steps to the Asia Region Funds Passport – Joint Committee Meeting 25-26 April 2018' (26 April 2018) <http://fundspassport.apec.org/2018/04/26/media-release/> accessed 31 December 2018. Second, there is the mutual recognition of collective investment funds between Hong Kong and China under the Mutual Recognition Platform. Third, there are the Undertakings for Collective Investments in Transferable Securities (UCITS), which are widely accepted in Singapore.

[57] In April 2016, it was announced by the ASEAN Capital Markets Forum that 13 funds have been authorized as Qualifying CIS for the purposes of the ASEAN CIS Framework: see ACMF, 'ACMF Action Plan 2016–2020' (n 17). While the Action Plan did not identify the funds, funds which were reported in the financial press to have utilized the ASEAN CIS Framework include Nikko Asset Management Shenton Horizon Investment Funds, 29 October 2014; two Maybank Focus Funds (Maybank Asian Equity Fund and the Maybank Asian Income Fund), 28 October 2014; copies on file with author.

[58] ACMF, Handbook for CIS Operators of ASEAN CIS (CIS Handbook) (25 August 2014) <http://www.theacmf.org/ACMF/upload/asean_cis_handbook.pdf> accessed 31 December 2018.

[59] The CIS operator must have a track record in managing CIS of at least five years: see ACMF, 'Standards of Qualifying CIS' (Standards of Qualifying CIS) (23 February 2018) <http://www.theacmf.org/ACMF/upload/standards_of_qualifying_cis.pdf> accessed 31 December 2018, Part 1, Section 1.2. There are also capital adequacy requirements imposed on the CIS: Standards of Qualifying CIS, Part 1, Sections 1.6–1.9.

[60] For example, the trustee/fund supervisor must be domiciled and regulated in the same jurisdiction as that of the Qualifying CIS: Standards of Qualifying CIS (n 58), Part 1, Section 2.1.

[61] The CIS' underlying investments may only consist of transferable securities, money market instruments, deposits, units in other CIS and financial derivatives. The CIS cannot engage in securities lending, repurchase transactions and direct lending of monies: Standards of Qualifying CIS, Part II, Section 1.

independent custodian and segregated from the custodian's own assets.[62] An independent party is required for valuations and Net Asset Value calculations and audits.[63]

The 'Handbook for CIS Operators of ASEAN CIS' (CIS Handbook) provides a nonexhaustive list of matters on which the host regulator may disapprove the prospectus, notwithstanding the approval by the home regulator.[64] These grounds include the situation where the host regulator is not satisfied that the applicable requirements under the laws and regulations of the host jurisdiction are not fully complied with, or where the qualifying CIS operator is found to be in default, such as submitting false information or misrepresentations to investors.

The review of the success of the ASEAN CIS Framework has been mixed. There is certainly market demand for the ASEAN CIS Framework, as evidenced from its use since it was set up in 2013. The first Exchange Traded Fund was approved under the ASEAN CIS framework.[65] However, there has been industry feedback that approvals are not as forthcoming and there is not a high demand from investors.[66] The ASEAN CIS Framework was revised in 2018 to enable a wider number of fund managers participating, to shorten the time taken to review the documents (to 21 calendar days) and introduce greater flexibility in delegating the investment mandate to manage the funds by managers that are not necessarily regulated by the participating member states, so long as they are regulated with a CIS framework that is broadly similar in effectiveness to the manager's home jurisdiction.[67] Indonesia has indicated that it may participate in AMCF's CIS framework,[68] which may make it more attractive given the country's growth potential.[69]

4. ASEAN TRADING LINK

The ASEAN trading link, introduced in 2012, allowed the licensed brokers in the member stock exchange to place orders in the stocks of all participating member exchanges. The initial participants were SGX, Bursa and SET. Prior to the implementation of the ASEAN trading link, a Malaysian investor wishing to trade in SGX-listed stocks would contact his broker in Malaysia, who in turn contacted a broker in Singapore. With the ASEAN

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62 Standards of Qualifying CIS (n 58), Part I, Section 3.

