



**INVESTMENT LAWS AND STRATEGIES IN ASEAN STATES AND THE ROLE OF THE
ASEAN LAW ASSOCIATION (ALA)**

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Introduction

This paper highlights two essential proposals for critical discussion:

1. A critical evaluation of investment laws as a tool of progress for ASEAN nations.
2. An enhanced role of our ASEAN Law Association as proxy legal advisor for ASEAN.

In accordance with the ASEAN Charter the first proposal is aimed at realising the provisions of the Preamble of the Charter which is amongst others; to resolve to ensure sustainable development for the benefit of present and future generations and to place the well-being, livelihood and welfare of the peoples at the centre of the ASEAN community building process; convinced of the need to strengthen existing bonds of regional solidarity to realise an ASEAN Community that is politically cohesive, economically integrated and socially responsible in order to effectively respond to current and future challenges and opportunities.¹

Under Chapter 1 Article 1 of the Charter it is provided that *inter alia*, the purposes of ASEAN are 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; and to alleviate poverty and narrow the development gap within ASEAN through mutual assistance and cooperation. Through combined efforts of member countries it is the desire of every member nations that these proposals will in effect strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights

¹ The ASEAN Charter



and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN consistent with the ASEAN Charter.

A MICRO FINANCE PROGRAMME

It is precisely through such efforts, which would help narrow the development gap, that it is proposed for the establishment of a Micro Finance PROGRAMME for the poor within the ASEAN countries, considering common denominators such as predominantly agrarian in nature and the abundant human resources capable to undertake the PROGRAMME. This will inevitably push more investments into the rural areas so as to meet the social obligations, where existing commercial banking and financial institutions may not be forthcoming.²

Micro-enterprises are an ancient way of livelihood of the rural poor, which has only recently been recognised as an effective tool of employment and income generation that lead to long-term economic development and consequently poverty alleviation. These tiny enterprises are self-financed by the entrepreneurs from their small family-savings in normal situations. In poverty-hit societies, the poor are unable to accumulate even tiny start-up capital. The local moneylenders are usually reluctant to lend to the poor due to fear of non-repayment and losing their money. When they do, they charge excessively higher rate of interests on their loan. So the micro-enterprise sector, despite potential for poverty alleviation, remains unattended or very narrowly attended by both formal and informal financial systems. The developing economies with very little or insignificant per capita income are highly poverty-prone and poverty-hit. Most of the developing countries suffer from chronic budgetary-deficits and hardly able to finance their long-needed poverty alleviation programmes. So they have remained overly dependent on donor funds for running economic development activities. However, until very recently, little attention has been placed on micro-enterprise development.³

Moreover, the micro-enterprise sector itself is a subset of informal economy. These self-owned tiny enterprises in both urban and rural areas are not registered or required to be registered with any taxation or regulatory bodies. They are not covered by uniform regulations. The main features of the informal sector are ease of entry, self-employment, small-scale production, labour-intensive work, lack of access to organised markets, and

² One example is the Grameen Bank of Bangladesh which has successfully used many different applications of microcredit by the bank such as the Village Phone Programme through which women entrepreneurs can start a business providing wireless payphone service in rural areas of Bangladesh. This programme earned the bank the 2004 Petersburg Prize worth EUR100,000/ for its contribution to technology development.

³ Social Finance Programme Working Paper No. 38 Migrant Worker Remittances and Micro-Finance in Bangladesh. Tasneem Siddiqui Chowdhury R. Abrar (Refugee and Migratory Movements Research Unit)



lack of access to traditional forms of credit due to supply-deficits and high cost of borrowing. As very small in size, micro-enterprises often employ less than 10 people, who are usually the entrepreneurs' family members, and can be based at or out of their home. Micro-enterprises are often the single source of family income of the poor entrepreneurs. Because of their alignment with the informal sector with inability to provide collaterals, the micro-enterprises face serious difficulties in obtaining credit from the formal banking system. Again, as they are highly vulnerable to risks, the local moneylenders, friends and even relatives in many instances show reluctance to give or lend them money. All of these continue to deprive the micro-enterprise sector from getting financial support both from formal banking system and from the informal credit market.

So this very bottom up economic activity of the poor people in developing countries went on for long with scarcity of necessary capital. In light of these, it is proposed that more Micro Finance Institutions (MFIs) be established to give support for this neglected sector. The MFIs have to target the micro-enterprise development initiative as a potential mechanic of poverty reduction. But these must be funded by donor agencies or commercial fund providers as their corporate social responsibility. The existing MFIs have no or little resources of their own to meet the increasing demand for micro credit. Most MFIs are non-governmental organisations that mainly offer tiny or micro-credit to the very poor and take back only small amounts of savings from their own borrower-members, not from the general public. These savings are quite insignificant to finance the existing financial needs of the micro-enterprise sector. Thus the donor agencies and commercial fund providers, in releasing much needed funds for the MFIs, would enhance the financial capability of the MFIs to lend to micro-enterprises and other anti-poverty activities would receive assistance. As a result, the opportunity for accessing micro-credit by the micro-entrepreneurs will be facilitated.

