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## Role of ALA in the Current Legal Issues under the ASEAN Charter

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### I. Introduction

When the Association of Southeast Asian Nations (ASEAN) was established at Bangkok on August 8, 1967, very few would hardly imagine that ASEAN would be “no longer just an association of neighboring counties”.<sup>1</sup> At that time, the original Member countries, namely, Indonesia, Malaysia, the Philippines, Singapore and Thailand, were overwhelmed with political and security issues. Now that the ASEAN Charter came into force,<sup>2</sup> maintenance of peace, security and stability becomes the very first purpose of ASEAN.<sup>3</sup>

However, the purposes of ASEAN are translated to be people – oriented as it aims, *inter alia*, to “strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms ...”<sup>4</sup> To further translate this principle or concept into action, ASEAN undertakes to consider engaging with entities listed in Annex 2 to the Charter.<sup>5</sup> This Annex 2 contains the list of entities associated with ASEAN, one of which is the ASEAN Law Association (ALA) which is included as one of the accredited civil society organizations. In fact, respect for justice and the rule of law has become one of the guiding principle of all ASEAN Member countries since its establishment in 1967,<sup>6</sup> and later reaffirmed under the Kuala Lumpur Declaration on the Establishment of the ASEAN Charter, 2005.

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<sup>1</sup> Phitip Kotler, Hermawan Kartajaya and Hooi Den Huan, “Think ASEAN! Rethinking Marketing toward ASEAN Community 2015” (Singapore : McGraw Hill, 2007, P. vii

<sup>2</sup> The ASEAN Charter was signed on November 20, 2007

<sup>3</sup> Article 1(1) of the ASEAN Charter.

<sup>4</sup> Article 1(7) of the ASEAN Charter.

<sup>5</sup> Article 16 of the ASEAN Charter.

<sup>6</sup> The ASEAN declaration (Bangkok Declaration) signed at Bangkok on August 8, 1967)



Since ASEAN is conferred legal personality<sup>7</sup> and comprises three ASEAN Community Councils,<sup>8</sup> as well as its Secretariat,<sup>9</sup> it has to function as a rules – based organization. Still, there remain legal issues to be resolved under the ASEAN Charter. To ensure that pacific settlement of dispute will be resorted, Chapters VII and VIII provide for modes of dispute settlement among ASEAN Member countries. In addition, ASEAN will continue entering into negotiations and conclusion of agreements. It means that there will be more agreements and international legal instruments to be concluded by ASEAN with other subjects of international law. Thus, there is a need for international lawyers to be more engaged in the discussions until the entry into force of agreements, including the implementation thereof. However, fragmentation of international law, where there are several judicial fora to hear cases, with or without different perspectives, coupled with the growing increase of specific areas of international law, has called for ASEAN to rise to such challenges.

This paper illustrates roles of international lawyers at various stages of activities and functions of ASEAN. It touches upon the feasibility of establishment of ASEAN court. In fact, it may be one of the visions ASEAN has to set as ASEAN is moving toward a peoples-oriented approach. This paper suggests that ASEAN proceeds gradually towards this aim, if and only if it is the common aim of ASEAN.

## **II. Need for International Lawyers and Ways forward**

First of all, as mentioned above, ASEAN has concluded a number of treaties or international agreements with many countries and international organizations. Moreover, ASEAN has issued many legal and political instruments in the form of joint declarations, joint statements, concords, etc.

Secondly, should ASEAN move forward on a rules-based approach, while promoting and strengthening the roles of the Secretary –General, ASEAN needs active participation of international lawyers.

Thirdly, upon the conclusion of many free trade agreements ASEAN has concluded with its partners, ASEAN will be pretty much involved with trade issues and cases. The ASEAN Secretariat is tasked with the duty to provide assistance to the dispute settlement mechanisms stimulated in such free trade agreements. This being the case, ASEAN

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<sup>7</sup> Article 3 of the ASEAN Charter.

<sup>8</sup> Article 9 of the ASEAN Charter.

<sup>9</sup> Article 11 of the ASEAN Charter.



member countries have to be associated with specific areas of international law, namely, international trade law, international investment law, international environmental law, and international arbitration. Such responsibility cannot be delivered without the competence of the ASEAN Secretariat. It purports that the Secretariat may consider setting up a treaty law division in order to serve and facilitate work of ASEAN as a whole.