63 Ibid., Part I, Section 5.

64 CIS Handbook (n 57), Box 8.

65 Listing of One Stoxx ASEAN Select Dividend ETF, issued by a Thai asset manager: see SGX, 'SGX welcomes the listing of One Stoxx ASEAN Select Dividend ETF' (5 April 2017). <http://infopub.sgx.com/FileOpen/20170405_SGX_welcomes_the_listing_of_One_STOXX_ASEAN_Select_Dividend_ETF.ashx?App=Announcement&FileID=446317> accessed 31 December 2018.

66 F N Acosta, 'Fund managers not keen on Asean CIS' (*Fund Selector Asia*, 9 May 2017) <https://fundselectorasia.com/fund-managers-keen-asean-cis/> accessed 31 December 2018.

67 ACMF, 'Retail investors in Malaysia, Singapore and Thailand to have wider access to fund managers across the three countries' (26 February 2018) <http://www.theacmf.org/ACMF/upload/26Feb2018.pdf> accessed 31 December 2018.

68 OJK, *Indonesian Services Financial Sector Master Plan 2015–2019*, 44.

69 C Kusuma, 'Indonesia's Prospects of Joining Cross-Border CIS' *Jakarta Post* (Indonesia, 30 October 2014), pointing out that as at 2014, the assets under management in Indonesia are only below Singapore, Malaysia and Thailand in ASEAN and its stock index growth rate is only behind Thailand and India in the Asia-Pacific region.

trading link, the Malaysian broker could route the order to the ASEAN Common Exchange Gateway (ACE) at Bursa Malaysia, which then transmitted the order to ACE at Singapore Exchange. The order would then be routed to the Singapore Exchange's matching engine.[70] In theory, the routing of the order through the ASEAN trading link would lower the transaction costs for the investor. However, the ASEAN Trading Link discontinued in 2017. There were no publicly available reports on the volume of trades or the amount of savings that were enjoyed by investors, but market reports indicated that the banks were not enthusiastic.[71]

There were a number of explanations for the lack of interest. First, the ASEAN Trading Link was similar to a 'direct market access scheme',[72] where a broker allowed its client to place the orders directly on the exchange. In comparison with the Hong KongShanghai Stock Connect (Stock Connect),[73] the process of connectivity with ASEAN Trading Link was not as streamlined. In the example above, the order was routed either to the participating exchange's matching system or to the host broker. In both cases, the trades were settled as trades of the host broker. In the case of the Stock Connect, however, the orders of orders are gathered on the subsidiaries of the two respective exchanges and placed on the partner exchange.

Second, as pointed out recently, the architecture of post-trade linkages (such as clearing, custody and settlement) was not in place within the ASEAN Trading Link, rendering it unable to be a 'full-fledged end to end platform' across the three participating stock exchanges.[74] Post-trade infrastructure linkages are vital in lowering costs, transaction time and settlement risks since they allow investors in one country to purchase shares in the other markets through their local broker and hold them in their local account.[75] David Donald has found that both the Hong Kong and Shanghai markets clear and settle trades through a central counter-party that assumes all counterparty risk.[76] In contrast, with the ASEAN Trading Link, there was no recognition of the broker-dealer: instead, the host broker continued to be liable for the trades of the originating broker. A participating exchange did not take the settlement risks that arise from orders that originated from

[70] See, Steve, 'The ASEAN trading link explained' (*Asia Etrading*, 4 September 2012) <http://asiaetrading.com/the-asean-trading-link-explained/> accessed 31 December 2018.

[71] J Grant, 'Singapore urges closer Asean markets integration' *The Financial Times* (12 June 2015).

[72] See, SGX, 'Proposed Enhancements to the Regulatory Framework for Access to SGX-ST' (9 April 2012).

[73] See, D Donald, 'Bridging Finance Without Fragmentation: A Comparative Look at Market Connectivity in the US, Europe and Asia' (2015) 16(2) *Eur Bus Org Law Rev* 173–201. See also information on the trading link whose technology is provided by SunGard: SunGard, 'Simplicity, scale and the single network: The ASEAN Trading Link explained' <https://www.sungard.com/~/media/02E263845E5D4FCCACDA799A51636C76.ashx> accessed 31 December 2018.

