

“Why Should We Study ASEAN Law”

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Background

The ASEAN Charter has transformed the Association of Southeast Asian Nations (ASEAN) from a loose international association into a full-fledged international organization since its entering into force in 2008. The ASEAN at present has both domestic legal personality and international legal personality, and thus can now conclude both a contract and a treaty. It also has privileges and immunities necessary for the exercise of its functions.

The ASEAN Charter envisages the ASEAN to be an ASEAN Community (AC) in which the ASEAN Member States (AMSs) and their political, economic, social, and cultural components, including their respective peoples, can integrate and interact with each other more broadly, deeply, and closely in all matters. It contemplates the AC to comprise 3 subcomponents, namely (1) ASEAN Political Security Community (APSC), (2) ASEAN Economic Community (AEC), and (3) ASEAN Socio-Cultural Community (ASCC) by the end of 2015.

In addition, as a supreme ASEAN legal instrument, the ASEAN Charter has also laid down many legal principles: such as amity and cooperation; sovereignty equality of ASEAN Member States; territorial integrity of ASEAN Member States; non-interference in internal affairs of other ASEAN Member States; renunciation of aggression and of the threat or use of force or other actions in any manner inconsistent with international law;

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adherence to the rule of law, good governance, democracy and constitutional government; respect for fundamental freedoms; promotion and protection of human rights; promotion of social justice; upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States; respect for the different cultures, languages and religions of the peoples of ASEAN, while emphasising their common values in the spirit of unity in diversity.

Furthermore, at the present time, there are a large numbers of ASEAN instruments which are important to the development of ASEAN, such as the ASEAN Economic Community Blueprint (AEC Blueprint), ASEAN Political Security Community Blueprint (APSC Blueprint), the ASEAN Socio-Cultural Community Blueprint (ASCC Blueprint), the ASEAN Human Rights Declaration (AHDR) (2012); ASEAN Declaration on Protection and Promotion of the Rights of Migrant Workers (ADPPRMW) (2007). All of these ASEAN instruments impose, more or less, legal obligations between or among ASEAN Member States.

Therefore, it is now a high time for all the ASEAN Member States, including their respective nationals, to pay more attention to the oft-neglected ASEAN legal features and components: that is the legal aspects of the organization. This brings us to the question “Why Should We Study ASEAN Law”.

Importance of the ASEAN Charter

The ASEAN Charter has transformed the Association of Southeast Asian Nations (ASEAN) from a loose international association into a full-fledged international organization since its entering into force in 2008¹. The ASEAN, at present, has both domestic

¹ The ASEAN Charter was adopted on 21 November 2017, and has entered into force since 15 December 2008.

legal personality² and international legal personality³, and thus can now conclude both a contract and a treaty.⁴ It also has privileges and immunities necessary for the exercise of its functions⁵.

The ASEAN Charter envisages the ASEAN to be an ASEAN Community (AC) in which the ASEAN Member States (AMSs) and their political, economic, social, and cultural components, including their respective peoples, can integrate and interact with each other more broadly, deeply, and closely in all matters. It contemplates the AC to comprise 3 subcomponents, namely (1) ASEAN Political Security Community (APSC), (2) ASEAN Economic Community (AEC), and (3) ASEAN Socio-Cultural Community (ASCC) by the end of 2015.⁶

² Agreement on Privileges and Immunities of the Association of Southeast Asian Nations, **Article 2 (1)** provides that “As a legal person, ASEAN shall have the following capacities under domestic laws: (a) to enter into contracts; (b) to acquire and dispose of movable and immovable property; and (c) to institute and defend itself in legal proceedings.”

³ ASEAN Charter **Article 3** provides that “ASEAN, as an inter-governmental organisation, is hereby conferred legal personality.”

⁴ ASEAN Charter **Article 41 (7)** provides that “ASEAN may conclude agreements with countries or sub-regional, regional and international organisations and institutions. The procedures for concluding such agreements shall be prescribed by the ASEAN Coordinating Council in consultation with the ASEAN Community Councils.”

⁵ ASEAN Charter **Article 17** provides that “(1) ASEAN shall enjoy in the territories of the Member States such immunities and privileges as are necessary for the fulfilment of its purposes. (2) The immunities and privileges shall be laid down in separate agreements between ASEAN and the host Member State.”; Agreement on the Privileges and Immunities of the Association of Southeast Asian Nations **Article 2: 1** provides that “As a legal person, ASEAN shall have the following capacities under domestic laws: (a) to enter into contracts; (b) to acquire and dispose of movable and immovable property; and (c) to institute and defend itself in legal proceedings.”

⁶ ASEAN Charter **Preamble Paragraph 11** provides that the ASEAN Member States “COMMITTED to intensifying community building through enhanced regional cooperation and integration, in particular by establishing an ASEAN Community comprising the ASEAN Security Community, the ASEAN Economic

Moreover, as a supreme ASEAN legal instrument, the **ASEAN Charter has also laid down many legal principles**; *such as* amity and cooperation; sovereignty equality of ASEAN Member States; territorial integrity of ASEAN Member States; non-interference in internal affairs of other ASEAN Member States; renunciation of aggression and of the threat or use of force or other actions in any manner inconsistent with international law; adherence to the rule of law, good governance, democracy and constitutional government; respect for fundamental freedoms; promotion and protection of human rights; promotion of social justice; upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States; respect for the different cultures, languages and religions of the peoples of ASEAN, while emphasising their common values in the spirit of unity in diversity.⁷

Community and the ASEAN Socio-Cultural Community, as provided for in the Bali Declaration of ASEAN Concord II;”

