



Resolving Present Legal Issues Under The ASEAN Charter

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ASEAN today was not what it was when it was first established over 40 years ago. With the rise of neighbouring economies and now., other non traditional security threats like e.g. diseases, gross border criminal transactions, ASEAN needs to be able to face these challenges. The entry into force of the ASEAN Charter on 15th December 2008 is a significant milestone for ASEAN and it is hoped that this would help ASEAN to face such challenges.

The topic for this session is on resolving present legal issues under the ASEAN Charter. This paper will set out what the writer perceives as a legal issue under the ASEAN Charter. The writer has also put forward proposals that ASEAN Law Association can do to help resolve such issue. This paper would not attempt to address all legal issues related to the ASEAN Charter but instead would cover one very important element under the Charter and also propose ways of how the ASEAN Law Association can assist ASEAN this issue, i.e. that of integration. In the Chairman's Statement of the 14th ASEAN Summit "ASEAN Charter for ASEAN Peoples", amongst other matters he stated about the Charter, *"The Charter provides the legal and institutional framework for ASEAN to be a more rules based, effective and people centred organisation paving the way for realising an ASEAN Community by 2015....."*

The Preamble of the Charter provides that the *"Peoples of the Member States of ASEAN"* are amongst other matters *"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 Community and the ASEAN Socio Cultural Community...."*

The Declaration of ASEAN Concord II (Bali Concord II), sought to bring the ASEAN Vision 2020 into reality by setting the goal of building an ASEAN Community by 2020 comprising three pillars, namely political-security community, economic community and socio-cultural community, all of which are closely intertwined and mutually reinforcing for the purpose of ensuring durable peace, stability and shared prosperity in the region. By



the 12th ASEAN Summit in Cebu Philippines in 2007 Heads of Government agreed to accelerate the establishment of the ASEAN Community by 2015. Now that is only about 6 years away.

In order to establish the three pillars that comprise the ASEAN Community, blueprints were established. The ASEAN Economic Community Blueprint which was adopted at the 13th ASEAN Summit in Singapore in 2007, the ASEAN Political Security Community Blueprint and the ASEAN Socio Cultural Community Blueprint which was adopted at the 14th ASEAN Summit in Thailand in February this year. The above instruments demonstrates how committed our leaders are in developing an ASEAN Community. However ASEAN Member States are diverse in culture, language history and even legal system so how can we as an association help in this process.

Article 16 of the Charter provides that ASEAN can engage with entities which support the ASEAN Charter, in particular its purposes and principles. Among the entities listed under Annex II of the Charter is the ASEAN Law Association (ALA). From the 3 pillars, the ASEAN political-security community pillar (APSC) and the ASEAN economic community pillar (AEC) would be relevant for us.

The ASEAN Political Security Community Blueprint provides a roadmap and timetable to establish the APSC by 2015. The activities and programmes under the APSC blueprint should also be able to continue beyond 2015. The APSC blueprint provides for the establishment of programmes for mutual support and assistance among AMS to strengthen the rule of law and judiciary systems and legal infrastructure. Among the necessary actions is for the ASEAN Law Ministers Meeting in cooperation with sectoral bodies and entities which includes ASEAN Law Association to develop cooperation programmes to strengthen the rule of law, judicial systems and legal infrastructure. Other actions are to undertake studies for lawmakers or the promulgation of laws and regulations develop a university curriculum under the ASEAN University Network, and another is to enhance cooperation between the ALAWMM and ALA and other Track II organisations through seminars workshops and research on international law including ASEAN Agreements.

Membership of ALA is comprised of legal, judicial and legal academics. With such a good combination of legal expertise in all areas of the law it is submitted that ALA can play an important role by helping ASEAN in realising an ASEAN Political Security Community. The last ASEAN Law Ministers Meeting (ALAWMM) was held in Brunei Darussalam on 20th October 2009. Unfortunately, as the APSC was still in the progress of



being developed, there was no discussion on this very important subject matter. However it is proposed that ALA should try and come up with proposals before the next ALAWMM. Such proposals could include matters related to how laws can be harmonised among ASEAN Member States, proposals on developing university curriculum and other ways that would not only enhance cooperation between ALAWMM but also assist ASEAN in realising an ASEAN Community. It is also proposed that in order to ensure that ALA can work together with ALAWMM and ASEAN Senior Law Officials Meeting (ASLOM) is by participating in the meetings where discussions related to this very important topic are being held.

Another pillar related to an ASEAN Community is the AEC pillar. The roadmap leading to realisation of an economic community is the ASEAN Economic Community Blueprint. At the ASEAN Summit in 1997, leaders had decided to transform ASEAN into *“a stable, prosperous, and highly competitive region with equitable economic development, and reduced poverty and socio-economic disparities”*. At that time the timeline was to be realised by 2020. By August 2006, the ASEAN Economic Ministers Meeting (AEM) held in Kuala Lumpur, Malaysia, agreed to develop *“a single and coherent blueprint for advancing the AEC by identifying the characteristics and elements of the AEC by 2015 with clear targets and timelines for implementation of various measures as well as pre-agreed flexibilities to accommodate the interests of all ASEAN Member Countries.”* At the 12th ASEAN Summit in January 2007, the ASEAN Leaders affirmed their strong commitment to accelerate the establishment of an ASEAN Community by 2015 and signed the Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015. In particular, the Leaders agreed to hasten the establishment of the ASEAN Economic Community by 2015 and to transform ASEAN into a region with free movement of goods, services, investment, skilled labour, and freer flow of capital.