[74] Ravi Menon (n 14).

[75] See, Jacqueline Loh (n 13).

[76] D Donald (n 72). There are also features in the post-trade linkages in the Shanghai-Hong Kong Stock Connect which make it challenging for investors, such as the limited support in shortselling, using renminbi as the sole settlement currency and the short settlement cycle of T+0 or T+1. See N Katkov and H Zhang, 'Shanghai-Hong Kong Stock Connect: It's just the beginning' (June 2015) <http://ioandc.com/wp-content/uploads/2015/06/4DTCC-report.pdf> accessed 31 December 2018.

one participating member state and placed on the exchange of another participating member state. Rather, all the settlement risks continued to be borne by the host broker. In February 2018, MAS and the Securities Commission announced that the SGX and Bursa would work towards setting up a bilateral trading link for the trading of stocks which would assist the retail investors as they allow for a more convenient mode of trading and settlement of the securities trading.[77] However, this move appeared to be shelved.

5. REGULATION OF CONTINUOUS DISCLOSURE AND CORPORATE GOVERNANCE STANDARDS

Unlike the preceding discussion on the harmonization of disclosure standards and mutual recognition of cross-border offering of funds which has been largely confined to the three ASEAN jurisdictions and is a 'top down' approach, the ACMF has also initiated a 'bottom-up' approach in assessing the corporate governance practices of the top publicly listed firms in each of the six participating ASEAN states that have major stock exchanges (Indonesia, Malaysia, Philippines, Singapore, Thailand and Vietnam) using corporate scorecards. The aim is ultimately for all ASEAN states to participate in the ASEAN Corporate Governance Scorecard.

The ASEAN Corporate Governance Scorecard was developed in 2011 by the Asian Development Bank (ADB) in partnership with the ACMF. The aim of the scorecard is to 'raise corporate governance standards of publicly listed companies (PLCs) in ASEAN countries and increase their visibility to investors'.[78] The scorecard had been derived from the Organisation for Economic Co-operation and Development (OECD) Principles of Corporate Governance 2004, and is supplemented by various initiatives of standards setting and regulatory bodies, including the International Corporate Governance Network (ICGN) Global Corporate Governance Principles (Revised) 2009, the United Kingdom (UK) Code of Corporate Governance 2010, the CLSA-ACGA Corporate Governance Watch 2010,[79] UK listing rules and Australian Stock Exchange or ASX listing rules.[80]

Since its introduction in 2011, five rounds of assessments have been made.[81] The selection of the questions in the scorecard is made by corporate governance experts in the region and the methodology was refined in 2016.[82] There are two levels of questions: Level 1 questions are indicative of laws, regulations and requirements of the ASEAN member

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[77] MAS, 'Malaysia and Singapore to set up stock market trading link' (6 February 2018) <http://www.mas.gov.sg/News-and-Publications/Media-Releases/2018/Malaysia-and-Singaporeto-set-up-stock-market-trading-link.aspx> accessed 31 December 2018.

[78] ADB, 'ASEAN Corporate Governance Scorecard Country Report and Assessments 2013– 2014' (2014), 1.

[79] The Credit Lyonnais Securities Asia (CLSA) publishes, in collaboration with the Asian Corporate Governance Association (ACGA), the Corporate Governance Watch, since 2001. It has published biennially since 2010 and its current edition is the 2016 edition.

[80] ADB, 'ASEAN Corporate Governance Scorecard Country Report and Assessments 2015' (2017).

[81] The assessments were made in 2012, 2013, 2014, 2015 and 2017. There was no assessment in 2016 as it was a gap year for the revision of the criteria.