⁷ **ASEAN Charter Article 2: 2** provides that “ASEAN and its Member States shall act in accordance with the following Principles: (a) respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States; (b) shared commitment and collective responsibility in enhancing regional peace, security and prosperity; (c) renunciation of aggression and of the threat or use of force or other actions in any manner inconsistent with international law; (d) reliance on peaceful settlement of disputes; (e) non-interference in the internal affairs of ASEAN Member States; (f) respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion; (g) enhanced consultations on matters seriously affecting the common interest of ASEAN; (h) adherence to the rule of law, good governance, the principles of democracy and constitutional government; (i) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice; (j) upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member States; (k) abstention from participation in any policy or activity, including the use of its territory, pursued by any ASEAN Member State or non-ASEAN State or any non-State actor, which threatens the sovereignty, territorial integrity or political and economic stability of ASEAN Member States; (l) Respect for the different cultures, languages and religions of the peoples of ASEAN, while emphasising their common values in the spirit of unity in diversity; (m) the centrality of ASEAN in external political, economic, social and

Furthermore, at the present time, there are a large numbers of ASEAN instruments which are important to the development of ASEAN,⁸ such as the ASEAN Economic Community Blueprint (AEC Blueprint), ASEAN Political Security Community Blueprint (APSC Blueprint), the ASEAN Socio-Cultural Community Blueprint (ASCC Blueprint), the ASEAN Human Rights Declaration (AHDR) (2012)⁹; ASEAN Declaration on Protection and Promotion of the Rights of Migrant Workers (ADPPRMW) (2007)¹⁰

Significance of ASEAN Economic Development

With respect to the AEC Blueprint, there are some provisions which deserve mentioned here.

AEC Blueprint Paragraph 9 provides that “An ASEAN single market and production base shall comprise five core elements: (i) free flow of goods; (ii) free flow of services; (iii) free flow of investment; (iv) freer flow of capital; and (v) free flow of skilled labour”. In addition, the single market and production base shall also include two important components, namely, the priority integration sectors, and food, agriculture and forestry.

cultural relations while remaining actively engaged, outward-looking, inclusive and non-discriminatory; and (n) adherence to multilateral trade rules and ASEAN’s rules-based regimes for effective implementation of economic commitments and progressive reduction towards elimination of all barriers to regional economic integration, in a market-driven economy”.

⁸ Protocol to the ASEAN Charter on Dispute Settlement Mechanisms (2010), Article 1 (a) defines an “ASEAN instrument as “any instrument which is concluded by Member States, as ASEAN Member States, in written form that gives rise to their respective rights and obligations In accordance with international law”.

⁹ ASEAN Human Rights Declaration was adopted on 18 November 2012.

¹⁰ ASEAN Declaration on Protection and Promotion of the Rights of Migrant Workers (2007).

AEC Blueprint Paragraph 13 provides that “Tariffs on all intra-ASEAN goods will be eliminated in accordance with the schedules and commitments set out in the CEPT-AFTA Agreement and other relevant Agreements/Protocols.”

AEC Blueprint Paragraph 21 (i) and (ii) provide that the ASEAN Member States shall “(i) Remove substantially all restrictions on trade in services for 4 priority services sectors, air transport, e-ASEAN, healthcare and tourism, by 2010 and the fifth priority services sector, logistics services, by 2013; (ii) Remove substantially all restrictions on trade in services for all other services sectors by 2015;”

AEC Blueprint Paragraph 21: 5 provides, *inter alia*, that “No restrictions for Modes 1 and 2, with exceptions due to *bona fide* regulatory reasons (such as public safety) which are subject to agreement by all Member Countries on a case-by-case basis; Allow for foreign (ASEAN) equity participation of not less than...70% by 2015 for other services sectors; and Progressively remove other Mode 3 market access limitations by 2015;”

In this connection, it is important to address 5 points, namely (1) what is ASEAN Economic Community (AEC)? (2) What are its objectives? (3) How can these objectives be achieved? (4) What are the challenges? (5) Can ASEAN maintain its centrality in dealing with outside states?

1. What is the AEC?

This question is interesting in the sense that what is the AEC actually mean? It has been referred to in the ASEAN Charter as one of the three main pillars of the **ASEAN as an international organization**.¹¹ At the same time, the AEC has also been mentioned

¹¹ This can be seen in the ASEAN Charter (2008) Article 3 and Article 41:7 together with the Agreement on Privileges and Immunities of the Association of Southeast Asian Nations (2009) (APIASEAN) Article 1. The APIASEAN Article 1 provides that “(1) As a legal person, ASEAN shall have the following capacities under domestic laws: (a) to enter into contracts; (b) to acquire and dispose of movable and immovable property; and (c) to institute and defend itself in legal proceedings. In the exercise of these capacities, ASEAN shall be represented by the Secretary-General of ASEAN, Deputy

simply as one of **the essential objectives that the ASEAN** would like to achieve, the details of which can be seen in the following second topic.

2. What are the AEC objectives?

The AEC objectives can be seen in the **Declaration of ASEAN Concord II (Bali Concord II)** (2003)¹² and the **ASEAN Charter** which altogether can be summarized as follows:

Secretaries-General or any member of the staff of the ASEAN Secretariat authorized by the Secretary-General of ASEAN. (2) In exercising its capacities under international law, including the power to conclude agreements under Article 41 (7) of the ASEAN Charter, ASEAN shall act through its representatives authorized by the Member States.”

ASEAN Charter Article 3 provides that “ASEAN, as an inter-governmental organisation, is hereby conferred legal personality”.

ASEAN Charter Article 41: 7 provides that “ASEAN may conclude agreements with countries or sub-regional, regional and international organisations and institutions. The procedures for concluding such agreements shall be prescribed by the ASEAN Coordinating Council in consultation with the ASEAN Community Councils”.

