



**ASEAN LIBERALIZATION OF THE MOVEMENT OF SKILLED LABORERS:
WHAT COULD BE GAINED BY THE ASEAN FROM THE PRINCIPLES OF
FREEDOM OF MOVEMENT AND NON-DISCRIMINATION OF THE EUROPEAN
UNION AND THE COUNCIL OF EUROPE?**

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TABLE OF CONTENTS

TABLE OF CONTENTS	i
ABSTRACT	iii
ACKNOWLEDGMENT	iv
LIST OF ABBREVIATIONS	v
I. Introduction	1
A. Migration and Globalization in the ASEAN and the European Regions	1
B. Research Goals and Methodology	3
C. Content and Limitations	5
i. <i>Posting of Workers and Free Movement of Services</i>	5
ii. <i>Definition of Worker in the European Union</i>	7
D. Legal Transplanting and the Reason for Comparison of the ASEAN with the EU and CoE	10
II. ASEAN	13
A. ASEAN Membership and History	13
B. Asian Culture and the ASEAN Way	14
C. ASEAN Pillars	15
D. ASEAN Integration and the Free Flow of Skilled Workers	16
III. The European Union	22
A. EU Membership and History	22
B. Pillars	24
C. Implementation Mechanism	24
IV. Council of Europe	26
A. Membership and Foundation	26
B. European Social Charter	26
C. Implementation Mechanism and Soft Law Characteristics of the ESC	27
V. Comparison of the EU and ESC's principles of Freedom of Movement and Non-Discrimination with the ASEAN's move towards Freedom of Movement of Skilled Laborers	30
A. EU's Principle of Freedom of Movement and ESC's Right to Gainful Employment compared with the ASEAN's Free Movement of Skilled Labor	30

B. EU Principle of Non-Discrimination and ESC’s Right to Be on Equal Footing as Host Country’s Citizens and The ASEAN’s Absence of a Non-Discrimination Principle	34
C. EU and ESC’s Scope of the Principles of Freedom of Movement and Non-Discrimination as compared with the ASEAN’s Scope and Limitations of the Freedom of Movement.....	38
VI. Roadblocks That May Be Encountered by the ASEAN in its Move to Have Freer the Movement of Skilled Workers	42
A. Perceived Threats of Free Flow of Workers By The Receiving State and the Sending State.....	43
i. <i>Perceived threats to the receiving state (Singapore)</i>	43
ii. <i>Perceived threats of the sending state (Philippines)</i>	45
B. Difficulty of Harmonization of Labor Standards	47
C. Inadequacy of Current Implementation Mechanism of the ASEAN	49
VII. EU and CoE’s Principles, Institutions and Norms the ASEAN May Find Useful to Transpose In Its Movement Towards Integration.....	50
A. Incorporating the Non-Discrimination Principle by the ASEAN	51
B. Possible effects of liberalization of freedom of movement of skilled workers with regard to harmonization of labor standards with the ASEAN and lessons to be learned from the EU and EoC as to harmonization of labor standards.....	52
C. Working with Soft Law and Sharpening the Teeth of the ASEAN with Regard to Ensuring Implementation and Compliance	54
VIII. Conclusion and Recommendations	57
BIBLIOGRAPHY	59

ABSTRACT

The Association of Southeast Asian Nations is an economic, socio-cultural and political community. ASEAN Integration was implemented last December 2015 and one of the goals of said integration is the free flow of skilled workers within the ASEAN's member states. As it stands such free movement of workers only apply to 8 professions. There is an aspiration, however, to further liberalize this freedom of movement of natural persons. There are currently apprehensions that the ASEAN is a mere toothless talk shop which is unable to enforce such freedom of movement and its goal of integration may be hindered by several roadblocks.

The goal of this thesis is to discover what may be gained by the ASEAN in its journey towards further liberalization on the movement of natural persons within the region from the principle of freedom of movement and non-discrimination of the European Union as well as the rights enshrined in the European Social Charter of the Council of Europe.

The study shall contain a comparison of the rationale, goals, principles and historical influences of the principles of freedom of movement and non-discrimination of the EU and the CoE with that of the ASEAN's goal to liberalize the movement of skilled laborers. The scope as to the workers involved, industries covered and the period for such freedom of movement will likewise be analyzed. Treaties, books, journals, migration statistics, ECJ cases, blogs and news articles shall be analyzed.

Although both the EU and the CoE have enshrined the principles of non-discrimination and respect the freedom of movement of workers in its member states, the ASEAN cannot merely transpose the EU and CoE institutions and principles. The ASEAN, however, must learn that in order for it to achieve its goals of integration, it needs to further liberalize the movement of workers. Moreover, there is a glaring necessity to implement and enforce minimum labor standards not only to prevent abuses of migrant workers but also to protect the domestic labor force. Hence, the ASEAN may gain from the EU and CoE in terms of institution building, enshrining the principle of non-discrimination in its regional and domestic laws and through finding a method which adopts to the ASEAN culture.

ACKNOWLEDGMENT

1 in every 10 Filipinos have left the Philippines, uprooted themselves from their motherland in order to give their families a chance at a better life. In this pursuit of economic development, these Overseas Filipinos workers have become subject to abuse, below human treatment and severe discrimination. For some, the lack of standards and proper regulation by both the sending and host state, have cost them their lives. And yet despite the risk of danger and the constant separation from their loved ones and from everything familiar, this diaspora continues. Hence, this humble effort is to honor the sacrifice, devotion and love of family of the Overseas Filipino Workers. It is hoped that this thesis will help the movement towards regulation of labor standards and improved treatment of migrant workers.

This thesis is dedicated to my heroes and my number one fans, my parents. They too, like millions of other Filipinos professionals have went in search for greener pastures. I thank them for the immeasurable hours they have labored for their children to have opportunities to better themselves. I thank my parents for the limitless support and prayers, the unconditional love and the boundless wisdom they have bestowed. Most of all, I thank my parents for raising us to be adventurous, brave and with an unquenchable thirst for new discoveries.

I would like to acknowledge and thank the patience, guidance and consideration of my thesis supervisor, my fountain of wisdom and my North Star, Professor. Csilla Kollonay-Lehoczky.

To my IBL 2016 classmates, a hodgepodge of brilliant minds from around the world. I enjoy learning with and from you. Nothing shows the extent of globalization and freedom of movement as much as what our futures will bring. These are exciting times.

LIST OF ABBREVIATIONS

AAMNP	ASEAN Agreement on the Movement of Natural Persons
ADB	Asian Development Bank
AEC	ASEAN Economic Community
AEC Blueprint 2025	ASEAN Economic Blueprint 2025
APSC	ASEAN Political-Security Community
ASCC	ASEAN Socio-Cultural Community
ASEAN	Association of Southeast Asian Nations
Cebu Declaration	ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers also known as Cebu Declaration on Migrant Workers
CoE	Council of Europe
ECJ	European Court of Justice
ECSR	European Committee of Social Rights
EEC	European Economic Community
ESC	European Social Charter
EU	European Union
ILO	International Labour Organization
IOM	International Organization for Migration
MPI	Migration Policy Institute
MRA	Mutual Recognition Arrangements
OFW	Overseas Filipino Workers
PAP	People's Action Party Singapore
RESC	Revised European Social Charter
TFEU	Treaty on the Functioning of the European Union
Treaty of Rome	Treaty Establishing the European Economic Community

I. Introduction

A. Migration and Globalization in the ASEAN and the European Regions

Due to globalization, both businesses and workers are moving between countries and jurisdictions with more ease and speed. Migration and the diaspora of laborers has been one of the consequences of this phenomena. Businesses now have a wider catalog of workers to choose from. Companies who consider themselves “burdened” with high labor standards, “demanding” trade unions and “uneconomical” national minimum wages, now have the option to hire workers from all over the world. This trend of the free market economy resulted into a race to the bottom and regulatory competition. If left unbridled, such practices would lead to unfair market competition as well as unfavorable labor standards worldwide. This is particularly so in developing countries such as the Philippines. In 2012, the Commission on Filipinos Overseas stated that an estimate of 11 million Filipinos worked abroad.¹ Hence, 10% of the Philippines’ 110 million population is working abroad in pursuit of their dream of a better life. However, in their goal to help lift their families out of poverty, Filipino migrants become prey to illegal recruitment, and human trafficking, not to mention being victims of experiencing below par labor standards and discrimination.

In an effort to counterbalance unregulated market economy, the European Union (“EU”) while promoting the freedom of movement of workers² also regulated some aspects of labor

¹ Stock Estimate of Overseas Filipinos as of December 2012 prepared by the Commission of Filipinos Overseas. (26 October 2015, 7:42 pm) http://cfo.gov.ph/images/stories/pdf/2012_Stock_Estimate_of_Filipinos_Overseas.pdf

² Article 45 of the Treaty of the Functioning of the European Union (Hereinafter referred to as the “TFEU”). Also *see* Article 15 of the EU Charter of Fundamental Rights (Hereinafter referred to as the “EUCFR”).

standards and has advocated the principle of non-discrimination as to nationality, sex,³ and later as to race, age, disability, religion and sexual orientation.⁴ The European Social Charter (“ESC”) of the Council of Europe (“CoE”) likewise has been drafted protecting the right of workers to travel in their exercise of their right to gainful employment⁵ and to be treated on equal footing as the nationals of the member state they have moved to due to work.⁶

With regard to this author’s region, the Association of South East Asian Nations (“ASEAN”) has implemented ASEAN Integration on 31 December 2015 and one of the goals of said integration is the free flow of skilled workers within the ASEAN’s member states. However, such “free low” is limited only to 8 professions, namely: engineering, nursing, architectural, surveying, dentistry, medicine, accountancy and tourism.⁷ There is, however, a desire to further liberalize the free movement of workers not only to these professions but to a wider group of workers allowing for more range of freedoms.

It must be noted, however, that due to the ASEAN Way—“which informally stipulates non-intervention, non-binding and consensus-based decision-making approaches to regional cooperation”⁸, the treaties or agreements signed by the members of the ASEAN are considered as non-binding soft law. In this regard, it would likewise be advantageous to consider what the ASEAN may learn from the implementation of ESC as well as the EU’s Open Method of Coordination and other forms of soft law.

³ Article 19 TFEU also *see* Equal Pay Directive 2006/54 and Equality of Opportunity Directive 2006/54.

⁴ *See* Framework Directive 2000/78.

⁵ Article 18 of the European Social Charter (“ESC”)

⁶ Article 19 of the ESC.

⁷ ASEAN Mutual Recognition Agreements (26 October 2015, 6:46 pm)

<http://investasean.asean.org/index.php/page/view/asean-free-trade-area-agreements/view/757/newsid/868/mutual-recognition-arrangements.html>

⁸ Takashi Terada, *ASEAN’s talk shop function and US engagement*, 10 August 2011 East Asia Forum (05 February 2015, 5:46pm) <http://www.eastasiaforum.org/2011/08/10/asean-s-talk-shop-function-and-us-engagement/>

It must be kept in mind, however, that due to recent developments especially as to mass illegal migration from less developed nations, the refugee crisis, and terrorist attacks, the EU member states have made moves to limit the freedom of movement. The ASEAN will do well to observe such trends in Europe with regard to the freedom of movement of its citizens in order to be more informed as to the direction the ASEAN would like to take in its journey towards integration.

B. Research Goals and Methodology

Hence, the goal of this thesis is to discover what may be gained by the ASEAN in its journey towards further liberalization on the movement of natural persons within the region from the principle of freedom of movement and non-discrimination of the EU as well as the rights enshrined in the ESC of the CoE. The purpose of this thesis is to discover what EU or CoE's principles, institutions, and implementing mechanisms may be transposed and utilized by the ASEAN in furtherance of its integration policies. This study shall likewise look into the possible harmonization of labor standards and qualifications brought about by the freedom of movement of workers within the ASEAN region.

The main research questions is: What may be gained by the ASEAN from the principle of freedom of movement of workers and non-discrimination of the EU and CoE? The researcher has identified and will focus on the following problem/issues that the ASEAN has to face in its move to liberalize freedom of movement of workers: discrimination, harmonization of labor standards, and implementation. Hence, the sub-questions are as follows:

- i. Considering that the ASEAN does not spell out the non-discrimination principle, what lessons can it learn from the EU and CoE on this?
- ii. What effects does the liberalization of freedom of movement of skilled workers have with regard to harmonization of labor standards with the ASEAN?
- iii. What lessons can the ASEAN learn from the EU and/or the CoE to solve said problems of implementation?