Given the transitional period of being a full-fledged inter-governmental organization (IGO), the above-mentioned problems could be addressed in either way or both, as follows:

1) ASEAN may adopt the way the United Nations has adopted, which is the setting up of a legal committee (so-called “the Sixth Committee” established by the General Assembly) for the drafting of any legal instruments and making recommendations to the ASEAN Summit and other ASEAN bodies, as appropriate. The legal committee would be a forum for international lawyers of all ASEAN member countries to share views and to prepare texts of legal documents for the consideration and adoption by the respective ASEAN bodies. This committee may set up sub-committees or working groups, as necessary, to deal with any particular legal issues, for example, international trade and investment, international environment, or international sale of goods, etc. This approach would be described as part of a division of labor and expertise where the legal committee would help ensure consistency of wording and rights and obligations, especially when it comes to compliance and interpretation of any legal instruments. All in all, it is the legal drafting technique that counts and plays an important role in addition to policy consideration.

However, it is better to avoid the duplication of work. It is construed that any legal issues which are not taken up by or fallen within the domain or responsibility of, any ASEAN body should primarily be considered by the legal committee. Then, work of the legal committee would not interfere with that of any ASEAN body.

2) The establishment of the International Law Commission by the United Nations is another option which has proven successful and its work has been given a lot of credentials. The Commission, referred to as the “ILC”, comprises jurists of high legal qualifications. It has codified customary international law and made a lot of contribution to the progressive development of international law. We note that there are a number of eminent international lawyers who are of ASEAN nationals. Therefore, the composition of qualified members to sit at the commission is not a problem.



At the same time, ASEAN should take into account ways and means to retain such qualified experts to work for ASEAN in a sustainable way. In that line of approach, an appropriate scale of remunerations must play an important role in securing the firm commitment of outstanding experts to remain with ASEAN in the long term. Under the current circumstances where the financial crisis is global in nature now, ASEAN member countries should be mindful of the cost-effective approach and have concerted efforts in moving towards the centrality of ASEAN.

Either option can be adopted right away and without causing major financial implications to the ASEAN Secretariat or member countries since ASEAN is used to designate a drafting group or working group of legal experts to deal with legal issues where the costs of which are borne by member countries. Nor would the formation of a legal commission composed of 10 jurists from all ASEAN member countries be a major problem for ASEAN.

### **III. Feasibility of Establishment of ASEAN Court of Justice**

At this juncture, the Court of Justice of the European Communities could be an example ASEAN might want to compare before making a decision on the establishment of ASEAN court of justice. The Court of Justice of the European Communities, based in Luxembourg, is assigned to consider disputes between member states of the European Union; between the European Union and member states; between the institutions within the European Union; between individuals, or corporate bodies, and the European Union<sup>10</sup>. It may deliver opinions on international agreements and give preliminary rulings on cases referred by national courts.<sup>11</sup> Such preliminary rulings are of significance to ensure uniform application of Community law by all member States<sup>12</sup>. The Court is composed of one judge from each member state. So, there are altogether 27 judges from all the national legal systems of the Communities.<sup>13</sup>

No doubt that there are difficulties in practice while there are also advantages. It appears that the Court of Justice of the European Communities allows itself to be involved

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<sup>10</sup> [http://europa.eu/institutions/inst/justice/index\\_en.htm](http://europa.eu/institutions/inst/justice/index_en.htm)(as of August 20, 2009)

<sup>11</sup> Ibid.

<sup>12</sup> Dick Leonard, "Pocket Guide to the European Community" (Oxford : Basil Blackwell Ltd. and The Economist Publications Ltd., 1988) : 47 – 49.

<sup>13</sup> See note 10 infra.



in the national caseload for the development of Community law.<sup>14</sup> It is then useful for the consistency of legal interpretation of Community law for national judges.<sup>15</sup> Against this backdrop, it seems as if “the national judiciary has no intelligent role to play in Community law.”<sup>16</sup> To put it in another way, the Court of Justice plays “a very broad interpretative monopoly.”<sup>17</sup> Such disadvantages may be resolved if mismanagement of the relationship between the Court of Justice and the national courts of Member States is not properly addressed.<sup>18</sup> It is observed that judges of the Court “realize that their power is ultimately contingent on the acquiescence of member states”.<sup>19</sup>

To illustrate, ASEAN needs to consider further whether ASEAN is determined to promulgate the so-called “ASEAN law”, as opposed to European Community (EC) law. If this is the case, ASEAN member countries have to come to terms that ASEAN would be a supranational organization as far as enactment of legislation is concerned. In any event, jurisdiction of ASEAN court of justice may differ from that of the Court of Justice. Then, the follow-up question to ASEAN is whether financial implications as a result of the establishment of the court is concerned. It gives rise to cross-border practice among ASEAN lawyers. In that case, ASEAN has to prepare appropriate ground work for lawyers to practice law in member countries. It would be illogical to have a court, but no legal counsels to represent their clients in litigations.