¹² **Bali Concord II** provides in its **Declaration B**, *inter alia*, that:

“1. **The ASEAN Economic Community is the realisation of the end-goal of economic integration** as outlined in the ASEAN Vision 2020, to create a stable, prosperous and highly competitive ASEAN economic region in which there is **a free flow of goods, services, investment and a freer flow of capital**, equitable economic development and reduced poverty and socio-economic disparities in year 2020.

2. **The ASEAN Economic Community is based on a convergence of interests among ASEAN members to deepen and broaden economic integration** efforts through existing and new initiatives with clear timelines.

3. **The ASEAN Economic Community shall establish ASEAN as a single market and production base**, turning the diversity that characterises the region into opportunities for business complementation making the ASEAN a more dynamic and stronger segment of the global supply chain. ASEAN’s strategy shall consist of the integration of ASEAN and enhancing ASEAN’s economic

- Single market and production base;
- Free flow of goods, services, and investment;
- Free movement of business persons, professionals, talents and labour;
- Freer flow of capital;
- Narrowing the development gap;
- Increasing intra ASEAN trade;
- Reducing ASEAN competition in foreign markets;
- Centrality and proactive role of ASEAN as the primary driving force in its

relations and cooperation with its external partners.

competitiveness. In moving towards the ASEAN Economic Community, ASEAN shall, *inter alia*, institute new mechanisms and measures to strengthen the implementation of its existing economic initiatives including the ASEAN Free Trade Area (AFTA), ASEAN Framework Agreement on Services (AFAS) and ASEAN Investment Area (AIA); accelerate regional integration in the priority sectors; facilitate movement of business persons, skilled labour and talents; and strengthen the institutional mechanisms of ASEAN, including the **improvement of the existing ASEAN Dispute Settlement Mechanism to ensure expeditious and legally binding resolution of any economic disputes**. As a first step towards the realization of the ASEAN Economic Community, ASEAN shall implement the recommendations of the High Level Task Force on ASEAN Economic Integration as annexed.”

ASEAN Charter provides in its Article 1 Paragraphs 5 and 6 that:

“5. **To create a single market and production base** which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is **free flow of goods, services and investment; facilitated movement of business persons, professionals, talents and labour; and freer flow of capital;**

6. **To alleviate poverty and narrow the development gap** within ASEAN through mutual assistance and **cooperation;**”

3. How can the AEC objectives be achieved?¹³

In summary, it can be said that the following ASEAN instruments, *inter alia*, are the main means to bring about the aforementioned ASEAN objectives:

- **ATIGA (ASEAN Trade in Goods Agreement) (2008)** which can be epitomized as follows:

- Regulation on ASEAN trade in goods;
- Amalgamation of the essences of various agreements dealing with trade in goods under the WTO (World Trade Organization), especially the GATT (General Agreement on Tariffs and Trade), into a single ASEAN Instrument;
- Implementation of the GATT rules in case the ATIGA is silent, or in doubt, or in conflict with the GATT;
- Tariffs reduction and/or elimination according to 8 Schedules (from A to H);¹⁴

¹³ Thanet Sucharikul, “ASEAN Economic Community (AEC) and Beyond”, presented at the “Regional Economic Cooperation in Asia: Inputs and Materials”, held by the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Bangkok, Thailand, May 2014: 23-26, <https://www.giz.de/en/downloads/giz2014-en-cross-border-cooperation-trade-asia.pdf>

¹⁴ ATIGA Article 19 Paragraph 1 and Paragraph 2 provide that:

1. Except as otherwise provided in this Agreement, Member States shall **eliminate import duties on all products** traded between the Member States by 2010 for ASEAN-6 and by 2015, with flexibility to 2018, for CLMV.

2. Each Member State shall **reduce and/or eliminate** import duties on originating goods of the other Member States in accordance with the following modalities:

“(a) Import duties on the products listed in **Schedule A** of each Member State’s tariff liberalisation schedule shall be **eliminated** by 2010 for ASEAN-6 and 2015 for CLMV, in accordance with the schedule set out therein. **Schedule A** of each Member State shall ensure the following conditions are met:

(i) For ASEAN-6, by 1 January 2009:

- Import duties of **at least eighty percent (80%)** tariff lines are **eliminated**;

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- Import duties on all **Information and Communications Technology (ICT)** products as defined in the e-ASEAN Framework Agreement, are **eliminated**;
 - Import duties on all **Priority Integration Sectors (PIS)** products are at **zero percent (0%)**, **except those listed in the accompanying negative lists** to the Protocols of the ASEAN Framework Agreement for the Integration of Priority Sectors and any amendments thereto; and
 - **Import duties on all products are equal to or less than five percent (5%);**
 - (ii) **For Lao PDR, Myanmar and Viet Nam**, import duties on **all products** are **equal to or less than five percent (5%)** by 1 January 2009;
 - (iii) **For Cambodia**, import duties of at least **eighty percent (80%)** tariff lines are **equal to or less than five percent (5%)** by 1 January 2009; and
 - (iv) Import duties on **some products** of CLMV, not exceeding seven percent (7%) of tariff lines, shall be eliminated by 2018. The list of the products and schedule of import duties reduction of these products shall be identified by CLMV no later than 1 January 2014;
 - (b) Import duties on **ICT products** listed in **Schedule B** of each CLMV Member State shall be **eliminated** in three tranches by 2008, 2009 and 2010 in accordance with the schedule set out therein;
 - (c) Import duties on **PIS products** listed in **Schedule C** of each CLMV Member State shall be **eliminated** by 2012 in accordance with the schedule set out therein;
 - (d) Import duties on **unprocessed agricultural products** listed in **Schedule D** of each Member State **on its own accord** shall be **reduced or eliminated** to zero to five percent (0-5%) by 2010 for ASEAN-6; 2013 for Viet Nam; 2015 for Lao PDR and Myanmar; and 2017 for Cambodia, in accordance with the schedule set out therein. Notwithstanding this, import duties on sugar products of Viet Nam shall be reduced to zero to five percent (0-5%) by 2010;
 - (e) **Unprocessed agricultural products** placed in **Schedule E** of each Member State **on its own accord** shall have their respective applied MFN import duties **reduced** in accordance with the schedule set out therein;
 - (f) The products listed in **Schedule F** of **Thailand and Viet Nam**, respectively, shall have their **out-quota tariff rates reduced** in accordance with the tariff reduction schedules corresponding to their respective product classification.
 - (g) Import duties on **petroleum products** listed in **Schedule G** of **Cambodia and Viet Nam**, respectively, shall be **reduced** in accordance with the schedule as mutually agreed by all Member States and set out therein;