In order to answer the above research questions, the study shall contain a comparison of the rationale, goals, principles and historical influences of the principles of freedom of movement and non-discrimination of the EU and the CoE with that of the ASEAN's goal to liberalize the movement of skilled laborers. The scope as to the workers involved, industries covered and the period for such freedom of movement will likewise be analyzed. Primary sources such as treaties of the EU, CoE and the ASEAN treaties and agreements will be compared and contrasted. Secondary sources such as EU labor books, journals on ASEAN integration shall likewise be used. European Court of Justice ("ECJ") cases on the application of the principles of freedom of movement and equal treatment are important to see how the Europeans interprets these principles and the trend towards widening or narrowing down these principles. Likewise, considering that ASEAN integration has just been enforced in December 2015 and that perception of the receiving and sending states are usually found in news articles, opinion columns, and blogs, the same shall be utilized in the analysis. Migration statistics and other available data in the chosen jurisdictions will also be used for this thesis.

C. Content and Limitations

For purposes of limiting the scope of this thesis, a preliminary discussion on the concept of posting and the free movement of services will be discussed as well as the definition of a worker. This thesis will focus on the free movement of workers and will not be on posting or the free movement of services. Likewise, it must be noted that the movement that will be discussed is freedom of movement of workers within the member states/region and not of third-party nationals.

i. Posting of Workers and Free Movement of Services

Posting of workers shall not be part of the scope of this thesis. It differs from freedom of movement of persons as the posted worker has not in himself exercised the freedom of movement of persons, it is his employee in its exercise of its right to free movement of services that brings the worker into the territory of another member state. The legal basis, rationale and the necessary definitions shall be further discussed below.

The legal bases for the posting of workers within the EU are Articles 45 of the Treaty on the Functioning of the European Union (“TFEU”) on the freedom of movement of workers, Article 49 of the TFEU on the freedom of establishment, and Articles 56 to 57 regarding free flow of services. Moreover, Rome I or Regulation 593/2008/EC on the law applicable to contractual obligations likewise provides the basis that the law of the country where the contract was signed will govern the relationship. And finally, another legal basis for posting of workers is Directive 96/71/EC.

Hence, the regulation of the minimal standards of working conditions to be observed in the case of posted workers is founded on the principle of free movement of services and of the goal of promoting transborder services. Article 56 of the TFEU provides that restrictions on the freedom

to provide services are prohibited. The right to provide services necessarily includes the right to move within the EU for that purpose. The prohibition on restrictions on the freedom of services also implies that service providers and recipients of services have the same rights as nationals of the host Member State.⁹

Article 2 of the Posting of Workers Directive states that a posted worker is a “a worker who, for a limited period, carries out his work in the territory of a Member State other than the State in which he normally works.”¹⁰ It must be noted that a posted worker is an employee of the service provider and not a provider of services himself and during his employment he is sent by the service provider (his employer) to provide services that it has contracted to perform within the host Member State.¹¹ Posted workers, in contrast to migrant workers, still form part of the labor force of their home member state and they do not take up residence status in the host member state but are there on a temporary status.¹² As a noted labor author Philippa Watson has stated, “posted workers are, to all intents and purposes, part of the equipment and facilities which the service provider moves to the host Member State to execute the contract.”¹³

As regards free movement of services, Article 56-62 of the TFEU provide the legal basis. The TFEU prohibits any restrictions on the provisions of service. It likewise define services as “where they are normally provided for remuneration, in so far as they are not governed by the provisions relating to freedom of movement for goods, capital and persons.”¹⁴ Services include the following: “(a) activities of an industrial character; (b) activities of a commercial character; (c) activities of craftsmen; and (d) activities of the professions.”¹⁵

⁹ PHILIPPA WATSON, *EU SOCIAL AND EMPLOYMENT LAW* (1st ed. 2009), page 330.

¹⁰ Article 2 of Directive 96/71/EC.

¹¹ PHILIPPA WATSON, *supra* 7 at page 330.

¹² *Id.*

¹³ *Id.*, page 331.

¹⁴ Article 57, TFEU.

¹⁵ *Id.*

As discussed above, the main difference of workers who are posted as part of the facilities of the service provider with those of migrants exercising their freedom of movement is that the posted workers remain in the employment of the service provider and hence still form part of the labor force of the home country. Whereas migrants establish residence in the host country and they themselves (not via a service provider) are the ones who contract with the employers in the host state. This thesis shall focus on the migrant workers exercise of the right of freedom of movement.

ii. Definition of Worker in the European Union

A discussion on the concept of the worker is likewise vital in these thesis. As only those who fall within the scope of a worker enjoy freedom of movement as well as other rights and benefits in relation to their employment. The definition of a worker is crucial considering that unless otherwise stated, as some labor regulations and directives only give benefit those falling within the definition of a worker. Moreover, benefits and other labor protections likewise usually benefit those who are considered as typical workers or those working full time for remuneration. As Catherine Barnard states that while the definition of worker is the lynchpin to Article 45 of the TFEU, none of the Treaties provide a definition of the concept.¹⁶ Barnard further states that definition of a worker as opposed to a self-employed person has become blurred considering the evolution of employment especially with the rise of atypical employment contracts such as interns, volunteers and zero hours contracts.¹⁷

It must be noted that the freedom of movement refers to workers. If a person is self-employed or owns a business, the freedom he may invoke is the right of establishment under

¹⁶ CATHERINE BARNARD, EU EMPLOYMENT LAW (4th ed. 2012), page 144.

¹⁷ Id.

Articles 49 to 55 of the TFEU and freedom of movement of services under Article 56-62 of the TFEU.

As the TFEU does not provide for the definition of worker, we must turn to jurisprudence for the current definition and scope of the same. The determination of whether a person is a worker is on a case to case basis. The ECJ in the case of Lawrie-Blum, provided that the term “worker” is a community term and the determining factor is that the person provides services within a given time for and under the direction of another in return he is paid wages/salary, to wit:

Since freedom of movement for workers constitutes one of the fundamental principles of the Community, the term 'worker' in Article 48 may not be interpreted differently according to the law of each Member State but has a Community meaning. Since it defines the scope of that fundamental freedom, the Community concept of a 'worker' must be interpreted broadly.

That concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.¹⁸

The purpose of a migrant’s employment in another member state does not affect his right of free movement within member states,¹⁹ however, the work must not be solely provided as a means of rehabilitation or reintegration of the workers into society.²⁰

As to time commitment, a worker can either be full-time or part-time , so long as the work is effective and genuine²¹ and not of such small scale, irregular nature or limited duration to be purely marginal and ancillary.²²

¹⁸ Case C-66/85, Deborah Lawrie-Blum v. Land Baden-Württemberg, 1986 E.C.R. 02121

¹⁹ Case C- 53/81, Levin v. Staatssecretaris van Justitie, 1982 E.C.R. 01035

²⁰ Case C- 344/87, Bettray v. Staatssecretaris van Justitie, 1989 E.C.R. 01621

²¹ Levin v. Staatssecretaris van Justitie, *supra*.

²² Case C- 357/89, Raulin v. Minister van Onderwijs en Wetenschappen, 1992 E.C.R. I-01027

As to whether certain people who work part-time are considered workers, it may be stated that one of the essential points to consider is whether a person has genuine and effective employment, not a mere marginal employment. In order to be more objective, the ECJ has stated that a worker is one who works for at least 10 to 12 hours in a week²³ any less than that is up to the member states to decide.²⁴

As to whether fixed-term employees are considered workers is likewise in a case to case basis, however, the ECJ ruled in the case of Franca Ninni-Orasche²⁵ that a minimum period of 10 weeks fixed contract would classify a person as a worker.

Another element to determine whether a person is a worker is remuneration. However, the amount of the wages is not a necessary qualifier of worker. A person is still considered a worker and has the right to free movement even if he receives additional financial assistance from the host Member.²⁶ Moreover, the form of salary is likewise not important in order to determine whether a person is a worker. In one case, the ECJ stated that indirect payment in the form of board and lodging was considered as remuneration.²⁷

Hence, only those falling within the above discussed definition of a worker may exercise freedom of movement and may likewise be protected by their right against discrimination in relation to their employment.

²³ See Case C- 139/85, R.H. Kempf v. Staatssecretaris van Justitie, 1986 E.C.R. 01741 and Case C-444/93, Ursula Megner and Hildegard Scheffel v. Innungskrankenkasse Vorderpfalz, now Innungskrankenkasse Rheinhessen-Pfalz, 1995 E.C.R. I-04741

²⁴ See Case C-14/09, Hava Genc v. Land Berlin, 2010 E.C.R. I-00931

²⁵ Case C-413/01, Franca Ninni-Orasche v. Bundesminister für Wissenschaft, Verkehr und Kunst, 2003 E.C.R. I-13187

²⁶ Kempf v. Staatssecretaris van Justitie, *supra*.

²⁷ Case C- 196/87, Udo Steymann v. Staatssecretaris van Justitie, 1988, 2003 E.C.R. I-13187

D. Legal Transplanting and the Reason for Comparison of the ASEAN with the EU and CoE

Although due to the difference in historical and cultural background, the ASEAN cannot merely transplant the laws, principles, norms and institutions of the EU and the CoE with regard to the freedom of movement and non-discrimination. Numerous scholars have analyzed that developing nations merely “cutting and pasting” Western laws do not benefit from them as “one size does not fit all” and whether a foreign legal norm will take off depends on how the society and government of the receiving state understand said laws.²⁸ The EU and the CoE were formed under a different historical background, hence, their institutions and norms have been built influenced by their particular and unique context.

Arno Maierbrugger has succulently stated, the geographical, and structural differences between the EU/CoE and the ASEAN are as follows:

European countries are standing culturally, economically and as per their political systems much closer to each other, while the gaps in ASEAN are much bigger. Within the ten AEC member states, there are democracies and semi-democracies, authoritarian governments, a junta-cum-monarchy, two communist countries and a sultanate. There are still strong nationalist tendencies and fragile inter-ASEAN relationships that have to do with religion, territorial disputes and historical feuds. Economic disparities reach from \$53,224 nominal GDP per capita in the richest country Singapore to around \$1,200 in Cambodia and Laos as per 2015 International Monetary Fund data.²⁹

However, certain norms may be considered universal, and there are principles and institutions of the EU and CoE that may be used as models by the ASEAN. Alain Supiot has discussed that certain legal concepts had to be adopted throughout the cultural landscape as a means to have meaningful discourse with other nations and in order to be categorized as a modern

²⁸ Kevin E. Davis and Michael J. Trebilcock, *The Relationship between Law and Development: Optimists Versus Skeptics* New York University School of Law, Public Law & Legal Theory Research Paper Series Working Paper No. 08-14, Law & Economics Research Paper Series Working Paper No. 08-24. May 2008, pages 13-14

²⁹ Arno Maierbrugger, *The ASEAN Economic Community Kicks Off- Will It Succeed?* 31 December 2015 (12 February 2016, 12:34pm) <http://investvine.com/the-asean-economic-community-kicks-off-will-it-succeed/>

society.³⁰ Therefore, it is possible for the ASEAN to transpose some legal institutions and concepts from the EU and the CoE without necessarily abandoning its own culture. Such cultural adaptation shall be explored in the next succeeding chapters.

Moreover, considering the similarities of certain aspects especially as to the soft law nature of the ASEAN Treaties and the CoE Treaties, there may be some knowledge that may be gained by the ASEAN from the CoE as well as the development of the ESC. Finally, given the trends in the EU where integration has lost popularity, the Eurozone crisis and movements to restrict freedom of movement, the ASEAN may learn from the EU experience and to assess whether the EU golden standard of integration is worth achieving.

As noted scholars, Philomena Murray and Edward Moxom-Browne, have analyzed, the EU has served as an ideal standard for other regional organizations, and despite the EU's uniqueness, the ASEAN may likewise gain from the EU's experiences and evolution:

As we have seen the EU has a history of making progress with its own integration by creating either institutions whose functions are allowed to develop gradually or setting deadlines which, although sometimes imperfectly respected, galvanize the EU towards new levels of integration. From this perspective, ASEAN's adoption of some EU nomenclature for new institutions and processes can be regarded simply as the setting of ambitious goals to create a new dynamism. On the other hand, if the new institutions cannot be operated on the same assumptions as their EU counterparts, there may set in a corrosive sense of frustration and disillusionment – or else a sense of the *sui generis* Asian way that is based on consensus in incipient institutions.