It is also proposed that this new investment PROGRAMME to finance micro enterprises by donor agencies and commercial fund providers be supported by Government incentives which should be based on investment projects such as micro credit financing. Incentives are provided according to the product and activity-based in order to steer investments toward micro enterprise activities. Malaysia, in its quest to narrow incidence of poverty and hardcore poor, has instituted an investment policy over the years, which has to a certain extent achieved the socio-political goals in its effort to bring up the economic standards of



its people. The incidence of poverty (% of households) and incidence of hardcore poverty reduced from 8.7 % and 2.1% in 1995 to 3.6% and 0.7% in 2007 respectively. ⁴

The proposed micro-credit financing PROGRAMME for ASEAN countries have to be incentive based and supported by the Governments. This PROGRAMME is also proposed to prompt member countries of ASEAN to take major steps in liberalising their investment regime which shall be regarded as a bold measure to enhance ASEAN investment climate.

Foreign participation in such a PROGRAMME and local businesses and ventures are highly encouraged. This must be done via local incorporation of entities or businesses, rather than just being a branch or agency in an effort to minimise risks and keeping the capital within the country that foreign participants invest in. In terms of protection of foreign investments, Malaysia is a good example where foreign investors are theoretically guaranteed against expropriation of property without compensation by virtue of Article 13 of the Federal Constitution. In the absence of a comprehensive investment law that can provide a blanket protection against expropriation for all foreign investments, Malaysia has relied extensively on bilateral investment guarantee agreements (IGAs) to;

- Protect against nationalisation and expropriation
- Ensure prompt and adequate compensation in the event of nationalisation or expropriation
- Provide free transfer of profits, capital and other fees
- Ensure settlement of investment disputes between private parties and Government under the Convention on the Settlement of Investment Disputes (ICSID) of which Malaysia has been a member since 1966.

The Malaysian Foreign Direct Investment regime is tightly regulated in that all foreign manufacturing activity must be licensed regardless of the nature of the business in which it is engaged. The most interesting feature is that, Malaysia does not have laws governing FDI that lay down the general principles and rules for foreign participation in local businesses as is the case of Thailand and its Foreign Business Act. This has allowed the Government maximum policy and regulatory space to screen and control FDI to suit economic and industrial needs of the particular time.

⁴ Economic Report 2008/2009: Malaysia;



For the PROGRAMME to work, policy interventions for the promotion of micro-enterprises will generally have the following broad themes:

- Adequate support structure, transfer of appropriate technology
- Entrepreneurial training and labour skills development
- Access to sources of funds including reducing collateral requirements, and providing safeguards for the credit delivery system
- Promoting linkages between large and small industries

Indeed it is emphasised that the PROGRAMME would need the support and combined efforts from member countries in ASEAN to adopt such a proposal. The ASEAN Charter shall be the main source for the drive of such collaboration to push for full participation of all the member countries.

ASEAN LAW ASSOCIATION (ALA) AS PROXY LEGAL ADVISOR FOR ASEAN

The main objectives of ALA, as set out in Article II of its Constitution, are:

- (a) To promote close relations, cooperation and mutual understanding amongst lawyers in the ASEAN countries;
- (b) To provide the organisational framework for regional cooperation;
- (c) To provide organisational facilities for ASEAN cooperation in conflict avoidance, in the arbitration or resolution of legal disputes in transnational contracts within ASEAN region; and
- (d) To cooperate with international, regional, national and other organisations in the furtherance of the aforementioned objectives.

In line with the above objectives, ALA has a pivotal role to play in promoting legal cooperation at the ASEAN level. This important role has to be seen in the context of the newly established ASEAN Charter which came into force in December 2008.

The ASEAN Charter can be considered as the founding constitutional document for the ASEAN countries, set to establish the juridical and legal personality of ASEAN.⁵ By expressly establishing the legal personality for ASEAN, the Charter clarifies ASEAN's international legal status. Legal personality confers on ASEAN rights, privileges and

⁵ See Article 3 of the ASEAN Charter which states 'ASEAN, as an inter-governmental organisation, is hereby conferred legal personality' an entity which can sue and be sued.



immunities as recognised in international law.⁶ It has also clarified ASEAN's legal personality within domestic laws where it may enjoy certain rights and privileges in each member state.

The ASEAN Charter purports to establish an executive mechanism for implementation and monitoring of the implementation of rules and decisions made by the organisation.⁷

Article 22 of the ASEAN Charter provides that each Member State shall endeavour to resolve peacefully all disputes in a timely manner through dialogue, consultation and negotiation. ASEAN shall maintain and establish dispute settlement mechanisms in all fields of ASEAN cooperation. By virtue of this provision, ASEAN encourages peaceful settlement of any disputes arising from any ASEAN agreements. In the event of unresolved disputes, ASEAN purports to establish appropriate dispute settlement mechanism including arbitration for interpreting and enforcing ASEAN rules and decisions.⁸

Based on the above legal perspectives, it is humbly observed that ALA consisting of diverse and comprehensive legal minds can provide the best avenue for assisting ASEAN in charting the new legal frontiers within ASEAN countries. ALA needs to take a strong stand in legal issues affecting ASEAN arising out of the ASEAN Charter. Therefore it is humbly suggested that ALA considers itself to be eligible to act as proxy legal advisors for ASEAN in interpreting and advising member states on the legal aspects of the ASEAN Charter.

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⁶ See, Locknie Hsu, Towards an ASEAN Charter: Some Thoughts from the Legal Perspective in Rodolfo C. Severino (ed), *Framing the ASEAN Charter: An ISEAS Perspective* 2005

⁷ See, Chapter VII of the ASEAN Charter providing for the decision making process and procedures.

⁸ See, Chapter VIII of the ASEAN Charter providing for settlement of disputes



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