○ With respect to **non-discrimination**, the striking difference from the GATT is that under the ATIGA the principle with respect to non-discrimination is **not unconditional in the sense of the GATT**.¹⁵ It is a **unilateral MFN** which is unique in the sense it is neither conditional MFN, if reciprocity is the essence, nor unconditional MFN, if automaticity is the rule;

○ **The unilateral MFN can be seen in the ATIGA Article 5** which provides that “With respect to import duties, after this Agreement enters into force, if a Member State enters into any agreement with a non-Member State where commitments are more favourable than that accorded under this Agreement, the other Member States have the right to request for negotiations with that Member State to request for the incorporation herein of treatment no less favourable than that provided under the aforesaid agreement. **The decision to extend such tariff preference will be on a unilateral basis. The extension of such tariff preference shall be accorded to all Member States.**”

● **AFAS (ASEAN Framework Agreement on Trade in Services)** (1995 as amended in 2003) which can be summarized as follows:

(h) The products placed in **Schedule H** of each Member State **shall not be subject to import duties reduction or elimination** for the reasons as provided in Article 8;

(i) Reduction and elimination of import duties shall be implemented on 1 January of each year; and

(j) The base rates from which import duties are to be reduced or eliminated shall be the Common Effective Preferential Tariffs (CEPT) rates at the time of entry into force of this Agreement;”

¹⁵ **GATT Article I: 1** provides that: “With respect to **customs duties and charges of any kind** imposed on or in connection with **importation or exportation** or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to **all rules and formalities in connection with importation and exportation**, and with respect to all matters referred to in **paragraphs 2 and 4 of Article III,* any advantage, favour, privilege or immunity** granted by any contracting party to any product originating in or destined for any other country shall be accorded **immediately and unconditionally** to the like product originating in or destined for the territories of all other contracting parties.”

- Rules govern trade in services;
- **Market access** and **national treatment** depend on negotiations;
- **Difference in terms of level of economic development is recognized**, and thus **different timeframes for liberalization is allowed**, and the rule of **ASEAN minus X is applicable** whereby ready ASEAN Member States may agree among themselves to liberalize and accord special benefits among themselves without having to wait for non-ready ASEAN Member States;

- However, in so far as non-discrimination is concerned, **the benefits that the ready ASEAN Member States accorded among themselves shall not be automatically extended to the non-ready ASEAN Member States** in the sense of unconditional MFN under the GATS (WTO General Agreement on Trade in Services);

- **The said non-discriminatory provision can be seen in the AFAS Article IV bis** which provides that “1. Notwithstanding the provisions of Article IV (*MFN*) of this Framework Agreement, two or more Member States may conduct negotiations and agree to liberalize trade in services for specific sectors or sub-sectors (hereinafter referred to as “the participating Member States”). Any extension of such preferential treatment to the remaining Member States on an MFN basis shall be **voluntary** on the part of the participating Member States.”

- **ACIA (ASEAN Comprehensive Investment Agreement) (2009)** which can be encapsulated as follows:

- **Investment governance**;
- **International standards plus**, an example of which can be seen in its provisions with respect to **expropriation**¹⁶ which can be synopsized as follows:

¹⁶ ACIA Article 14 provides that

“1. A Member State shall not expropriate or nationalise a covered investment either directly or through measures equivalent to expropriation or nationalisation (“expropriation”), except for a public purpose; in a non-discriminatory manner; on payment of prompt, adequate, and effective compensation; and in accordance with due process of law.

- No expropriation except for **public purpose**;
- In addition to that, there shall be “**just compensation**” which is
 - Prompt
 - Adequate
 - Effective;
- Expropriation shall include “**measures equivalent to expropriation or nationalisation**”.

4. What are the challenges?

In light of the information provided in questions 1 to 3 above, **the following points can be considered to be the challenges of ASEAN:**

The compensation referred to in sub-paragraph 1(c) shall: be paid without delay;¹⁶ be equivalent to the fair market value of the expropriated investment immediately before or at the time when the expropriation was publicly announced, or when the expropriation occurred, whichever is applicable; not reflect any change in value because the intended expropriation had become known earlier; and be fully realisable and freely transferable in accordance with Article 13 (Transfers) between the territories of the Member States.

In the event of delay, the compensation shall include an appropriate interest in accordance with the laws and regulations of the Member State making the expropriation. The compensation, including any accrued interest, shall be payable either in the currency in which the investment was originally made or, if requested by the investor, in a freely usable currency.

If an investor requests payment in a freely useable currency, the compensation referred to in sub-paragraph 1(c), including any accrued interest, shall be converted into the currency of payment at the market rate of exchange prevailing on the date of payment.

This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement”.

- *AEC is aiming at increasing intra ASEAN trade and reducing economic gaps among the ASEAN Member States.*¹⁷ However, ATIGA Article 5 allows an ASEAN Member State to accord special treatment to a state outside the group without having to accord the same treatment to other ASEAN Member States, and AFAS Article IV *bis* allows ASEAN Member States which are ready to liberalize trade in services between or among themselves without having to accord the same treatment to other ASEAN Member States which are not ready. If that is the case, can the ASEAN achieve the said goals by 2015? Should ASEAN employ the principle of unconditional MFN as done in the WTO?