...

Despite problems of perceived legitimacy, and despite persisting notions of a 'democratic deficit' within the EU, there is a sense that the public 'ought' to be involved. Hence the attempts at writing a 'Constitution' and hence the features of Lisbon designed to involve national parliaments in draft EU legislation. In sum, there may be a conflict between the supranational assumptions underlying the decision-making mechanisms of the EU which ASEAN now partly reflects, on the one hand, and the latter organization's carefully preserved intergovernmentalism, on the other. Yet just as the EU developed its own, at times uneasy, coexistence of intergovernmentalism and supranationalism, so too ASEAN may well develop,

³⁰ Alain Supiot, *The Dogmatic Foundations of the Market (Comments illustrated by some examples from labour law and social security law)*, *Industrial Law Journal*, Vol. 29, No. 4, December 2000, pages 321-345

through the Charter and especially the CPR, an enduring institutionalization of its decision-making mechanisms and procedures. There is rich scope for future comparative research of the evolution of both committees over time, their working methods and their relationships with the other institutions and bodies within the EU and ASEAN, respectively, as well as in terms of inter-regional relations.³¹

In the immediately succeeding chapters (Chapter II, III and IV) shall discuss the historical evolution as well as the cultural context of the ASEAN, EU and the CoE. Thereafter, in Chapter V, there will be an analysis and comparison the principles of freedom of movement, nondiscrimination and their scope in the EU, CoE and the ASEAN. In Chapter VI, there shall be a discussion on the possible problem areas of the receiving state and the sending state, the difficulty of harmonization of labor standards in the ASEAN as well as the problems in implementation. In Chapter VII, an analysis of what the ASEAN may gain from the EU and CoE experience with regard to widening the scope of freedom of movement, enshrining the principle of non-discrimination and enforcement mechanisms shall be made. Finally, Chapter VII, contains the conclusion and recommendations.

³¹ Philomena Murray and Edward Moxom-Browne, *The European Union as a Template for Regional Integration? The Case of ASEAN and Its Committee of Permanent Representatives*. *Journal of Common Market Studies*. May 2013, Vol. 51 Issue 3, p522-537.

II. ASEAN

A. ASEAN Membership and History

The ASEAN is a political, economic and socio-cultural community, currently composed of the following member states: Philippines, Singapore, Malaysia, Indonesia, Thailand, Brunei, Vietnam, Laos, Myanmar and Cambodia.³²

The ASEAN was formed in 08 August 1967 when its founding members (the Philippines, Malaysia, Indonesia, Singapore and Thailand) signed the Bangkok Declaration otherwise known as the ASEAN Declaration.³³ Deliberation were conducted in a typical Asian manner and to what is described as “sports-shirt diplomacy”, the foreign ministers of the founding stated “with goodwill and good humor, as often as they huddled at the negotiating table, they finessed their way through their differences as they lined up their shots on the golf course and traded wisecracks on one another’s game, a style of deliberation which would eventually become the ASEAN ministerial tradition.”³⁴ Such diplomatic styles as well as approaches to negotiations sprout from the ASEAN Way and Asian culture which play a key role in the implementation mechanisms of the ASEAN. Its impression to be without any teeth or true means of ensuring compliance by the member states. This shall be a recurring theme in the next chapters.

Formally, the purpose of the formation of the ASEAN was for “cooperation in the economic, social, cultural, technical, educational and other fields, and in the promotion of regional peace and stability through abiding respect for justice and the rule of law and adherence to the principles of

³² *Overview of the ASEAN* (09 October 2015, 6:27 am) <http://www.asean.org/asean/about-asean>

³³ *History of the ASEAN* (08 March 2016, 3:25 pm) <http://www.asean.org/asean/about-asean/history/>

³⁴ *Id.*

the United Nations Charter.”³⁵ However, the true reason was a growing fear of the rise of communism in the region which was only referred then as “negative influences from outside the region.”³⁶

B. Asian Culture and the ASEAN Way

In discussing the ASEAN, it is important to differentiate the ASEAN Way from the Western Way in handling diplomacy and regional integration. The ASEAN Way stems from the Asian culture of non-confrontation, non-interference and putting a premium on respect and saving face. Asian culture, being more community based is less formal and rigid and more interpersonal and fluid. Fulfillment of contractual obligations in Asia is based on trust and the relationship of the parties. Formal contracts and agreements, all Western concepts, are thus superfluous. The very formation of the ASEAN highlights the ASEAN Way, as the Bangkok Declaration was drafted in a resort and negotiations were done in the golf course not the board room.

The ASEAN Way is thus best described as where “[p]olicymakers constantly utilize compromise, consensus, and consultation in the informal decision-making process. While the doctrine of ‘quiet diplomacy’ is ambiguous, it above all prioritizes a consensus-based, non-conflictual way of addressing problems. Quiet diplomacy allows ASEAN leaders to communicate without bringing the discussions into the public view. Members avoid embarrassment that may lead to further conflict.”³⁷

This ASEAN Way then tends to show why the ASEAN Agreements are considered as soft law. Any violation of the treaties are then met not with dire consequences nor can the other member

³⁵ Id.

³⁶ Id.

³⁷ [Logan Masilamani](http://www.foreignpolicyjournal.com/2014/10/15/the-asean-way-the-structural-underpinnings-of-constructive-engagement/) and [Jimmy Peterson](http://www.foreignpolicyjournal.com/2014/10/15/the-asean-way-the-structural-underpinnings-of-constructive-engagement/), *The “ASEAN Way”: The Structural Underpinnings of Constructive Engagement*, 15 October 2014 (08 March 2016, 4:39 pm) <http://www.foreignpolicyjournal.com/2014/10/15/the-asean-way-the-structural-underpinnings-of-constructive-engagement/>

states interfere. These factors, must then be taken into consideration in the analysis of whether the EU and Council of Europe's principles and enforcement mechanisms maybe transplanted by the ASEAN.

C. ASEAN Pillars

Likewise, to better understand the ASEAN its goals, a discussion on its structure is necessary. The ASEAN has three pillars, which are the following: ASEAN Political-Security Community ("APSC"), ASEAN Economic Community ("AEC"), and ASEAN Socio-Cultural Community ("ASCC") and each of these pillars have its own Blueprint.³⁸

The first pillar, the APSC was established to ensure peaceful co-existence of the ASEAN's member states with each other and the rest of the world in a harmonious, democratic and just environment.³⁹ The second pillar and the most relevant to this thesis is the AEC.⁴⁰ The AEC was established in December 2015 with a goal for economic integration within the ASEAN region.⁴¹ During the ASEAN Summit held on 22 November 2015, the AEC Blueprint 2025 was adopted which contained the strategies for the AEC from 2016 to 2025.⁴² The AEC Blueprint 2025 replaced the AEC 2015 Blueprint and boasts that not only will the 10 ASEAN signatory states be integrated economically with each other but also the ASEAN will be integrated with the global economy.⁴³

The final pillar, the ASCC, has for its goal a community identity as well as enhancing community solidarity and social responsibility within the member states, its goal is to forge a

³⁸ *Overview of the ASEAN* (09 October 2015, 6:27 am) <http://www.asean.org/asean/about-asean>

³⁹ *ASEAN Political-Security Committee* (04 February 2016, 10:09 pm) <http://www.asean.org/asean-political-security-community/>

⁴⁰ *ASEAN Economic Community* (04 February 2016, 10:16 pm) <http://www.asean.org/asean-economic-community/>

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

community identity by building a caring and inclusive society that enhances the welfare and, livelihood of the people.⁴⁴

D. ASEAN Integration and the Free Flow of Skilled Workers

Pursuant to the AEC Blueprint 2015, the ASEAN Integration was implemented in 31 December 2015 and one of the goals of said integration was the free flow of skilled workers within the ASEAN's member states. The ASEAN Agreement on the Movement of Natural Persons ("AAMNP") states: "The ASEAN Economic Community Blueprint mandates that free flow of skilled labor is one of the core elements of the ASEAN single market and production base; which allows for managed mobility or facilitated entry for the movement of natural persons engaged in trade in goods, trade in services and investment, according to the prevailing regulations of the receiving country."⁴⁵

Currently, there are only 8 professional fields of where there are Mutual Recognition Arrangements ("MRAs") among the ASEAN which are engineering, nursing, architectural, surveying, dentistry, medicine, accountancy and tourism.⁴⁶ MRAs are agreements created to liberalize trade in services and facilitate the mobility of skilled labor in the ASEAN region; it was also established for the ASEAN member states to adopt best practices on professional qualification and standards through information exchange.⁴⁷ The fact that there are only 8 MRAs despite 10 years to prepare for the implementation of ASEAN Integration on December 2015, highlights the

⁴⁴ ASEAN Socio-Cultural Community (04 February 2016, 10:18 pm) <http://www.asean.org/asean-socio-cultural/>

⁴⁵ ASEAN Agreement on the Movement of Natural Persons, Brunei-Cambodia-Indonesia-Laos-Malaysia-Myanmar-Philippines-Singapore-Thailand-Vietnam, Recitals, 19 November 2012.

⁴⁶ ASEAN Mutual Recognition Agreements (26 October 2015, 6:46 pm) <http://investasean.asean.org/index.php/page/view/asean-free-trade-area-agreements/view/757/newsid/868/mutual-recognition-arrangements.html>

⁴⁷ Id.

lack of political will of the ASEAN members states to pursue freedom of movement of workers as well as the ASEAN lack of coercive or at least convincing powers.

Likewise, presently, ASEAN Member states provide a schedule of commitments wherein they state the duration of the temporary stay of the said workers: “These Schedules shall specify the general conditions and limitations governing those commitments, including the length of stay, for each category of natural persons included in each Member State's Schedule of Commitments.”⁴⁸ This is relevant to highlight the lack of uniformity within the region as to the extent of the movement of workers and highlights the ASEAN Way of non-interference as to the domestic laws of the member states particularly with regard to immigration.

There is, however, a desire to further liberalize the scope and duration of the freedom of movement of workers. The AAMNP states that “Member States shall enter into discussion to review the Schedules of Commitments under this Agreement with a view to achieving further liberalization on the movement of natural persons.”⁴⁹

The recent AEC Blueprint 2025 further states that the MRAs were the beginning of facilitating the free flow of skilled labor.⁵⁰ The MRAs were implemented to enable the temporary movement of natural persons and non-tourist visitors (businessmen) who are engaged in the trade of goods, services and/or investments within the ASEAN region.⁵¹ The AEC Blueprint 2025 likewise states that the its strategic measures to ensure free movement of skilled labor include the widening the

⁴⁸ Article 6, ASEAN Agreement on the Movement of Natural Persons, Brunei-Cambodia-Indonesia-Laos-Malaysia-Myanmar-Philippines-Singapore-Thailand-Vietnam, Recitals, 19 November 2012.

⁴⁹ Article 7, Id.

⁵⁰ *ASEAN Economic Blueprint 2025* page 10-11 (04 February 2016, 10:42pm) <http://www.asean.org/storage/images/2015/November/aec-page/AEC-Blueprint-2025-FINAL.pdf> (Hereinafter, “AEC Blueprint 2025”)

⁵¹ Id.

commitments of the ASEAN member states under the AAMNP and to lessen and harmonize immigration/recognition documentation requirements.⁵²

The AEC Blueprint 2015, however, was silent as to the further liberalization of the principle of freedom of movement of all citizens of the member states, not just skilled workers, and only discussed the possible addition of MRAs for other professions and skilled labor.⁵³ This again is significant to highlight the uncertainty of the region as to the extent of this liberalization of the freedom of movement and may likewise signal the lack of genuine commitment to this measure.

It must be noted that while the AEC has formulated strategy to ensure the free flow of professional and skilled labor, most of the migrants within the region are domestic helpers, blue collared, and low skilled workers.⁵⁴ Aside from this, most of the migration of workers are undocumented⁵⁵ and are limited to only a few corridors which normally flows to the more economically successful states *i.e.* Singapore, Malaysia and Thailand.⁵⁶ Apart from the prevention of wastage of human capital as a result of lack of skills recognition within the ASEAN region,⁵⁷ nowhere in the AEC blueprint or in any ASEAN drafted document is the reason stated for such limitation to only skilled workers and the rationale as to limiting the same to only the 8 professions listed above. It may be assumed that such limitations were done in order to avoid social dumping and to appease the apprehensions of the destination member states.