[82] ACMF, 'The ASEAN Capital Markets Forum Collaborates with International Capital Market Association to Introduce ASEAN Green Bond Standards' (13 March 2017) <http://www.theacmf.org/ACMF/upload/13march2017.pdf> accessed 31 December 2018.

country and expectations of the OECD principles. In respect of the OECD principles, they are classified into five categories, including rights of shareholders, equitable treatment of shareholders, the role of stakeholders, disclosure and transparency and responsibilities of the board. Level 2 questions reflect emerging good practices and penalty items reflecting actions that indicate poor governance (such as being censured by the stock exchange). There is a process of peer review and independent validation.[83] In 2015, a total of 555 publicly listed companies in respect of six participating jurisdictions were assessed.[84]

Other indices have been used in the academic literature, including the investor protection index by La Porta et al.[85] and subsequent studies[86] (covering five ASEAN jurisdictions: Malaysia, Singapore, Thailand, Indonesia and Philippines) and the CLSA Corporate Governance Watch (which covers the same five of the ASEAN jurisdictions). Nevertheless, the ASEAN scorecard improves on the existing indices in three material respects. First, there are two levels of assessments in the ASEAN scorecard: the first level being the assessment conducted by the domestic ranking bodies[87] that ranks their domestic publicly listed companies, and the second level being the peer review by the domestic-ranking bodies. Secondly, the assessors examine the corporate governance practices of listed companies from the shareholders' perspective, using publicly available information that investors can obtain, including annual reports, notices to shareholders' meetings and company websites. This avoids the somewhat subjective judgement by analysts found in the CLSA-ACGA Corporate Governance Watch analysis.[88] Finally, while the questions asked in each of the years of assessment are not identical, a high degree of similarity remains and this offers comparison across the corporate governance scores of the publicly listed companies, rather than a static measure at any given point in time.[89]

In assessing the ASEAN Corporate Governance Scorecards against a broader framework, there are two processes to achieve regulatory convergence, the top down or bottom up approaches. The 'top down' approach refers to the use of law and regulation from the top down, imposed on the listed companies. A 'bottom up' approach refers to the process of regulatory convergence through the practices of the member states. The ASEAN corporate scorecard represents a hybrid of a top down and a gradual bottom up

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[83] Ibid.

[84] While the aim was to assess the top 100 companies for each jurisdiction, it was not possible because for some countries, there was limited availability of the disclosures in English. See ABD (n 79). While the latest assessment was done in 2017, not all of the country reports were available as at the date of writing.

[85] R La Porta et al., 'Law and Finance' (1998) 106(6) *J. Polit. Economy* 1113.

[86] R La Porta et al., 'What Works in Securities Laws?' (2006) 61(1) *Journal of Finance* 1–32.

[87] For the most recent exercise, the domestic ranking bodies are the Indonesian Institute for Corporate Directorship, the Minority Shareholder Watchdog Group (Malaysia), the Institute of Corporate Directors (Philippines), the Singapore Institute of Directors and Centre for Governance, Institutions and Organisations, National University of Singapore Business Schools, the Thai Institute of Directors and in the case of Vietnam, a corporate governance expert was appointed.

[88] See also, B Black et al., 'How Corporate Governance Affect Firm Value? Evidence on a Self Dealing Channel from a Natural Experiment in Korea' (2015) 51 *Journal of Banking and Finance* 131 at n 6, criticizing that the CLSA survey mixes measures of management and governance. [89] See, ADB (n 77), (2014), 4.

[89] See, ADB (n 77), (2014), 4.

approach. Using a scoring system within the ASEAN scorecard is imposed from the top but is not mandatory. Instead, this represents incentives for the listed companies in the participating states to converge towards best practices and which may evolve over time.[90]

There are good reasons for conducting further research into ASEAN companies. First, the Asian financial crisis of 1997 affected most states, with Thailand and Indonesia being severely affected. These countries have undertaken aggressive corporate governance reforms. Second, ASEAN jurisdictions are dominated by listed companies with concentrated ownership, whether family or state-owned. Thus, the agency problem between owners and insiders found in Western jurisdictions does not exist, since there is no separation of ownership from management. Instead, the agency problem exists between the controlling and minority shareholders. The ASEAN scorecard examines whether the Anglo-American model of corporate governance, as found in the OECD Principles, is effective in markets with concentrated shareholdings. In the country reports for the assessments, issuers' year-on-year assessments have improved.[91] The scorecards recognize that harmonization of corporate governance standards is difficult to achieve and provides a way to achieve gradual convergence. The question as to whether ASEAN will move to a more ambitious plan of setting minimum standards of corporate governance and disclosure standards still remains.