- ASEAN has a clear target for liberalizing trade in goods by fixed timeframes while at the same time has as much as 8 Schedules for the liberalization, 3 for elimination, 2 for elimination/reduction by one's own accord, 2 for reduction, and 1 for no reduction/elimination. If that is the case, can the objective of the AEC for "a single market and production base" be achieved by 2015?

- ASEAN is determined to achieve the AEC by providing for clear target dates for trade in goods liberalization¹⁸ but at the same time it has a very flexible provision for safeguard measures in ATIGA Article 23: 1 which provides that "where a Member State faces *unforeseen difficulties* in implementing its tariff commitments, that Member State may temporarily modify or suspend a concession contained in its Schedules under Article 19 (Reduction or Elimination of Customs Duties)".¹⁹ Will such a safeguard measure be an incentive or an impediment to achieve the AEC?

¹⁷ ASEAN Charter Article 1:5 provides that a purpose of the ASEAN is "To alleviate poverty and narrow the development gap within ASEAN through mutual assistance and cooperation;"

¹⁸ See question 3.

¹⁹ ATIGA Article 23: 1 provides that "In exceptional circumstances other than those covered under Article 10, Article 24 and Article 86 where a Member State faces unforeseen difficulties in implementing its tariff commitments, that Member State may temporarily modify or suspend a concession contained in its Schedules under Article 19 (Reduction or Elimination of Customs Duties)"

- While ASEAN Member States are Members of the WTO and ASEAN, they are also parties to several FTAs, some of which have more depth and breadth in trade liberalization than in the hitherto existed in CEPT/AFTA. Will such proliferation of these FTAs hinder the achievement of the AEC?

- AEC is somewhat misnomer since legally speaking it can be only an FTA or an FTA Plus, it cannot be even a customs union, since it has no common external tariffs towards countries outside its group. Should ASEAN endeavour to be a customs union, or a community in the sense of the European Community? If so, would it be possible, or would there be any difficulty?

- Since its establishment in 1967, all decision makings under ASEAN have been done by consensus, which we usually regard it as the “ASEAN Way”. However, with the advent of the ASEAN Charter in 2008, an option to such a decision making method is provided for in the ASEAN Charter Article 20: 2 which provides that “Where consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made.”²⁰ Will this development be beneficial to the ASEAN? Will there be any difficulty in implementing it?

- Will economic gaps among the ASEAN Member States be alleviated by means of the existing programs of the ASEAN such as:

- AISP (ASEAN Integration system of preferences) whereby the more affluent ASEAN Member States can accord special treatment to the less affluent ASEAN Member States; or the

²⁰ ASEAN Charter Article 20 provides that: “(1) As a basic principle, decision-making in ASEAN shall be based on **consultation and consensus**. (2) Where consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made. (3) Nothing in paragraphs 1 and 2 of this Article shall affect the modes of decision-making as contained in the relevant ASEAN legal instruments. (4) In the case of a serious breach of the Charter or non-compliance, the matter shall be referred to the ASEAN Summit for decision.”

○ **AIF** (ASEAN Integration Fund) where money is provided to finance economic development of non-affluent ASEAN Member States.

Significant of ASEAN Political Security Development

In terms of **ASEAN Political Security Community (APSC)**, there are also some salient developments as can be seen in the following provisions.

APSC Blueprint Paragraph 9 provides that “The APSC shall promote political development in **adherence to the principles of democracy, the rule of law and good governance, respect for and promotion and protection of human rights and fundamental freedoms** as inscribed in the ASEAN Charter.”

APSC Blueprint Paragraph 15 provides that ASEAN Member States shall cooperate in “**preventing and combating corruption; and cooperation to strengthen the rule of law, judiciary systems and legal infrastructure, and good governance.**”

APSC Blueprint Paragraph 17 provides that “In building a cohesive, peaceful and resilient Political Security Community, ASEAN subscribes to the principle of **comprehensive security**, which goes beyond the requirements of traditional security but also takes into account non-traditional aspects vital to regional and national resilience, such as the economic, socio-cultural, and environmental dimensions of development. ASEAN is also committed to **conflict prevention/confidence building measures, preventive diplomacy, and post-conflict peace building.**”

Significance of Recent ASEAN Socio-Cultural Development

As to the **ASEAN Socio-Cultural Community Blueprint**, the examples of significant provisions can be seen in the following paragraphs.

ASCC Blueprint Paragraph 4 provides that “The primary goal of the ASCC is to contribute to realising an ASEAN Community that is **people-centred** and socially

responsible with a view to achieving enduring solidarity and unity among the nations and peoples of ASEAN by forging a common identity and building a caring and the peoples are enhanced”.

ASCC Blueprint Paragraph 7 provides that “The ASCC **shall respect the different cultures, languages, and religions of the peoples** of ASEAN emphasise their common values **in the spirit of unity in diversity** and adapt them to present realities, opportunities and challenges.”

ASCC Blueprint Paragraph 11 (ix) provides that the ASEAN Member States **shall “Develop and offer courses on ASEAN studies**, both in the primary, secondary and higher education levels;”

ASCC Blueprint Paragraph 12 provides that the ASEAN Member States shall **“Enhance and improve the capacity of ASEAN human resource** through strategic programmes and develop a qualified, competent and well-prepared ASEAN labour force that would benefit from as well as cope with the challenges of regional integration.”

ASCC Blueprint Paragraph 18 provides that “ASEAN is committed to enhancing the well-being and the livelihood of the peoples of ASEAN through **alleviating poverty**, ensuring social welfare and protection, building a safe, secure and **drug free environment**, enhancing disaster resilience and addressing **health development** concerns.”