⁵² Id.

⁵³ Id.

⁵⁴ International Labour Organization and Asian Development Bank, *ASEAN Community 2015: Managing Integration for Better Jobs and Shared Prosperity*, p. 83 (05 February 2016, 12:05pm) <http://www.adb.org/sites/default/files/publication/42818/asean-community-2015-managing-integration.pdf> (Hereinafter, "ILO and ADB")

⁵⁵ Id.

⁵⁶ Guntur Sugiyarto and Dovelyn Rennveig Agunias, *A "Freer" Flow of Skilled Labour within ASEAN: Aspirations, Opportunities and Challenges in 2015 and Beyond*. Issue in Brief A Joint Series of the International Organization for Migration Regional Office for Asia and the Pacific and the Migration Policy Institute No. 11 December 2014, Bangkok and Washington DC (05 February 2016, 4:08pm) http://www.ioe-emp.org/fileadmin/ioe_documents/publications/Working%20at%20Regional%20Level/Asia/EN/2015-07-16_Freer_Flow_of_Skilled_Labour_within_ASEAN_IOM_Issue_Brief_11_2014.pdf ("IOM and MPI")

⁵⁷ Id, page 3

At present, the main action of the AEC towards free movement of workers is centered on facilitating visa issuances and mutual recognition of qualification and skills.⁵⁸ As observed by the International Organization for Migration Regional Office for Asia and the Pacific (“IOM”) and the Migration Policy Institute (“MPI”) that based on the AEC Blueprints and the actions of the member states, the ASEAN as of now does not have the goal to provide unbridled freedom of movement as in its European counterparts. The IO and the MPI further observe that the ASEAN is a far cry from the free movement principles of the EU and the AEC in its current state neither guarantees nor seeks complete mobility of workers, it merely facilitates this movement of skilled workers.⁵⁹

According to the AEC Blueprint 2025, the creation of task forces, formulation of action plans, coordination with sectorial bodies, transposition of the same into national law, monitoring mechanism and enacting partnership agreements with the private sector are the measures that will ensure its implementation.⁶⁰ Despite these outlined strategies for the implementation of the AEC Blueprint 2025, critics of the ASEAN likewise label it as a mere “talk shop” and only providing a venue for leaders to meet and socialize which is mainly due to the non-intervention, non-binding and consensus-based decision-making approaches to regional cooperation⁶¹ of the ASEAN Way.

Moreover, the ASEAN has earned a reputation for being all bark and no bite, as observed by the BBC News Network: “[i]ts critics have portrayed Asean as being big on words and short on action, driven by the desire for consensus among its members. Its staunch support for the principle of non-interference has, paradoxically, reinforced both regional stability and authoritarian

⁵⁸ Id, page 3

⁵⁹ Id, page 4

⁶⁰ AEC Blueprint 2025, *supra* 50, page 37

⁶¹ Takashi Terada, *ASEAN's talk shop function and US engagement*, 10 August 2011 East Asia Forum (05 February 2015, 5:46pm) <http://www.eastasiaforum.org/2011/08/10/asean-s-talk-shop-function-and-us-engagement/>

governance.”⁶² Due to this ASEAN Way, it would seem that despite its being an international agreement which was in fact ratified on the national level by the different member states, the ASEAN can be characterized as being toothless and does not have the implementing means as its European counterparts.

One of the leading voices in international affairs in Singapore, Chia Siow Yue, has lauded the importance of allowing the free flow of skilled workers but at the same time has outlined the possible challenges for its fruition, as follows:

Skilled labor mobility is essential for effective implementation of services liberalization and foreign direct investment liberalization as well as a goal in itself for deeper economic integration in the ASEAN Economic Community (“AEC”). Currently Singapore is the main recipient, while the Philippines and Malaysia are the main suppliers. However, as ASEAN countries move up the technology ladder, demand for skills will increase. Foreign talent is needed to augment the domestic pool, as well as to create the competitive synergy for domestic talents. Strategic actions on the free flow of skilled labor outlined in the AEC Blueprint include --- facilitate the issuance of visas and employment passes; mutual recognition arrangements (“MRAs”) for major professional services; core concordance of services skills and qualifications; and enhance cooperation among ASEAN universities to increase regional mobility for students and staff. The MRA is a major instrument for skilled labor mobility in ASEAN. However, recognition of each other’s qualifications and experience does not ensure market access. Policies and regulatory frameworks that constrain and impede skilled labor mobility include--- requirements and procedures for employment visas and employment passes; constitutional provisions reserving jobs for nationals; policies that close or impose numerical caps on foreign professionals and skills in sectors and occupations; economic and labor market tests that constrain employment of foreigners and requiring to have them replaced by locals within a stipulated period; licensing regulations of professional associations; and language proficiency requirements. Countries should cooperate to minimize the impediments.”⁶³

From the above discussion, it is readily apparent that there are numerous challenges that the ASEAN must overcome before it reaches true freedom of movement of workers. It is said that one

⁶² BBC News, *Profile: Association of Southeast Asian Nations*, 01 February 2012 (05 February 2016) http://news.bbc.co.uk/go/pr/fr/-/2/hi/asia-pacific/country_profiles/4114415.stm

⁶³ Chia Siow Yue, *Free Flow of Skilled Labor in the AEC*, in Urata, S. and M. Okabe (eds.), *Toward a Competitive ASEAN Single Market: Sectoral Analysis*. ERIA Research Project Report 2010-03, pp.205-279. Jakarta: ERIA

must learn from experience, preferably not one's own. It is a well-known fact that in the EU as well as the ASEAN, not all the member states have the same level of economic development. Hence, looking into the EU's experience wherein Germany reported the highest number of immigrants and Spain has the highest number of emigrants,⁶⁴ it would be an interesting study to compare the same to the experience of Singapore as the host state and the Philippines as the origin state. As more than 10% of the Philippines' 110 million population is working abroad, 184,498 of whom work in Singapore,⁶⁵ this would prove to be a significant study particularly to this author who is a native of the Philippines.

With the foregoing context of the ASEAN in mind, this author shall now proceed to discuss its European counterparts.

⁶⁴ *Migration and Migrant Population Statistics* (26 October 2015, 7:24 pm) http://ec.europa.eu/eurostat/statistics-explained/index.php/Migration_and_migrant_population_statistics

⁶⁵ In 2012, the Commission on Filipinos Overseas estimated that approximately 10.5 million Filipinos worked in 218 countries. [Stock Estimate of Overseas Filipinos as of December 2012 prepared by the Commission of Filipinos Overseas. (26 October 2015, 7:42 pm) http://cfo.gov.ph/images/stories/pdf/2012_Stock_Estimate_of_Filipinos_Overseas.pdf]

III. The European Union

A. EU Membership and History

The EU is a political and economic institution composed of the following 28 member states as of 2016: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom.⁶⁶

Following World War II, there was a universal desire of peace within the region. Hence, the European leaders at that time wanted to foster cooperation in order to prevent further conflict. The initial step taken was to create the European Economic Community (“EEC”) in 1958 which was created primarily for economic cooperation between Belgium, Germany, France, Italy, Luxembourg and the Netherlands.⁶⁷ The preamble of the Treaty Establishing the European Economic Community (“Treaty of Rome”) clearly stated that economic union was a means of preventing another war.⁶⁸

Through the years, the EEC has evolved from a purely economic union to a political one which was reflected in the name change to the EU in 1993.⁶⁹ Apart from a single currency, the euro, the EU has likewise abolished border control within the region, allowing people to exercise the freedom of movement to travel, live and work in the other member states.⁷⁰ Because of the

⁶⁶ *About the EU* (15 March 2016, 5:24 PM) http://europa.eu/about-eu/countries/index_en.htm

⁶⁷ *The EU In Brief* (15 March 2016, 5:40 PM) http://europa.eu/about-eu/basic-information/about/index_en.htm

⁶⁸ Preamble, Treaty Establishing the European Economic Community, Belgium-Germany-France-Italy-Luxembourg-Netherlands, 25 March 1957

⁶⁹ *The EU In Brief* (15 March 2016, 5:40 PM) http://europa.eu/about-eu/basic-information/about/index_en.htm

⁷⁰ *The EU In Brief* (15 March 2016, 5:40 PM) http://europa.eu/about-eu/basic-information/about/index_en.htm

single market, which is the EU's primary economic engine, capital, goods, services, and people are able to move freely within the region.⁷¹

The Treaty of Rome, however, did not make any reference to social and employment policy apart from equal pay of men and women. The EU leaders predicted that there would be no need to legislate on the matter as it was assumed that economic prosperity would raise employment rates and improve labor standards.⁷² However, this did not come to fruition and the EU saw the necessity of stepping in. The Treaty of Maastricht specifically Article 118a gave the Commission the legal competence in the field of public health and safety of workers and was rules in the case of *United Kingdom vs. Council*⁷³ as the proper legal basis of the Work Time Directive.⁷⁴ And subsequently, in 1997 through the Treaty of Amsterdam, the EU was given the competence to rule on social and labor policy.⁷⁵ It was through the Treaty of Amsterdam that marked a further evolution of the EU from an economic-political entity to a more social one, it showed a commitment by the EU that social and employment policy was one of the primary objectives of the Community.⁷⁶

Likewise, since the Lisbon Treaty's enforcement in 2009, the EU's Charter of Fundamental Rights has declared that the promotion of human rights has become one of the goals of the EU and has stated that the following were the core values of the EU: equality, freedom, democracy, human dignity, the rule of law, and respect for human rights.⁷⁷

⁷¹ Id.

⁷² Philippa Watson, *supra* 7 at page 4.

⁷³ Case C-84/94, *United Kingdom of Great Britain and Northern Ireland v Council of the European Union*, 1996 ECR I-5755

⁷⁴ Directive 2003/88.

⁷⁵ Philippa Watson, *supra* 7 at page 4.

⁷⁶ Id.

⁷⁷ *The EU In Brief* (15 March 2016, 5:40 PM) http://europa.eu/about-eu/basic-information/about/index_en.htm

B. Pillars

The Treaty of Maastricht, enacted on 01 November 1993, introduced the 3 pillar system of the EU which were the following:

1. The European Communities pillar which was responsible for social, economic, and environment matters;
2. The Common Foreign and Security Policy pillar handled the foreign and military policy; and
3. Police and Judicial Co-operation in Criminal Matters, which was formerly known as the Justice and Home Affairs Pillar.⁷⁸

These pillars were, however, abolished on 01 December 2009 by the coming into force of the Treaty of Lisbon wherein the EU “replaced and succeeded the European Community”⁷⁹ and obtained a legal personality.⁸⁰

C. Implementation Mechanism

EU Member States are responsible for the implementation of EU Treaties and regulations, directives and ECJ decisions within their territories, and the Commission ensures compliance of the same and may take action against a member state if it fails to transpose EU law into national law and/or to report to the Commission the measures it has taken to incorporate the same; or if the

⁷⁸ Petr Novak, *Fact Sheets on the European Union- 2016: The Maastricht and Amsterdam Treaties*, October 2015 (16 March 2016, 2:30 PM) http://www.europarl.europa.eu/ftu/pdf/en/FTU_1.1.3.pdf

⁷⁹ Article 1 of the TFEU.

⁸⁰ Article 47 of the TFEU.

member state is suspected of breaching the EU's primary or secondary law, by filing infringement proceedings against the member state before the ECJ.⁸¹

The EU, although the most well-known, is, however, not the only intergovernmental institution in Europe. The next Chapter discusses the CoE and further highlights the feasibility of creating principles and norms from soft law and from being able to enforce nonbinding laws.