One of the problems ASEAN member countries may take up for consideration is the issue of sovereignty. We have to proceed with a clear mind and a common goal whether ASEAN court is feasible; and whether ASEAN court would be a supranational body. More importantly, ASEAN should examine whether ASEAN is prepared to adopt the idea of ASEAN judicial body. Lessons learnt from the experience of the European Court of justice will be of great value to determine the appropriate roadmap for this purpose.

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14 Gareth Davies, “Reforming the Relationship between National and European Courts”, in *International Institutional Reform. Proceedings of the Seventh Hague Joint Conference held in The Hague, The Netherlands. 30 June – 2 July 2005*, edited by Agata Fijalkowski (The Hague : T.M.C. Asser Press, 2007) : 183

15 Ibid.

16 Ibid, p. 184

17 Ibid.

18 Ibid.

19 Geoffrey Garrett, R. Daniel Kelemen, and Heiner Schulz, “The European Court of Justice, National Governments, and Legal Integration in the European Union” in Beth A. Simmons and Richard H. Steinberg, edited, “*International Law and International Relations*” (Cambridge: Cambridge University Press, 2006)p. 487.



In the spirit of ASEAN encompassing solidarity, cooperation and consensus, rather than “ASEAN Way”, ASEAN has to nurture further so that related issues, for example, qualifications and admission to practice in ASEAN court, would be overcome. By the time ASEAN stands ready for the establishment of ASEAN court, any appealing model, like the Court of Justice of the European Communities, may be introduced for consideration and discussion. This paper does not rule out such possibility. Simply put, ASEAN has to make up its mind in which direction it wishes to proceed and to engage itself in the fast-changing environment at the global and regional levels.

#### **IV. Contribution of the ASEAN law Association (ALA) to ASEAN**

Even though ASEAN is approaching its 43 years in existence, ASEAN is in the era of opportunities and challenges, partly attributable by globalization and crisis, be they natural, political, or economic. ASEAN is in the process of adaptation to fit in the changing environment by making the best use of its resilience and solidarity which has been nurtured over the past years. As the foregoing parts of this paper illustrate that ASEAN may be in a better position to proceed cautiously by taking time to contemplate on the legal issues at hand. This does not prevent ALA from making contribution to the work of ASEAN.

Based on its 1979 Constitution, ALA has served its members well. Article II (d) provides an avenue for ALA to be assertive the work of ASEAN. To implement it, studies and researches conducted by ALA should be officially shared with ASEAN in a timely manner. This would certainly raise the profile of ALA while strengthening the relationship with ASEAN and its member countries.

ALA might consider offering its expertise to ASEAN as it resources allow. Collaboration with ASEAN in the form of a joint organization of seminars or workshops on issues of common concern should be favorably considered. Sharing of resources and expertise would be a way to consolidate partnership between ASEAN, an inter-governmental organization, and ALA, a non-governmental organization, as envisaged in the ASEAN Charter.

In the overall perspectives, other than legal advice and recommendations ALA may be more than competent to make to ASEAN, as appropriate, it is advisable that capacity building is an area ALA should explore further to determine in which way and to what extent ALA may extend assistance for mutual benefit of the two bodies.



Capacity building is one of the issues the developing countries have called for, ALA still has a role to play in shaping attention of practitioners in the field of progressive development of international law underpinning the ASEAN Charter. ALA may also help design relevant training courses at different levels to meet the differing background of attendants, one of which could be implementation of international obligations under the ASEAN Charter in domestic laws of the respective Member countries. It should be noted that the future of international law lies within the capacity to respond to issues of international concern and to “harness national institutions in pursuit of global objectives”.<sup>20</sup> Focus may be made on capacity building of national institutions in the respective ASEAN member countries. It could possibly entail to the revisit of legal norms and principles in some specific areas of international law, i.e., human rights, maritime security, alternative dispute resolution, etc.

**V. Concluding Remarks**

In the final analysis, ASEAN and ALA need each other. At the same time, each will contribute very much to work of the other. The concept of partnership should be forged at this stage which will lead to further collaborative engagement between the two prominent bodies. Any legal issues ASEAN might not be comfortable to deal with, due to the sensitivity of their nature or for whatever reasons, could be addressed by ALA. To translate the key objectives of ALA into action as far as ASEAN is concerned, nothing is insurmountable to overcome.

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<sup>20</sup> Ann-Marie Slaughter and William Burke-White, “The Future of International Law Is Domestic (or, The European Way of Law)” in Charlotte Ku and Paul F. Diehl, edited, “International Law. Classic and Contemporary Readings” (Boulder, Colorado: Lynne Rienner Publishers, Inc. ,2009), p. 466.