ASCC Blueprint Paragraph 19 provides that the ASEAN Member States shall **“Fully address socio-economic disparities and poverty** that persist across ASEAN Member States including achieving the MDG goal of eradicating extreme poverty and hunger.”

Significance of Legal Development

The most remarkable and important development and innovation is the **ASEAN Dispute Settlement Mechanisms (ADSMs)**. The ASEAN Charter devotes the whole Chapter VIII to the ADSMs.

The ADSMs include, *inter alia*, (1) dialogue, consultation, and negotiation²¹, which are the DSMs that only parties to a disputes are involved; (2) good offices, mediation, and conciliation²², which are the DSMs in which a third party is involved as a facilitator or an advisor who can at most recommend a solution; and (3) arbitration²³ which is a DSM whereby a third party is involved and can make a binding solution. Arbitration is the most innovated ADSM.

In addition, ASDM has additional **2 unique DSMs**, namely (1) **serious breach of the ASEAN Charter and non-compliance**²⁴; and (2) **unresolved disputes**²⁵. These 2 disputes are to be sent to the ASEAN Summit for solutions. The ASEAN Summit's solutions can be seen as not purely legal solutions to legal disputes because decisions of the ASEAN Summit are not limited to legal considerations, but can also include political and other reasons.

Moreover, in terms of **trade and investment disputes**, ADSMs have assigned very much importance to quick and effective resolutions of the disputes.

With respect to **trade**, ASEAN now has the so-called “**Enhanced Dispute Settlement Mechanism (EDSM)** (2004) which has drawn most of its provisions from the World Trade Organization (WTO) Understanding on Rules and Procedures Governing the

²¹ ASEAN Charter Article 22 (1) provides that “Member States shall endeavour to resolve peacefully all disputes in a timely manner through dialogue, consultation and negotiation.”

²² ASEAN Charter Article 23 (1) provides that “Member States which are parties to a dispute may at any time agree to resort to good offices, conciliation or mediation in order to resolve the dispute within an agreed time limit.”

²³ ASEAN Charter Article 25 and Protocol Attached to the ASEAN Charter on Dispute Settlement Mechanisms (2010).

²⁴ ASEAN Charter Article 5 (3) and Article 20 (4) provide that “In the case of a serious breach of the Charter or non-compliance, the matter shall be referred to the ASEAN Summit for decision.”

²⁵ ASEAN Charter Article 26 provides that “When a dispute remains unresolved, after the application of the preceding provisions of this Chapter (Chapter VIII), this dispute shall be referred to the ASEAN Summit, for its decision.”

Settlement of Disputes (DSU). The actual employment of the EDSM has yet remained to be seen.

As to **investment**, in the ASEAN context, there are at least **three groups of laws applicable to ASEAN investment**, namely: (1) conflicting claims on principles of **customary international law** *such as* “**minimum standards of international justice**” (MSIJ) and “**Calvo Doctrine**”; (2) **bilateral investment treaties (BITs)**, *such as* between Thailand with the six ASEAN Member States, namely Cambodia, Indonesia, Laos, Myanmar, Philippines, and Vietnam; and (3) **multilateral investment treaties (MITs)**, *to wit* **ASEAN Comprehensive Investment Agreement (ACIA)**. All these laws have provisions for settlement of disputes between **private individual ASEAN investors and a host state**. All these laws assign the **International Center for the Settlement of Investment Disputes (ICSID)** as a means for resolution of the disputes.²⁶ It is interesting, therefore, to see how the actual resolution of the ASEAN investment disputes will look like. At the present time, there is at least one foreign direct investment case, that is the ‘**ASEAN Arbitral Tribunal: Yaung Chi Oo (YCO) Trading v. Myanmar (YCO Award)**’²⁷, which was chaired by Dr. Sompong Sucharitkul, an eminent international jurist.

²⁶ **ACIA Article 33 (1)** provides that “A disputing investor may submit a claim referred to in Article 32 (Claim by an Investor of a Member State) at the choice of the disputing investor: (a) to **the courts or administrative tribunals of the disputing Member State**, provided that such courts or tribunals have jurisdiction over such claims; or (b) **under the ICSID Convention and the ICSID Rules of Procedure** for Arbitration Proceedings, provided that both the disputing Member State and the non-disputing Member State are parties to the ICSID Convention; or (c) **under the ICSID Additional Facility Rules**, provided that either of the disputing Member State or the non-disputing Member State is a party to the ICSID Convention; or (d) **under the UNCITRAL Arbitration Rules**; or (e) to **the Regional Centre for Arbitration at Kuala Lumpur or any other regional centre for arbitration in ASEAN**; or (f) if the disputing parties agree, **to any other arbitration institution**, provided that resort to any arbitration rules or fora under sub-paragraphs (a) to (f) shall exclude resort to the other.”

²⁷ **ASEAN Arbitral Tribunal: Yaung Chi Oo (YCO) Trading v. Myanmar (Award)**; https://cil.nus.edu.sg/wp-content/uploads/2017/07/Yaung_Chi_Oo_v_Myanmar-pdf.pdf

5. Proliferation of FTAs and ASEAN Centrality²⁸

There are 2 questions here, in my opinion: (1) Can ASEAN maintain its centrality in dealing with outside states? And (2) Can ASEAN remain at the center of economic integration in Asia?

The answer to the first question depends very much, in my opinion, on the success of the ASEAN as an international organization, and on the cohesiveness and centrality of ASEAN in its dealing with outside states.

The answer to the second question depends on both the success of the ASEAN and the geographical location of ASEAN in Asia.

The Success of ASEAN²⁹

With regard to the first question, the success of ASEAN should be considered and evaluated from at least 7 factors, namely the ASEAN's (1) organization; (2) membership; (3) administration; (4) decision; (5) solution; (6) recognition; and (7) cooperation.