⁸¹ *Monitoring the Application of Union Law, European Commission at Work*, (16 March 2016, 2:52 PM)
http://ec.europa.eu/atwork/applying-eu-law/index_en.htm

IV. Council of Europe

A. Membership and Foundation

The CoE is Europe's leading human rights intergovernmental organization composed of 47 member states, 28 of which are likewise members of the EU.⁸² The CoE was founded in 05 May 1949 by UK's prime minister Winston Churchill, Germany's Chancellor and Minister of Foreign Affairs Konrad Adenauer, France's Minister of Foreign Affairs Robert Schuman, Belgium's Prime Minister and Minister of Foreign Affairs, Paul-Henri Spaak, and Italy's Prime Minister Alcide de Gasperi, who envisioned a peaceful Europe whose goals were for the respect of human rights, rule of law and democracy.⁸³

B. European Social Charter

The ESC is a comprehensive body of international standards concerning social and economic rights, as well as a treaty which provides for a monitoring mechanism to ensure implementation and compliance by the signatory states.⁸⁴ The ESC is one of the treaties of the Council of Europe which that guarantees basic social and economic rights related to employment, social protection, education, welfare housing, health and education, and the ESC requires that enjoyment of the these fundamental human rights be given without discrimination.⁸⁵ The ESC is

⁸² *Who we are, Council of Europe website* (16 March 2016, 3:59 PM) <http://www.coe.int/en/web/about-us/who-we-are>

⁸³ *History, Founding Fathers, Council of Europe website* (16 March 2016, 3:59 PM) <http://www.coe.int/en/web/about-us/founding-fathers>

⁸⁴ *The Charter in Four Steps* (16 March 2016, 4:48 PM) <http://www.coe.int/en/web/turin-european-social-charter/about-the-charter>

⁸⁵ *The European Social Charter* (16 March 2016, 4:21 PM) <http://www.coe.int/en/web/turin-european-social-charter/home>

recognized as the Social Constitution of Europe as there is no other treaty in the region which provides a comprehensive protection of social rights and serves as a benchmark by EU legislation.⁸⁶ The ESC is the counterpart of the European Convention on Human Rights which was established to guarantee civil and political rights; hence, the ESC was enacted to widen the scope of protected rights to include fundamental social and economic rights.⁸⁷

As regards the interplay of the ESC with EU law, the rights established by the ESC can be matched to binding provisions of EU's TEU and TFEU, regulations and directives, however, in varying forms and degrees of extend and detail.⁸⁸

The 1961 ESC and the 1996 Revised ESC ("RESC") are two co-existing treaties which are both in force that guarantees fundamental social, economic and cultural rights to its signatories.⁸⁹ As of 2016, all of the 28 EU member states have ratified either the 1961 ESC or the RESC: 9 EU member states are bound by the 1961 ESC, and 19 by the RESC.⁹⁰ While only Liechtenstein, Monaco, San Marino and Switzerland are the only member states out of the 47 of the CoE have not ratified either the 1961 ESC or the RESC.⁹¹

C. Implementation Mechanism and Soft Law Characteristics of the ESC

The enforcement of the ESC is through a reporting system wherein the member states report to the European Committee of Social Rights ("ECSR") how it has honored its commitments

⁸⁶ Id.

⁸⁷ Id.

⁸⁸ *European Social Charter and European Union Law* (16 March 2016, 5:13 PM) <http://www.coe.int/en/web/turin-european-social-charter/european-social-charter-and-european-union-law>

⁸⁹ DAVID HARRIS AND JOHN DARCY, *THE EUROPEAN SOCIAL CHARTER* (2nd ed. 2000), page 1.

⁹⁰ *European Social Charter and European Union Law* (16 March 2016, 5:13 PM) <http://www.coe.int/en/web/turin-european-social-charter/european-social-charter-and-european-union-law>

⁹¹ *The Charter in Four Steps* (16 March 2016, 4:48 PM) <http://www.coe.int/en/web/turin-european-social-charter/about-the-charter>

to the ESC.⁹² Likewise, the ECSR monitors compliance by the member states by the collective complaint procedure where social partners and other non-governmental organizations can file collective complaints against member states.⁹³

The decisions of the ECSR must be respected by the state parties, even if they are technically not directly enforceable in the member states' domestic legal system and even if they do not technically fall as jurisprudence of the national law of the member state, the decisions of the ECSR provide the member state's legislation and judiciary with a guidance as to positive developments in social and economic rights.⁹⁴ At the final stages of the ESC's monitoring mechanism, the Committee of Ministers, by issuing Resolutions and Recommendations, ensures the implementation of the decisions adopted by the ECSR.⁹⁵

Because of the varying degrees of commitments of the CoE member states to the ESC, it is clearly viewed as a soft law, much like the ASEAN, the COE likewise does not have much teeth to implement its laws. Moreover, due to the fact that the EU member states do not have a uniformity of acceptance of the ESC as an exercise of sovereignty, these member states have not recognized the ESC has a source of legally binding law.⁹⁶

It must be noted that throughout the half century of the application of the ESC member states made efforts to respect the decisions of the ECSR and have made the steps to ensure compliance. It is expected, however that not all state signatories have initiated the changes necessary but a great majority of the party states have not challenged the findings of the ECSR and

⁹² Id.

⁹³ Id.

⁹⁴ Id.

⁹⁵ Id.

⁹⁶ *European Social Charter and European Union Law* (16 March 2016, 5:13 PM) <http://www.coe.int/en/web/turin-european-social-charter/european-social-charter-and-european-union-law>

have acted to ensure compliance.⁹⁷ However, the ESC has still far to go in order in terms of implementation as well as the ECSR's decisions respected by the member states as legally binding. As one author puts it: "social rights remain the poor step sister of civil and political rights and this is every bit as true within the Council of Europe as elsewhere."⁹⁸

The soft law nature of the ESC as well as the relationship between the CoE with its member states, make it a good point of comparison with the ASEAN. The succeeding chapters shall then discuss what the ASEAN can gain from the development and trends of the CoE's ESC.

⁹⁷Regis Brillat, *The Supervisory Machinery of the European Social Charter: Recent Developments and their Impact*, in SOCIAL RIGHTS IN EUROPE (Grainne de Burca and Bruno De Witte eds., 2005), page 32.

⁹⁸ Philip Alston, *Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System*, in SOCIAL RIGHTS IN EUROPE (Grainne de Burca and Bruno De Witte eds., 2005), page 47.

V. Comparison of the EU and ESC's principles of Freedom of Movement and Non-Discrimination with the ASEAN's move towards Freedom of Movement of Skilled Laborers

A. EU's Principle of Freedom of Movement and ESC's Right to Gainful Employment compared with the ASEAN's Free Movement of Skilled Labor

The legal basis of the freedom of workers is in Article 45 of the TFEU. Article 45 likewise provides the scope and limitations of such freedom of movement and states:

1. Freedom of movement for workers shall be secured within the Union.
2. Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.
3. It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
 - (a) to accept offers of employment actually made;
 - (b) to move freely within the territory of Member States for this purpose;
 - (c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
 - (d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in regulations to be drawn up by the Commission.
4. The provisions of this Article shall not apply to employment in the public service.⁹⁹

The principles of freedom of movement of workers in the EU are likewise contained in Article 15 of the EU Charter of Fundamental Rights which states:

- Freedom to choose an occupation and right to engage in work:
1. Everyone has the right to engage in work and to pursue a freely chosen or accepted occupation.

⁹⁹ Article 45 of the TFEU.

2. Every citizen of the Union has the freedom to seek employment, to work, to exercise the right of establishment and to provide services in any Member State.

3. Nationals of third countries who are authorised to work in the territories of the Member States are entitled to working conditions equivalent to those of citizens of the Union.¹⁰⁰

Brian Bercusson, a leading EU Labor Law expert has stated that Article 15(2) of the EU Charter of Fundamental Rights states that the basic right of freedom of movement of EU Citizens has a constitutional ranking and is a constitutional anchor that may be used by the citizens of the EU with regard to employment.¹⁰¹

From the foregoing, the right of freedom of movement is persons within the EU is a principle enshrined in the highest level of EU Law, in treaties. This highlights the importance of the said principle is to the EU's goal of integration.

According to a leading author in European Labor Law, Catherine Barnard, the rationale and purpose of the principle of freedom of movement was to provide a balance wherein laborers from member states with higher level of unemployment would be able to move to member states where there is a higher demand for labors and there such workers could be employed, be paid higher wages and provide the services needed by the receiving member state.¹⁰² As Hans von de Groeden, a former member of the Commission has stated that the freedom of movement of workers is fundamental to the concept of the market economy and is likewise one of the freedoms sought in Europe during the 19th-century; and without the concept of the freedom of movement, there would not be any true integration, "if 'integration' is to mean not only a merger of state powers

¹⁰⁰ Article 15 of the EU Charter of Fundamental Rights.

¹⁰¹ Brian Bercusson, *EUROPEAN LABOUR LAW AND THE EU CHARTER OF FUNDAMENTAL RIGHTS* (2006), page 187.

¹⁰² Catherine Barnard, *EU EMPLOYMENT LAW* (4th ed. 2012), page 143.

and the creation of a larger economic area but also the consolidation and interweaving of cultural and human relationships.”¹⁰³

Historically, one of the founding principles of the 1957 European Economic Community was the free movement of workers, services, goods and capital. Articles 48 to 51 of the Treaty of Rome likewise already included the free movement of workers among the EU’s original Member States.¹⁰⁴ At present, the citizens of the EU’s 28 member states have unrestricted freedom of movement. Moreover, third party nationals working for at least 5 consecutive years in the EU member states are entitled to permanent residency and hence, enjoy freedom of movement within the region.¹⁰⁵ It can clearly be seen that the European Union prioritizes harmonization of labor policies, therefore, permitting the EU member states to govern the social policy area but at the same time preventing regulatory competition.¹⁰⁶ The principle of freedom of movement of workers is intrinsic to EU economic integration and was lauded as an indispensable requirement for economic cooperation among the EU member states.¹⁰⁷

As regards the ESC, the freedom of movement of persons can be found in Article 18, the right to engage in a gainful occupation in the territory of other Parties, which states that:

Article 18 –With a view to ensuring the effective exercise of the right to engage in a gainful occupation in the territory of any other Party, the Parties undertake:

- 1 to apply existing regulations in a spirit of liberality;
 2. to simplify existing formalities and to reduce or abolish chancery dues and other charges payable by foreign workers or their employers;
 3. to liberalise, individually or collectively, regulations governing the employment of foreign workers;
- and recognise:

¹⁰³ Quoted in Vicki Paskalia, *Free Movement, Social Security and Gender in the EU* (2007), p. 112

¹⁰⁴ ILO and ADB, *supra* 52, p. 90

¹⁰⁵ C. Barnard and S. Deakin: “Negative and positive harmonization of labour law in the European Union”, in *Columbia Journal of European Law* (2002, Vol. 8), p. 389. quoted in ILO and ADB, *supra*, p. 90

¹⁰⁶ ILO and ADB, *supra* 52, p. 90

¹⁰⁷ Paskalia, *supra* 95, p. 111.

4. the right of their nationals to leave the country to engage in a gainful occupation in the territories of the other Parties.

It must be highlighted that Article 18 of the ESC is not primarily concerned with the entry of a national of a member state into the territory of another member state but it focuses on the employment of such a national in the territory of another party to the ESC.¹⁰⁸ Hence, in Article 18 of the ESC, the right protected is access to employment in the host states' national labor market and the free movement of workers is a consequence but not the focus of the said right.

Article 18 of the ESC, thus, bears a strong resemblance with the ASEAN's AAMNP as it is not dedicated to the entry or residence of persons within the region but is concerned with the facilitation of employment of workers and to simplify, if not eliminate the formalities of entry to the labor market of such workers who travel for purpose of employment.

Whereas in the ASEAN, no such charter on fundamental rights exist that mention freedom of movement of workers. Such freedom of movement is only mentioned in the preamble of the AAMNP states that the rationale for the said agreement was that the member states "Desiring for an effective mechanism to further liberalise and facilitate movement of natural persons towards free flow of skilled labour in ASEAN through close cooperation among related ASEAN bodies in the areas, including and not limited; also desiring to eliminate substantially all restrictions in the temporary cross-border movement of natural persons involved in the provision of trade in goods, trade in services and investment within the provisions of this Agreement."¹⁰⁹

Likewise Article 1 of the AAMNP states that the objectives of the agreement include providing the rights and obligations of the member states in relation to the movement of persons between and among the ASEAN member states, to facilitate the movement of persons engaged

¹⁰⁸ Harris and Darcy, *supra* 81, page 200-201.