6. THE FUTURE OF CROSS-BORDER REGULATION OF SECURITIES MARKETS, COORDINATION AND INTEGRATION

While considering the optimal mode of regulatory coordination and integration in ASEAN's securities markets, ASEAN's preference of consensus building and using soft law instruments has meant that none of the initiatives are enforceable, including harmonization and mutual recognition. While coordination and integration may be achieved through harmonization of disclosure rules and listing framework, in practice this could be undermined by how laws and regulations are interpreted, applied and enforced in each jurisdiction. None of the ASEAN initiatives explicitly or comprehensively target effective supervision and enforcement, preferring to leave this to ASEAN states' discretion. For example, criminal or civil liability for breach of the prospectus requirements (whether for offerings of securities or CIS) are subject to the relevant jurisdiction. There is no body or committee to ensure the consistent application of the harmonized disclosure standards across all participating states. Neither is there a peer review or comparison of regulatory practices to ensure consistent application and enforcement. Peer reviews are limited to the ASEAN Corporate Governance Scorecard to ensure consistency of criteria and assessment.

[90] Dale Arthur Oesterle, 'Inexorable March toward a Continuous Disclosure Requirement for Publicly Traded Corporations: Are We There Yet' (1998-1999) 20 *Cardozo L. Rev.* 135, contrasting the bottom up approach used in the context of US securities regulation with the top down approach where there is a general disclosure standard with clear exceptions.

[91] ADB (n 79), (2017), x. For example, in the case of Indonesia, it was pointed out that significant progress was made in Level 1 questions. However, it should be noted that comparisons based on points attained are not adequate because the questions are not identical on a year-on-year basis.

6.1 Supervision and Coordination

Some suggest that there needs to be a shift away from substantive regulation (in the form of harmonization or mutual recognition of frameworks) towards regulatory supervision. While there is currently no prospect to create a supra-national securities agency, the scope of ASEAN Disclosures accommodate standardization for the interpretation of the ASEAN Disclosure Standards. For example, even though offerings pursuant to the ASEAN Disclosure Standards are rare, regulators of participating states can promulgate guidelines on how to interpret and apply disclosure-based standards, including the materiality thresholds, pre-empting further fragmentation. Further, when the states adopt the ASEAN Disclosure Standards, this assists the securities regulator to administer and review prospectuses.

6.2 Enforcement

Turning to enforcement, in the 'ACMF Action Plan 2016-2019', ACMF will finalize the proposed best practice guidelines and a framework for domestic dispute resolution bodies to cooperate, with the aim of increasing investor confidence by making available recourse mechanisms to investors who invest in or receive services from licensed persons or entities residing in other ASEAN member countries. However, this dispute resolution is confined to those who purchase services or products from financial intermediaries, and do not extend to cross-border offering of securities or collective investment schemes. It is suggested that there should be a convergence of a broader 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. In the context of ASEAN, while the harmonisation 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 across the region, participants can still 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 in addition to these sanctions. This will give the investors some assurance of the consequences in relation to a breach of the disclosure standards.

CONCLUSION

In conclusion, the harmonization efforts by ACMF relating to the ASEAN Disclosure Standards in promoting cross-border initial public offerings have not yet been successful, although the mutual recognition framework for CIS pursuant to the ASEAN CIS Scheme has been utilized. The ASEAN Trading Link has not been a success, although there are plans for a more limited trading link. The ASEAN Corporate Governance Scorecard received significant buy-in from the participating states, even though it does not seek to mandate corporate governance standards. The broader question that remains is the viability of ASEAN's strategies on regulatory coordination and integration of the securities markets post-AEC, in respect of the tools of minimum harmonization and limited mutual recognition. While

this chapter does not claim that amending the regulatory framework will lead to demand where none exists, it has identified some areas which will provide impediments towards achieving pan-ASEAN offerings, and suggests that more emphasis should be placed on achieving a greater degree of convergence in supervision and enforcement.