All these factors have been evolved since the creation of the ASEAN in 1967 to the adoption of the ASEAN Charter in 2008 and beyond. The evolution, I venture to say, seems to indicate in the success of the organization.

1. **Organizationally speaking**, ASEAN has been transformed from a mere association to a full-fledged international organization status. The ASEAN Charter and its Protocol on Privileges and Immunities have accorded it the international legal personality and the domestic legal personality required for such status. This can be regarded as progress.

²⁸ Thanet Sucharikul, Keynote Speaker and Participant presented at the “Expert Forum on ASEAN Regional Integration Revisited: New Perspectives for Old Institutions?”, held by the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH, Bangkok, Thailand, 26-27 May 2015, at 12-18 http://connecting-asia.org/wp-content/uploads/2016/07/GIZ_Expert-Forum_BKK_2015_SCSI.pdf

²⁹ Ibid,

2. **With regard to Membership**, it has been open to all states in South East Asia (SEA) since its creation in disregard of all the differences, political systems or otherwise. This is the wisdom of the founders of the organization since virtually all SEA states, notwithstanding friends or foes in the past, are now members of it. The only two SEA states left are Timor Leste which is now applying for ASEAN membership, and Papua New Guinea which is at present an observer of the organization. This can be counted as the ASEAN wisdom.

3. **In terms of Administration**, the level of the supreme organs of the organization has continually been enhanced to a higher status: from the meeting of ministers of foreign affairs (1967-1976)³⁰ to the meeting of the heads of governments (1976-2008)³¹ and to the meeting of heads of states or heads of governments (ASEAN Summit) of the ASEAN Member States (2008-present).³² This can be considered as progress.

4. **With respect to Decision making**, the customary practice of consultation and consensus (the ASEAN Way)³³ has been confirmed in writing and supplemented with the option of other methods if there is a consensus to do so by the ASEAN Member States.³⁴ In addition, “in the implementation of economic commitments, a formula of flexible

³⁰ **Bangkok Declaration** Third Declaration (a).

³¹ **Bali Concord I** (1976) Programme of Action A (Political): 1.

³² **ASEAN Charter Article 7.**

³³ **Consensus** is a process of consultation between or among parties concerned to arrive at agreement on any contending issue by means discussion and compromise, not a solution by majority vote. It is the process whereby everyone's opinion is heard and taken into account. It is not a zero sum solution. It is a solution in which no one gets all and no one loses all. It is a voluntary and compromising process whereby everyone can live with it even though is not fully happy.

³⁴ **ASEAN Charter Article 20** provides, *inter alia*, that (1) “as a basic principle, decision-making in ASEAN shall be based on consultation and consensus but (2) ‘where consensus cannot be achieved, the ASEAN Summit may decide how a specific decision can be made.’ Nevertheless, (3) “nothing in paragraphs 1 and 2 of this Article shall affect the modes of decision-making as contained in the relevant ASEAN legal instruments.”

participation, including the ASEAN minus X formula, may be applied where there is a **consensus to do so.**³⁵ This provision is consistent with the current ASEAN rules on trade in services which allow two or more ASEAN Member States to liberalize trade in services between or among themselves without having to wait for, and to accord the benefits deriving therefrom to, other ASEAN Member States which have not participated in the liberalization.³⁶ This can, *in a sense*, be regarded as a positive evolution³⁷.

5. **In terms of DSMs (Dispute Settlement Mechanisms)**, they have been continually improved. During the period 1967-1996, the DSM is simply consultation and consensus. In 1996, the TAC was adopted to prevent a conflict from arising; to settle a dispute which nevertheless arose via negotiation bilaterally between the parties to the dispute; and to resolve the dispute by means of good offices, mediation, or conciliation by

³⁵ **ASEAN Charter Article 21: 2** provides that “2. In the implementation of economic commitments, a formula for flexible participation, including the ASEAN Minus X formula, may be applied where there is a consensus to do so.”

³⁶ **AFAS (ASEAN Framework Agreement on Services) (1995/2003) Article IV bis** provides that “Notwithstanding the provisions of Article IV (MFN) of this Framework Agreement, two or more Member States may conduct negotiations and agree to liberalize trade in services for specific sectors or sub-sectors (hereinafter referred to as “the participating Member States”). Any extension of such preferential treatment to the remaining Member States on an MFN basis shall be voluntary on the part of the participating Member States.” (Parenthesis added on MFN)

³⁷ However, *in another sense*, it may be arguable by some quarters that it may widen the gap of economic development among the ASEAN Member States.

a third party: the High Council³⁸. Also in 1996, the ASEAN adopted the PDSM 1996³⁹ that was later replaced by the EDSM 2004⁴⁰ which is dedicated to solution of an economic dispute. The EDSM 2004 DSM is very similar to the WTO (World Trade Organization) DSM which starts with consultation and followed by panel and Appellate Body; all with time frames, binding force, and effective enforcement mechanism. Subsequently, the ASEAN Charter (2008) assigns the TAC for resolution of a political dispute⁴¹, the EDSM 2004 for an economic dispute⁴², and the PDSM 2010⁴³ for the ASEAN Charter and other disputes

³⁸ A High Council comprises representatives at ministerial level from the ASEAN Member States whose function is provided in the TAC (Treaty of Amity and Cooperation in Southeast Asia) Article 15 which reads “In the event no solution is reached through direct negotiations, the High Council shall take cognizance of the dispute or the situation and shall recommend to the parties in dispute appropriate means of settlement such as good offices, mediation, inquiry or conciliation. The High Council may however offer its good offices, or upon agreement of the parties in dispute, constitute itself into a committee of mediation, inquiry or conciliation. When deemed necessary, the High Council shall recommend appropriate measures for the prevention of deterioration of the dispute or the situation.”

³⁹ Protocol on Dispute Settlement Mechanism (20 November 1996).

⁴⁰ Protocol on Enhanced Dispute Settlement Mechanism (29 November 2004).