¹⁰⁹ Preamble, ASEAN Agreement on the Movement of Natural Persons, Brunei-Cambodia-Indonesia-Laos-Malaysia-Myanmar-Philippines-Singapore-Thailand-Vietnam, Recitals, 19 November 2012.

in the trade of goods, services and investment between Member States, to create streamlined procedures for applications for immigration formalities for the temporary entry or stay of persons covered by the AAMNP, and to protect the borders and domestic labor force of the ASEAN member states.¹¹⁰

As discussed above and as contrasted with the EU's principle of freedom of movement of workers, the ASEAN and the current AEC Blueprint 2025 does not aim for a completely free flow of all individuals, neither does it provide for unrestricted flow of professionals as the MRAs are currently only available for 8 professions. As will be discussed below, the current landscape of migration within the ASEAN member states will show the need for the further expansion of this freedom of movement considering that most of the migrants are from low to middle skilled workers, that the flow of workers are limited to certain corridors mostly going to Singapore, Malaysia and Thailand and the status of illegal or undocumented migrants.¹¹¹

B. EU Principle of Non-Discrimination and ESC's Right to Be on Equal Footing as Host Country's Citizens and The ASEAN's Absence of a Non-Discrimination Principle

It must be highlighted that that non-discrimination, even though referred by the ECJ as a part of the fundamental principles of the common traditions of the EU member states was not a norm. The possibility of non-discrimination being enshrined as a norm came with the Article 13 (now Article 19) of the Amsterdam Treaty in 1997. The non-discrimination principle has become

¹¹⁰ Article 1 of the TFEU.

¹¹¹ IOM and MPI, *supra*, p. 1.

obligatory in 2009 with the enactment of the TFEU which contains principles against non-discrimination especially as to race and nationality, to wit:

Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.¹¹²

The non-discrimination principle is likewise contained in Article 21 of the EU Charter of Fundamental Rights which states:

Non-discrimination:

1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on grounds of nationality shall be prohibited.¹¹³

It has been stated that the rationale for it was for potential employers to employ workers based on their merit and capabilities and not their nationality.¹¹⁴ Brian Bercusson likewise discusses the importance of the principle of non-discrimination in the field of labor law as principally for fighting against baseless justifications and distinctions in the selection of employers which are based on nationality, gender, race, religion or any other factor not based on merit; in this matter the rationale of non-discrimination is the promotion of human dignity.¹¹⁵

¹¹² Article 19 (1) TFEU.

¹¹³ Article 21 of the EU Charter of Fundamental Rights.

¹¹⁴ Barnard, *supra*, page 143.

¹¹⁵ Bercusson, *supra*, page 195.

From the above, presently, the EU has a broad Treaty-based commitment to battle with various forms of discrimination. Historically, ever since the beginning of the 21st century, EU member states, as constitutional democracies, have had an almost universal commitment to safeguard human dignity by combating the most obvious forms of discrimination.¹¹⁶ Such commitment has likewise been enshrined in EU member states constitutions or legislation.¹¹⁷ It must be noted, however, that the EU member states differ on matters such as the grounds of discrimination that are strictly prohibited, the scope of action that falls within the provisions as well as the areas of life that non-discrimination may be invoked.¹¹⁸

As to the CoE, Article 19 of the ESC provides for the rights of migrant workers and their families. Specifically, Article 19 (4), (5) and (7) provides for equal footing of migrants as that of the workers of the domestic labor force in various areas:

Article 19 – The right of migrant workers and their families to protection and assistance With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Party, the Parties undertake:

- ...
4. to secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect of the following matters:
 - a. remuneration and other employment and working conditions;
 - b. membership of trade unions and enjoyment of the benefits of collective bargaining;
 - c. accommodation;
 5. to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals with regard to employment taxes, dues or contributions payable in respect of employed persons;
- ...

¹¹⁶ Nicolas Bamforth, Maleiha Malik AND Colm O’Cinneide, *Discrimination Law: Theory and Context* (1st ed. 2008), p. 3-4

¹¹⁷ *Id.*

¹¹⁸ *Id.*

7. to secure for such workers lawfully within their territories treatment not less favourable than that of their own nationals in respect of legal proceedings relating to matters referred to in this article;

Hence, migrant workers must not suffer discrimination on the basis of their nationality in the fields of remuneration, vocational training, promotion, membership to trade unions, benefits derived from collective bargaining, accommodation, taxes, contributions as well as access to legal proceedings.

It must likewise be emphasized that as to non-discrimination, no such principle is mentioned in the AAMP, in the ASEAN Charter or in any of the ASEAN documents. It could even be argued that by stating in the objectives itself of the agreement that it aims to “protect the integrity of Member States’ borders and protect the domestic labour force and permanent employment in the territories of Member States”¹¹⁹ that there is very limited freedom of movement and there is a preference towards the nationals of the member states or those engaged in permanent employment therein.

With regard to ILO conventions, it is worth noting that the Philippines, Indonesia and Cambodia, who are all sources of labor, are the only ASEAN countries who have ratified all eight (8) of the ILO Fundamental Conventions.¹²⁰ While, none of the ASEAN host countries (Singapore, Malaysia and Thailand) have ratified ILO Convention No. 111 re: Discrimination (Employment and Occupation) Convention, 1958 which “prohibits distinctions, exclusions or preferences made on the basis of a person’s race, colour, sex, religion, political opinion, national extraction (including nationals’ place of birth, foreign origin, or ancestry) or social origin.”¹²¹

¹¹⁹ Article 1(d), TFEU.

¹²⁰ ILO and ADB, *supra* 52, page 96.

¹²¹ *Id.*

C. EU and ESC's Scope of the Principles of Freedom of Movement and Non-Discrimination as compared with the ASEAN's Scope and Limitations of the Freedom of Movement

As to the scope of industries, type of worker and length of time of the freedom of movement, the EU applies to every citizen of the EU,¹²² without limit as to the type of industry except for public service¹²³ and without restrictions as to the length of time served. As discussed above, the only issue it would seem is the absence of the definition of “worker”.

At the early stages, the EU's principle of freedom of movement encompassed only workers or “a right only for economically active people” and was “linked to the pursuit of an economic activity.”¹²⁴ In time, however, the right of freedom of movement was extended to all citizens of the EU member states, not just workers, job-seekers or those who were “economically active”.¹²⁵ Several EU Council Directives in 1990¹²⁶ were enacted to expand the right of freedom of movement to those who were economically active but who ceased to be active, to students, and to family members of those who fit within these categories.¹²⁷

¹²² Article 15 (2) of the EU Charter of Fundamental Rights.

¹²³ Article 45 (4) of the TFEU.

¹²⁴ Paskalia, *supra* 95, page 111.

¹²⁵ Paskalia, *supra* 95 page 112.

¹²⁶ Council Directives 90/364/EEC of 28 June 1990 on the right of residence; Council Directives 90/365/EEC of 28 June 1990 on the right of residence for employees and self-employed persons who have ceased their occupational activity; and Council Directives 90/366/EEC of 28 June 1990 on the right of residence for students.

¹²⁷ Paskalia, *supra* 95, page 112.

At present, the right to freedom of movement is entrenched as an inherent right for all citizens of the EU and is considered an inherent part of EU citizenship.¹²⁸ It must, however, be noted that a new phase has characterized labor migration in Europe, namely, the migration of skilled workers via intra-firm migration¹²⁹ and other attempts from citizens of less developed nations to seek a better life in Europe resulting to brain drain from the less developed member states. Aside from the migration of highly-qualified workers, illegal migration from third-party nationals has likewise increased in the region due to the recent refugee crisis. As and other attempts from citizens of less developed nations to seek a better life in Europe.

With regard to the ESC, Article 18 on the right to gainful employment only applies *rationae personae* to the nationals of the party states, it does not apply to nationals of third party states.¹³⁰ It must be noted, however, that as discussed, nationals of the EU who are also signatories of the ESC, already have freedom of movement for being EU citizens, hence, the ESC has more importance as to non-EU signatories of the ESC and the freedom of movement between their citizens within said territories.

As to Article 19 of the ESC, the scope is likewise only as to nationals of the state signatories but with an additional requirement that the said workers be “lawfully within”, “lawfully residing within” or “permitted to establish himself in” that territory.¹³¹ Hence, the non-discrimination principle that workers from other contracting states will be on equal footing on certain areas as those of the local work force applies only if the said worker has lawfully entered the territory and is permitted to work therein.

¹²⁸ Paskalia, *supra* 95, page 112.

¹²⁹ Paskalia, *supra* 95, pages 109-110.

¹³⁰ Harris and Darcy, *supra* 81, pages 202-203.

¹³¹ Harris and Darcy, *supra* 81, pages 211-213.

It must likewise be noted that for both Articles 18 and 19 of the ESC, applies to refugees in accordance with the general rules in the Chapters' Appendixes as well as to the self-employed.¹³²

For the ASEAN, the AAMP provides a scope of workers included and all are only granted to natural persons seeking temporary entry or stay which include business visitors, intra-corporate transferees, contractual service suppliers, other categories specified in the Schedules of Commitments of the ASEAN Member State¹³³ as to the skilled workers limited only to engineers, nurses, architects, surveyors, dentists, doctors, accountants and tourism professionals.¹³⁴

The ASEAN's current restrictions on freedom of movement and the apprehensions of the member states to an EU-like freedom of movement can clearly be cleaned from the AAMN itself wherein it is stated that member states can freely regulate workers on a more permanent basis and that right of the member states to protect the integrity of its borders:

This Agreement shall not apply to measures affecting natural persons seeking access to the employment market of another Member State, nor shall it apply to measures regarding citizenship, residence or employment on a permanent basis. Nothing contained in this Agreement shall prevent a Member State from applying measures to regulate the entry into, or temporary stay, of natural persons of the other Member State in its territory, including those measures necessary to protect the integrity of its territory and to ensure the orderly movement of natural persons across its borders, provided that such measures are not applied in a manner so as to nullify or impair the benefits accruing to the other Member State under the terms of a specific commitment.¹³⁵

The ASEAN's AAMNP likewise defines the time limitations as to the stay of natural persons and specifically states that the same is merely temporary. It must likewise be noted that said length of times are merely defined in the schedule of commitments and are not imposed by

¹³² Harris and Darcy, *supra* 81, pages 203 and 212.

¹³³ Article 2 of the ASEAN Agreement on the Movement of Natural Persons, Brunei-Cambodia-Indonesia-Laos-Malaysia-Myanmar-Philippines-Singapore-Thailand-Vietnam, Recitals, 19 November 2012.

¹³⁴ ASEAN Mutual Recognition Agreements (26 October 2015, 6:46 pm)

<http://investasean.asean.org/index.php/page/view/asean-free-trade-area-agreements/view/757/newsid/868/mutual-recognition-arrangements.html>

¹³⁵ Article 2 of the ASEAN Agreement on the Movement of Natural Persons, Brunei-Cambodia-Indonesia-Laos-Malaysia-Myanmar-Philippines-Singapore-Thailand-Vietnam, Recitals, 19 November 2012.

the ASEAN.¹³⁶ Hence, it could be stated that in the ASEAN's goal to liberalize freedom of movement, said schedule of commitments should be either enlarged, harmonized or eliminated altogether for an EU-like unrestricted permanent stay in other member states by workers.

As discussed above, this limited scope of application of freedom of movement of skilled workers does not reflect the actual migration pattern of the region.

¹³⁶ Article 6 ASEAN Agreement on the Movement of Natural Persons, Brunei-Cambodia-Indonesia-Laos-Malaysia-Myanmar-Philippines-Singapore-Thailand-Vietnam, Recitals, 19 November 2012.

VI. Roadblocks That May Be Encountered by the ASEAN in its Move to Have Freer the Movement of Skilled Workers

On paper, the AEC is exciting as its goal is to integrate a market and a labor source of over 600 million people; however, in reality there are serious doubts as to whether the ASEAN can achieve its goals, primarily because of lack of strong institutions.¹³⁷ Even the EU has expressed that it foresees more trade opportunities with the region due to the integration, European Chamber of Commerce of the Philippines Vice President has stated that “Although the ambition level [of the regional economic unification] is less than the EU—with common currency and all that—it is an important first step to start trading more with newer markets [in Europe and in other parts of the world. It is already a very powerful region. If the economic growth of the Asean countries continues like now, it will overtake the European Union as an economic block in the next few years.”¹³⁸ This potential of greatness, however, must be seen through a more realistic perspective and it is important to recognize the weaknesses in the system in order for the ASEAN to reach its goals of true integration.