It is envisaged that the AEC will establish ASEAN as a single market and production base, making ASEAN more dynamic and competitive with new mechanisms and measures to strengthen the implementation of its existing economic initiatives; accelerating regional integration in the priority sectors; facilitating movement of business persons, skilled labour and talents; and strengthening the institutional mechanisms of ASEAN.

The key characteristics under the AEC are as follows: (a) a single market and production base, (b) a highly competitive economic region, (c) a region of equitable economic development, and (d) a region fully integrated into the global economy. These



characteristics are inter-related and mutually reinforcing. Incorporating the required elements of each characteristic in one blueprint shall ensure the consistency and coherence of these elements as well as their implementation and proper coordination among relevant stakeholders.

Such characteristics are consistent with the objectives of the ASEAN Charter under Article 1 which provides amongst other matters:

“...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”,

Based on the above objective in order to achieve economic integration a key element would be the free flow of services i.e. a need for liberalisation of the services sector. Economic integration may not be as difficult as some might perceive, as ASEAN has put in place mechanism that would help to achieve it, such as AFTA, and the ASEAN Framework Agreement on Services (AFAS).

After taking into account the above, in particular, political statements related to economic integration, it would seem that the legal services sector, not only for being a professional services sector but also for being a sector that plays a key role in helping maintain a harmonious flow in trade, would also be expected to liberalise itself prior to 2015.

The legal profession is often considered as being a sensitive sector by some, however liberalisation should not be considered negatively especially by the local practitioners. Among potential advantages to the legal profession are:

- i. *Increase in Competitive Edge*: Local law firms may risk getting complacent and not feel the urge to improve themselves if there is no outside pressure or threat. Lawyers are always expected to update themselves with the speedy development of the law internationally and there is fear that without their “boat being rocked”, local law firms may maintain status quo in their practices as their status is not being compromised. With the introduction of foreign law firms coming in and sharing their turf, this may actually encourage them to improve their services so they will not lose their clients to the newer law firms coming in.



- ii. Transfer of knowledge: Along with more employment opportunities, especially for fresh law graduates, having prominent foreign law firms who have experience in a wide range of legal issues would be beneficial for the local lawyers to learn from.
- iii. Infiltration of local lawyers to practise abroad: Not only will our lawyers be able to practise anywhere within ASEAN (which will of course help facilitate the free flow of services and establishment within ASEAN), there is possibility of ASEAN lawyers to practise in the territories of dialogue partners if the governments of ASEAN Member States decide to make legal services commitments in free trade agreement negotiations with them.
- iv. More transparency: There are actual cases where member countries do allow foreign lawyers or consultants to enter and practise on a temporary basis. \
- v. Joint Ventures: joint ventures between a local law firm and foreign law firm which may enable the lawyers from the foreign law firm to advise clients on host country law.
- vi. Increased FDI: The establishment of the foreign law firm, especially a prominent one can also be seen as type of investment made which will increase foreign direct investment into the host country.

With advantages, there are some disadvantages that come with it too, some possible examples are:

- i. Overcoming differences: ASEAN consists of a diverse mix of legal systems and legal practices and with the sensitivities of the legal services sector, it is difficult for countries to recognise each others' legal qualifications given such differences. Nevertheless, this should not be accepted as a justification to never liberalise because the European Union, with its own diversity and differences have been able to set up the Council of Bars and Law Societies of Europe and have issued a number of directives that has permitted free movement of European lawyers within the region.
- ii. Need to establish a stronger and effective regulatory regime: With such a liberal movement of lawyers across the region, it would be difficult for a national Law Society to regulate the conduct of its national lawyers who are practising in other member countries. It is therefore imperative that something like an Intra-ASEAN regulatory regime be established first. Such a mechanism need to be set out and



there also needs to be implementers; both of these will most definitely require more resources which may be an added burden for some member countries.

- iii. *Fear from local lawyers:* The disadvantage most expressed is the idea that the local lawyers may lose out or be badly affected from the hordes of foreign lawyers coming in especially when they are of Multinational Corporation's status.
- iv. *Need to amend laws or constitutions:* There is also the issue that some countries just are not able to overcome their national sensitivities in permitting a foreign lawyer to practice in their territory and there may be a need to amend laws or even the Constitution for this change to happen.

While liberalisation is something for the governments of the respective ASEAN Members States to decide on, however as an entity recognised under the ASEAN Charter, ALA can still make it easier for our governments to achieve this objective. We do not have to start from scratch. We can build on the cooperation we have and increase awareness of the various areas that are of concern amongst members e.g. recognition and enforcement of commercial judgements, familiarisation of legal systems of each member. This can be through the exchange of information, sharing of experiences, undertaking transparency exercises in legal systems, legal traditions and legal practices would all be very valuable to have amongst members to enable us to have a clearer understanding of what needs to be done for liberalisation and in turn we would be prepared for any eventuality once liberalisation does happen by 2015.

In conclusion, the entry into force of the ASEAN Charter is the beginning of a new era for ASEAN. Realisation of an ASEAN Community is only but a few years away. We have to prepare ourselves for integration and this can be done through effective coordination and cooperation with the relevant ASEAN Sectoral bodies in particular the ASEAN Law Ministers Meeting and the ASEAN Senior Law Officials Meeting. We should also try to promote activities which are consistent with the objectives of the ALA Constitution in particular to cooperate with international, regional, national and other organisations in the furtherance of its objectives.

Resources:

1. The ASEAN Charter
2. Framing the ASEAN Charter, ISEAS Perspective
3. Report of the Eminent Persons Group on the ASEAN Charter
4. Roadmap for an ASEAN Community (2009-2015)