⁴¹ ASEAN Charter Article 24: 2 provides that “Disputes which **do not concern** the interpretation or application of any **ASEAN instrument** shall be resolved peacefully in accordance with the Treaty of Amity and Cooperation in Southeast Asia and its rules of procedure” Protocol on Dispute Settlement Mechanism Attached to the ASEAN Charter (2010) (**PDSM 2010**) defines an **ASEAN instrument** in its Article 1 (a) as “ASEAN instrument means any instrument which is concluded by Member States, as ASEAN Member States, in written form, that gives rise to their respective rights and obligations in accordance with international law”.

⁴² ASEAN Charter Article 24: 3 provides that “Where not otherwise specifically provided, disputes which concern the interpretation or application of ASEAN economic agreements shall be settled in accordance with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism.”

⁴³ Protocol to the ASEAN Charter on Dispute Settlement Mechanism (8 April 2010).

between or among the ASEAN Member States⁴⁴. In addition, the ASEAN Charter entrusts the ASEAN Secretariat with the task of monitoring compliance with the DSMs' resolutions of the ASEAN Member States⁴⁵, and empower it to assist a party or parties to a dispute in the interpretation of the ASEAN Charter⁴⁶. Moreover, the ASEAN Charter empowers the ASEAN Summit with the authority to decide a case of unresolved disputes⁴⁷, or a case of non-compliance⁴⁸. However, for the sake of flexibility, any party to an ASEAN dispute may opt out of all the ASEAN DSMs and resort to the Charter of the United Nations' DSMs under Article 33:1 at any time⁴⁹.

6. **With reference to Recognition**, ASEAN has been recognized worldwide. Membership of the TAC has been enlarged to cover many states outside SEA, including the

⁴⁴ ASEAN Charter Article 25 provides that 'Where not otherwise specifically provided, appropriate dispute settlement mechanisms, including arbitration, shall be established for disputes which concern the interpretation or application of this Charter and other ASEAN instruments.'

⁴⁵ ASEAN Charter Article 27: 1 provides that "The Secretary-General of ASEAN, assisted by the ASEAN Secretariat or any other designated ASEAN body, shall **monitor the compliance** with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism, and submit a report to the ASEAN Summit."

⁴⁶ ASEAN Charter Article 51: 1 provides that "Upon the request of any Member State, the **interpretation** of the Charter shall be undertaken by the ASEAN Secretariat in accordance with the rules of procedure determined by the ASEAN Coordinating Council."

⁴⁷ ASEAN Charter Article 26 provides that "When a dispute remains **unresolved**, after the application of the preceding provisions of this Chapter, this dispute shall be referred to the ASEAN Summit, for its decision."

⁴⁸ ASEAN Charter Article 27: 2 provides that "Any Member State affected by **non-compliance** with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism, may refer the matter to the ASEAN Summit for a decision."

⁴⁹ ASEAN Charter Article 28 provides that "Unless otherwise provided for in this Charter, Member States have the right of recourse to the modes of peaceful settlement contained in **Article 33(1) of the Charter of the United Nations** or any other international legal instruments to which the disputing Member States are parties."

five permanent members of the United Nations' Security Council.⁵⁰ ASEAN has been admitted as an observer to the United Nations.⁵¹ Moreover, Papua New Guinea, Timor-Leste, Bangladesh, and Fiji have been admitted to be ASEAN observers. In addition, Australia, Canada, China, EU, India, Japan, Republic of Korea, New Zealand, Russia, and United States are now ASEAN dialogue partners.⁵² This can be regarded as favourable.

7. **With regard to economic Cooperation**, the “ASEAN Vision 2020” (1977) envisages a free flow of trade in goods and services, as well as investment among the ASEAN Member States, and their cooperation on ASEAN Power Grid, Trans ASEAN Gas Pipeline, and Water Pipeline⁵³. The “Roadmap for the Integration of ASEAN” (RIA) (2001) further looks for cooperation on “Singapore-Kunming Railway Link.”⁵⁴ The ASEAN (Bali) Concord II (2003) envisions the ASEAN Economic Community (AEC) which will turn ASEAN into “a single market and production base, turning the diversity that characterises the region into opportunities for business complementation making the ASEAN a more dynamic and stronger segment of the global supply chain.”⁵⁵ The ASEAN Charter turns the AEC Vision 2020 into legal commitment by providing in its Article 1: 5 that ASEAN is going “to create a single market and production base which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is free flow of

⁵⁰ **Members of the TAC which are outside SEA** are, *inter alia*, China, India, Japan, Pakistan, Republic of Korea, Russia, New Zealand, Mongolia, Australia, France, East Timor, Bangladesh, Sri Lanka, North Korea, United States, and European Union. http://en.wikipedia.org/wiki/Treaty_of_Amity_and_Cooperation_in_Southeast_Asia

⁵¹ http://en.wikipedia.org/wiki/United_Nations_General_Assembly_observers

⁵² <http://www.asean.org/asean/external-relations/asean-dialogue-coordinator>

⁵³ **ASEAN Vision 2020 (15 December 1977)**, A PARTNERSHIP IN DYNAMIC DEVELOPMENT, Paragraph 5 and 6 (Dot 7).

⁵⁴ **RIA (Roadmap for the Integration of ASEAN) (12 September 2002)**, Roadmap xi: Land Transport, Paragraph 23.

⁵⁵ **ASEAN (Bali) Concord II (7 October 2003)**, B. ASEAN ECONOMIC COMMUNITY (AEC), Paragraph 3.

goods, services and investment; facilitated movement of business persons, professionals, talents and labour; and freer flow of capital;”⁵⁶

All these developments and their significance aforesaid are the reasons why we should study ASEAN Law.

⁵⁶ ASEAN Charter Article 1: 5.