A discussion of the problem areas of the ASEAN is necessary in order to determine if its European counterparts can provide a suitable solution to the said perceived roadblocks. Considering that ASEAN Integration has just been implemented in December 2015, at the moment most of the threats are only perceived and there is no existing case law invoking the freedom of movement of case law as well as discrimination cases. Hence, an initial discussion on the

¹³⁷ Elodie Sellier, *The ASEAN Economic Community: The Force Awakens? The AEC is here, but can it deliver on its promise?*, 12 January 2016 (04 February 2016, 4:51pm) <http://thediplomat.com/2016/01/the-asean-economic-community-the-force-awakens/>

¹³⁸ Roderick L. Abad, *ASEAN Integration Opens Trade Opportunities for EU*, Business Mirror, 25 July 2015 (06 October 2015, 10:28 pm) <http://www.businessmirror.com.ph/asean-integration-opens-trade-opportunities-for-eu/>

apprehensions of member states shall be made focusing on Singapore as the receiving state and the Philippines as the sending state. The more inherent roadblocks, such as the lack of a regional minimum labor standards as well as the implementation issues, shall likewise be discussed in this chapter.

A. Perceived Threats of Free Flow of Workers By The Receiving State and the Sending State

i. Perceived threats to the receiving state (Singapore)

As in the European setting, the most obvious apprehension that Singapore is unfair competition between the skilled migrant workers and their domestic work force. Singapore fears that migrants would cause unfair wage competition and that those coming from less developed member states who have had a cheaper cost of education and lower standards are placed on equal footing as their citizens. Several news articles and blogs have expressed this fear in less than polite manner. In one blog, a Singaporean has accused his government of “putting your expensive and hard-earned qualifications on a par with third-rate institutions or worse in other ASEAN countries. We have all read about the scandal of the number of fake degree and degree mill holders who are working in Singapore”¹³⁹ The blog further reflects the majority of the sentiment of Singaporean who fear the broadening of the scope of free movement of workers within the region, the blog continues: “We can be certain that if Singaporeans let them the PAP (People’s Action Party) will be among the most enthusiastic adopters of a free market in skilled labour. This is just the thin end of the wedge of course. After that there will be pressure on Singapore to agree to free movement

¹³⁹ Kenneth Jeyaretnam, *Have Singaporeans Woken Up to the Implications of the ASEAN Agreement on Free Movement of Labour?* (06 October 2015, 10:34 pm) <http://sonofadud.com/2015/05/22/have-singaporeans-woken-up-to-the-implications-of-the-asean-agreement-on-free-movement-of-labour/>

of unskilled labour.”¹⁴⁰ The blog ends protesting that the Singaporean government has not made any moves to protect its local labor force from the influx of migrant workers: “It would be unprecedented for a rich country like Singapore to ignore the majority of its citizens’ economic interests and sign up to an agreement on free movement of labour without even basic protections for its workers but that is what the PAP Government are doing.”¹⁴¹

Another perceived threat is a flow imbalance as the corridors of the migration only go to the more developed member states such as Singapore which may lead to social dumping. Instead of using workers in Singapore, business in their quest to make profits, may make use of migrants who are paid less and who have fewer benefits as those of the Singaporeans. Hence, even if skilled Singaporeans may work in any country within the ASEAN region, they would not benefit from this as they already work in the country with the highest wages.

However, not all Singaporeans fear integration but may merely have objections to the lack of transparency and information decimation of ASEAN Integration has been handled in Singapore, in another blog, the author stresses that freedom of movement of workers is a positive trend, however, he states that “What I find troubling is that there has been a democratic deficit in the process of reaching these agreements. This tangle of agreements has been reached in backroom deals among ASEAN (sic) politicians. Locally, there has been little more than the occasional announcement in the mainstream media, dutifully trumpeting (sic) the government’s spin, with virtually no searching questions asked. The lack of enough opposition in parliament means another opportunity for scrutiny missed... Most Singaporeans, I’d reckon, have little idea that these treaty instruments have been signed and are on their way to implementation. Their effects however, will not always be hidden. When people start noticing, they are likely to be controversial. As the paper

¹⁴⁰ Id.

¹⁴¹ Id.

by the Economic Research Institute for Asean and East Asia noted, ‘some countries have started to become concerned over the free flow of skilled labour’.¹⁴²

Hence, this misperception by Singaporeans on the negative effects of integration and their fear of the free flow of labor is likewise heightened by the lack of transparency of the Singapore government or at the very least, the lack of public consultation and information on these issues. It is true, however, that the negotiations and deliberations by the ASEAN are confidential and could not be accessed online. Likewise, there has little been said in the AAMNP, the ASEAN documents and in the media that would ease Singapore and other receiving state’s apprehensions.

ii. *Perceived threats of the sending state (Philippines)*

It may be an obvious conclusion that the sending states have more to gain from the free movement of labor. Likewise, in theory, skilled workers are able to find better opportunities in other member states and their professional credentials will be recognized within the region. However, although Overseas Filipino Workers (“OFWs”) may be paid more, there are numerous threats to their well-being due to discrimination and lack of regional minimum labor standards.

Likewise, the AAMNP and the AEC only allow for free movement of skilled workers. This however, does not reflect the through state of migration in the region wherein mostly mid to low level workers migrate and are frequently undocumented. Domestic helpers, form the majority of these migrant workers and there is an ongoing phenomena that labor standards for them are below par, leaving these low-skilled to mid-skilled migrant workers unprotected by any regional law.

¹⁴² Au Waiping, *ASEAN Single Market and the Free Movement of Skilled Labour*, 25 May 2015 (06 October 2015, 10:30 pm) <https://yawningbread.wordpress.com/2015/05/25/asean-single-market-and-the-free-movement-of-skilled-labour/>

Modern day slavery of OFWs is an actual apparent threat that the Philippines is facing and is perhaps the most prevalent human rights challenge in the Philippines. In 2012, the Commission on Filipinos Overseas estimated that more than 10% of the Philippines' 100 million population is working abroad to help lift their families out of poverty.¹⁴³ However, in pursuit of the dream of a better life, OFWs fall victim to illegal recruitment and human trafficking. Consequently, they become victims to numerous heinous crimes such as sexual abuse,¹⁴⁴ mutilation,¹⁴⁵ and even murder by their employers. The International Labour Organization estimates that there are 60,000 to 100,000 Filipino children, and as many as 400,000 Filipino women, trafficked each year.¹⁴⁶ These Filipinos are subject to involuntary servitude and live in conditions that are below the standards that any human should be allowed to live.

United Nations Secretary-General Ban Ki-Moon during the Global Forum on Migration and Development in Brussels held on 10 July 2007 has lauded the work of migrant workers and have highlighted the necessity of their protection: "For decades, the toil of solitary migrants has helped lift entire families and communities out of poverty. Their earnings have built houses, provided health care, equipped schools and planted the seeds of business. They have woven together the world by transmitting ideas and dynamic human link between cultures, societies, and economies. Yet, only recently have we begun to understand not only how much international migration impacts development, but how smart public policies magnify this effect."¹⁴⁷

¹⁴³ *Stock Estimate of Overseas Filipinos as of December 2012 prepared by the Commission of Filipinos Overseas.* (26 October 2015, 7:42 pm) http://cfo.gov.ph/images/stories/pdf/2012_Stock_Estimate_of_Filipinos_Overseas.pdf

¹⁴⁴ *Hong Kong One of The Worst Places to Be a Filipino Maid*, 08 August 2013 (17 March 2016, 6:31 PM) <http://www.asianpacificpost.com/article/5689-hong-kong-one-worst-places-filipino-maids.html>

¹⁴⁵ Lila Ramos Shahani, *Violence and Violations: OFWS and Human Rights*, 22 December 2014 (17 March 2016, 6:28pm) <http://www.philstar.com/opinion/2014/12/22/1405360/violence-and-violations-ofws-and-human-rights>.

¹⁴⁶ As quoted in Lila Ramos Shahani, *Violence and Violations: OFWS and Human Rights*, 22 December 2014 (17 March 2016, 6:28pm) <http://www.philstar.com/opinion/2014/12/22/1405360/violence-and-violations-ofws-and-human-rights>.

¹⁴⁷ As quoted in Ferdinand A. Tan, *Handbook on Overseas Employment and Pleadings (Annotated)* (2010) page 1.

Finally, another perceived threat is that there would be a brain drain, wherein the richer member states such as Singapore will syphon out the best and brightest of the Philippines's skilled laborers, luring them with promises of salaries that could not be matched in the Philippines. The Institute of Chartered Accountants in England and Wales, in an Economic Insight report, observed that ASEAN economies are benefiting from its growing and young populations, but some, particularly the Philippines, has a grave brain drain issue depriving the country of the much needed talent and skills needed for it to develop.¹⁴⁸

These skilled workers are likewise needed in the Philippines to provide quality services to the Filipino people as well as to further develop the country who could not survive purely on the remittances of OFWs nor would it achieve enough progress if the high skilled jobs were to be left vacant or be left to be filled by unskilled or incompetent workers.

B. Difficulty of Harmonization of Labor Standards

In relation to the above discussion, another perceived problem with the free movement of skilled workers as crafted by the ASEAN is the difficulty of harmonization of labor standards. Currently, there is no such thing as ASEAN Labor Standards and the ASEAN AEC Blueprint 2025 drafters did not include human rights principles or labor standard issues in said documents. Strong supporters for the delay of the implementation of the AEC have stated that the ASEAN has been notorious in being impotent to provide protection for the citizens of its member states from human

¹⁴⁸ As quoted in *How Philippines can reverse 'brain drain'*, 11 March 2015 (17 March 2016, 6:47 PM) <http://news.abs-cbn.com/business/03/11/15/how-philippines-can-reverse-brain-drain>

rights abuses by their own government and the ASEAN member states have been criticized for not involving civil society in the drafting of the AEC Blueprint 2025:

It is no secret that ASEAN countries have long lacked the capacity to provide legal protection and ensure the welfare of their citizens. The region has only average rankings on the UN Development Program's "Human Development Index" and the World Justice Report's "Rule of Law" index. When ASEAN leaders drafted their "blueprint" for the region, they did not consult civil society; it was a top-down process of political elites, and many stakeholders still have limited or uneven knowledge about the initiative. This is highly problematic, as the sheer number of low-cost workers and accompanying lack of regulations mean that labour rights are always an issue in the region. In addition, in many ASEAN countries, civil society workers and human rights activists have been threatened or killed, and their organizations disbanded.¹⁴⁹

One of the main reasons for ASEAN's roadblock relating to its challenge of lack of minimum labor standards quality is the limited adoption and enforcement of fundamental internationally recognized labor standards enshrined in the ILO Conventions, namely: freedom of association and the right to collective bargaining, the elimination of all forms of forced or compulsory labor, the abolition of child labor, and the elimination of discrimination in employment and occupation.¹⁵⁰ Conventions, only 3 of the 10 ASEAN Members States have ratified the 8 fundamental ILO Conventions and none of these 3 are the receiving states.

Moreover, it must be noted that there is an existing document, albeit non-binding, between the Member States of the ASEAN, called the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers otherwise known as the Cebu Declaration on Migrant Workers ("Cebu Declaration). Article 1 of the Cebu declaration requires both the sending and receiving member states to fortify the economic, political, and social pillars of the ASEAN

¹⁴⁹ Haris Azhar, *Making the ASEAN Economic Community Human Rights-friendly*, 28 January 2016 (12 February 2016, 12:30pm) <https://www.opendemocracy.net/openglobalrights/haris-azhar/making-asean-economic-community-human-rights-friendly>

¹⁵⁰ ILO and ADB, *supra* 52, pages 13-14.

by stimulating the full potential of migrant workers and promoting their dignity by providing a climate of stability, freedom, and equity.¹⁵¹ Article 8 of the Cebu Declaration states that one of the obligations of the receiving states is to facilitate protection of workers, ensure payment of wages and to provide access to migrant workers of working and living conditions that are decent.¹⁵²

C. Inadequacy of Current Implementation Mechanism of the ASEAN

As discussed above, the weakness of the ASEAN institution, the ASEAN way, and the lack of political will of the ASEAN's leaders have caused another roadblock regarding the difficulty with implementation, enforcement and policing its members. As a critic has put it:

[T]he extremely pervasive and, some would say, blind adherence to the overarching principles of consensus and non-interference, combined with the lack of a robust and sound institutional architecture, have left intact the problem of ensuring compliance and effective implementation of targets by national governments and agencies. In spite of the various commitments entered into under the AEC, ASEAN is still missing the necessary institutional glue, which could take the form of an overarching regional mechanism that ensures the smooth coordination of the vast array of government actors from the different national sectors, ministries and agencies.¹⁵³

Hence, despite the lofty goals of the ASEAN with the AEC Blueprint 2015, without the proper institutions, implementation mechanisms as well as the participation of civil society, true ASEAN integration will only remain a theory. In the next succeeding chapter, I shall discuss the possible solutions that may be provided by the EU and the CoE to the above mentioned problems that are encountered by the ASEAN.

¹⁵¹ Article 1 of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers Brunei-Cambodia-Indonesia-Laos-Malaysia-Myanmar-Philippines-Singapore-Thailand-Vietnam, 13 January 2007

¹⁵² Article 8 of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers Brunei-Cambodia-Indonesia-Laos-Malaysia-Myanmar-Philippines-Singapore-Thailand-Vietnam, 13 January 2007

¹⁵³ Elodie Sellier, *The ASEAN Economic Community: The Force Awakens? The AEC is here, but can it deliver on its promise?*, 12 January 2016 (04 February 2016, 4:51pm) <http://thediplomat.com/2016/01/the-asean-economic-community-the-force-awakens/>

VII. EU and CoE's Principles, Institutions and Norms the ASEAN May Find Useful to Transpose In Its Movement Towards Integration

In the long term, perhaps when the ASEAN member states' societies are more prepared to accept a larger degree freedom of movement of natural persons, the ASEAN may learn from the EU by widening the scope persons who enjoy this freedom in order to reflect the actual state of migration in the region.

As discussed above, the freedom of movement of persons in Europe is inherent in EU citizenship. The trends in the EU have, however, have shown a movement to limit this freedom due to social dumping, brain drain and a means to prevent terrorism and undocumented migration.

The ASEAN now needs to find a balance between total limitations to the freedom of movement of skilled workers and unbridled freedom of movement of natural persons within the region. In the first place, migration of skilled workers represent only a fraction of the migration in the ASEAN region. Policies must be in place in order to regulate, monitor and reflect the actual migration patterns in the region which is mostly the migration of unskilled laborers from less developed member states to the more industrialized member states such as Singapore, Malaysia and Thailand. Moreover, each of the Member States' governments must likewise provide proper measures to ensure protection of both their labor force and the migrants. It is hoped that a stronger feeling of solidarity will grow within the region to recognize the necessity not only to widen the scope of free movement but also to enshrine the principle of non-discrimination.

Moreover, as will be further expounded below, ASEAN institution building and strengthening is essential in order for the ASEAN to prove it is worthy of the rice it eats and to

dispel any more doubts that it is a mere talk shop setting out goals it could not or will not aim to achieve.

A. Incorporating the Non-Discrimination Principle by the ASEAN

As discussed above, the ASEAN's AMNP does not include the principle of non-discrimination. Neither does any of the documents in relation to the AEC Blueprint 2025 mention any prohibition against discrimination. In contrast, both the EU and the CoE are explicit in their treaties, charters and other legislation as to the principle of non-discrimination. The EU even takes it further with issuing directives based on the treaties as regards equality of pay and opportunity based on sex,¹⁵⁴ it likewise has the Framework Directive which prohibits discrimination based on religion, disability, age and sexual orientation,¹⁵⁵ and the Race Directive¹⁵⁶ which prohibits discrimination based on race and color of the skin.

Although the ASEAN does not have the institutions nor the competence to issue directive or any equivalent legal instrument equivalent to a directive, at the very least, it is recommended that it explicitly enshrine the principle of non-discrimination in its future agreements and declarations especially with regard to migrant workers within the region.

Likewise, another step that may be emulated by the ASEAN with its European counterpart is to put pressure in the other 7 ASEAN member states--- Singapore, Malaysia, Thailand, Laos, Brunei, Vietnam and Myanmar-- to enact and implement the ILO conventions, particularly ILO Convention No. 111 re: Discrimination 1958 prohibiting distinctions, exclusions or preferences made on the basis of a person's sex, race, color, religion, political opinion, or social origin.

¹⁵⁴ See Equal Pay Directive 2006/54/EC and Equality of Opportunity Directive 2006/54/EC

¹⁵⁵ See Religion, Disability, Age and Sexual Orientation Directive 2000/78.

¹⁵⁶ Directive 2000/43.

Finally, the ASEAN may likewise learn from the EU and the CoE in its propaganda on unity. The constant reminder that members of the ASEAN region are in the same boat, cut from the same cloth and in this together adds to the perception of sameness, cooperation and solidarity by its citizens. This may aid in reducing the excessive misplaced nationalism which in turn leads to discrimination and an “us vs. them” attitude. In this regard, the ASEAN may learn from the EU as to the reason for its unification: money and peace. The ASEAN is in a tacit war with China not only as a competitor for investors but also because China has threatened the territories of all of the ASEAN countries located in the South China Sea by occupying international waters and building structures in island in the territory of the ASEAN member states.¹⁵⁷ China, being the “common enemy” and its perceived threat by the ASEAN member states may spark the much needed unity and urgency for cooperation that the region needs.

- B. Possible effects of liberalization of freedom of movement of skilled workers with regard to harmonization of labor standards with the ASEAN and lessons to be learned from the EU and EoC as to harmonization of labor standards

The EU has long learned that economic prosperity does not automatically translate into improved labor standards.¹⁵⁸ Hence, although the liberalization of freedom of movement in the ASEAN may lead to the creation of minimum ASEAN labor standards and migrant protections, there is a need for the implementation of region wide minimum standards.

¹⁵⁷ Elodie Sellier, *The ASEAN Economic Community: The Force Awakens? The AEC is here, but can it deliver on its promise?*, 12 January 2016 (04 February 2016, 4:51pm) <http://thediplomat.com/2016/01/the-asean-economic-community-the-force-awakens/>

¹⁵⁸ Philippa Watson, *supra* 7 at page 4.

As discussed above, the implementation and the transformation to a binding legal obligation by all the ASEAN member states of the Cebu Declaration is a necessary first step for the protection of migrant workers.

Likewise, the ASEAN may learn from the experience EU as to the necessity of decent working conditions in order to create fair competition and to protect workers. Governments of the ASEAN members would do well to develop a political will to strengthening national policies to improve labor standards. The ASEAN may gain from the EU's experience that setting minimum standards are not only for the benefit of the workers but will likewise level the playing field and eliminate unfair competition and stop the regulatory competition. As the ILO and ADB has found that the success of the AEC and ultimately the future of the ASEAN depends on the economic development that goes with minimum labor standards and has likewise stated the benefits of the same which are that firstly, labor standards protect the rights of workers and ensure that they benefit economically from integration by promoting social cohesion and development and by alleviating poverty; secondly, international labor standards can manage the negative market effects in the domestic sector that are disadvantaged within the ASEAN region; thirdly, harmonization of labor standards illuminate the regulatory competition and eradicates the race to the bottom.¹⁵⁹

The ASEAN, will also do well to study the trends with its European counterpart. The ESC for example was considered as a non-binding law and in the past, social rights took a back seat to political rights. However, there is a universal trend towards seriously implementing these social rights. Even the EU which does not have competence with regard to labor standards has found a way to be able to regulate work time under the competence of health and safety. There is therefore

¹⁵⁹ ILO and ADB, *supra* 52 at pages 14-15.

a strong leaning towards regional standardization of labor standards which the ASEAN may only benefit from by both eliminating the fears of its domestic labor market and protecting the migrant workers from abuse.

C. Working with Soft Law and Sharpening the Teeth of the ASEAN with Regard to Ensuring Implementation and Compliance

Perhaps the most problematic area of the ASEAN is its implementation mechanism. Because of the ASEAN Way and the general lack of teeth and claws of the ASEAN institutions, getting solid commitments by the member states as well as ensuring enforcement of the said commitments is not the strongest suit of the ASEAN. It has, thus, received international criticism for its passivity. Although, it is easy to merely recommend that the ASEAN be more proactive and to discard entirely the ASEAN Way's wait and see attitude, the same is unlikely to happen.

The ASEAN, however, needs to work on finding an approach that does not necessitate complete discard the ASEAN Way but clearly there is need to grow out of the principle of non-interference and to relax the principles of consensus and saving face. Institutions building is key, there is a need for the formation of body much like the ECJ and ESCR and other institutions to ensure accountability and enforcement. There has to be a grievance mechanism and there has to be sanctions for non-compliance in order for the ASEAN goals to not be mere motherhood statements and rhetoric. Admittedly, this is easier said than done. However, the ASEAN may do well to learn from the CoE, the implementation of the ESC and the trend towards the recognition of the binding effect of decisions of the ECSR. But first, the ASEAN must create such an equivalent institution.

In the meantime, the ASEAN may learn from the EU's implementation of soft laws such as the Open Method of Coordination. The Open Method of Coordination is a form of intergovernmental policy-making that relies on peer pressure which results to non-binding EU legislation and provided a new method for cooperation wherein the national policies of the member states can be engaged towards common objectives.¹⁶⁰ The Open Method of Communication usually is on matters within the EU member states such as employment standards and social protection and is done by identifying objectives, establishing quantifiable standards and by comparing other member state's performance and exchange of best practices.¹⁶¹

This monitored peer-pressure method of the Open Method of Coordination may play well with the saving face culture of the ASEAN member states and could prove to be an appropriate mechanism for advancement of labor standards. Moreover, should there be resisting member states, ASEAN Member states may enter in to bilateral or multilateral agreements with each other as to labor standards, free flow of labor and non-discrimination.

The involvement of the private sector and international organizations such as the ILO and the International Organization for Migration will aid in the international pressure and educating of member states' governments and societies to the benefits of freedom of movement of labor, standardization of labor standards and enshrining the principle of non-discrimination. An initial step for ASEAN member states to take is to inform its people, civil society need to be informed and included in the decision making process. The ASEAN would do well to learn from the transparency of the EU's decision making process and legislation drafting.

¹⁶⁰Eur-Lex, *Open Method of Communication* (03 March 2016, 10:49 am) http://eur-lex.europa.eu/summary/glossary/open_method_coordination.html

¹⁶¹ Id.

Lastly, political will of the governments of the Member States must likewise be developed. The ASEAN Member States may gain from the EU Member States in their recognition of the necessity of developing labor standards and eliminating discrimination in order to facilitate free movement of workers in the ASEAN's goal of integration. The ASEAN's Agreement and treaties will remain words on paper if they are not transposed into domestic laws.

VIII. Conclusion and Recommendations

From the above discussion, the ASEAN is a far cry from its EU counterparts in terms of institutions, commitments and enforcements. Although both the EU and the CoE have enshrined the principles of non-discrimination and respect the freedom of movement of workers in its member states, the ASEAN cannot merely transpose the EU and CoE institutions and principles. The ASEAN is sui generis, the ASEAN way is so deeply ingrained in its being that it is almost paralyzed from developing and achieving its potential. The ASEAN, however, must learn that in order for it to achieve its goals of integration and for it to be able to achieve a true ASEAN Economic Community in 2025, it needs to further liberalize the movement of workers. Moreover, it needs to assure a certain quality of life in the region. There is a glaring necessity to implement and enforce minimum labor standards not only to prevent abuses of migrant workers but also to protect the domestic labor force.

Hence, the ASEAN may gain from the EU and CoE in terms of institution building, enshrining the principle of non-discrimination in its regional and domestic laws and through finding a method which adopts to the ASEAN culture and at the same time achieves its lofty goals of being a “politically cohesive, economically integrated, socially responsible”¹⁶² group of Southeast Asian nations, it will need more than merely stating these motherhood statements. Not only does the ASEAN need to grow teeth to ensure enforcement and compliance by the member states, it needs

¹⁶² ASEAN 2025: *Forging Ahead Together* (18 March 2016, 12:16 PM)
<http://www.asean2016.gov.la/index.php?r=site/content&page=8>

to develop hands to work towards its goals of integration, feet in order to move forward with its plans as stated in the AEC Blueprint 2025 and a heart in order to understand the need for labor standards and social responsibility. Otherwise, it is just a mouth paying lip service to ideals that would never come to fruition.

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