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Workshop III

**WTO and Regional Trade Liberalization:
Implication for ASEAN**

**WTO AND REGIONAL TRADE
LIBERALISATION :
IMPLICATIONS FOR ASEAN**

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WTO AND REGIONAL TRADE LIBERALISATION : IMPLICATIONS FOR ASEAN

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1) INTRODUCTION

The topic of globalisation has been argued and debated at countless conferences over the years. It is a topic that evokes a sense of trepidation, expectancy or optimism, depending on which side of the divide one is standing.

There are essentially two positions adopted in discussions on globalisation. One is that globalisation involves a loss of national sovereignty, even cultural identity. The other is the diametrically opposite view that rather than loss or weakening of national sovereignty and identity, globalisation in fact strengthens it.¹

The WTO, GATS, FTAs , RTAs, AFAS are but some of the acronyms banderred about in a maze of interconnecting fora. Rules, procedures and substantive legal issues are created and argued, and they litter the maze with stumbling blocks and trapdoors. Forums such as this, are not meant for rhetorical discourse but they serve as avenues in which answers are sought, and explanations delivered in a common pursuit of understanding and cooperation.

A recent development in this era of globalisation, is the growing acceptance of regionalisation as a political and economic formation for reasons of geographical affinity. The EU, AFTA, NAFTA and APEC and are examples of this trend. The removal of tariffs and immigration barriers has enabled these regions to grow and develop.² ASEAN is another example of this.

The purpose of this paper is not to debate the pros and cons of globalisation, nor is it to discuss the socio-cultural and economic aspects of globalisation. Globalisation is inextricably linked to trade. As lawyers, purely trade and economic issues may not be of acute interest. In any event, I do not possess the expertise to expound the trade aspects of globalisation , and it is more for this reason that I have limited the scope of this paper to the implications to the legal profession and laws in general.

¹ Professor Seong Chee Tham
Department of Malay Studies
The National University of Singapore - 'Globalisation Implications For Environmental Protection '.

² See footnote (1) above



There will be many aspects of the legal profession that will be affected by the liberalisation process, including the business structures (for law firms). However, this paper will be confined to the following areas -

- Domestic regulations governing the legal profession
- Development of national laws
- Harmonisation of laws
- Self regulation of the legal profession

As the factors driving the liberalisation process in the ASEAN region are similar to the factors driving that process in other countries, there will be references in this paper to international developments and trends.

2) DEVELOPMENTS UNDER THE WTO AND OTHER REGIONAL /BILATERAL AGREEMENTS

Before an examination of the above areas, a synopsis of the recent developments under the WTO and regional /bilateral agreements is necessary.

2.1) GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

Pursuant to the GATS, it is the fundamental right of a government to regulate in order to pursue its national policy objectives. The Agreement's preamble recognises, inter alia, "the right of Members to regulate, and to introduce new regulations, on the supply of services within their territories in order to meet national policy objectives".³

The Doha Round collapsed recently as a result of the failure on the part of the US and the EU, and some developing countries to reach a consensus on reducing farm subsidies and tariffs. The 21 Apec leaders at the Apec Summit of leaders meeting in Hanoi held in November 2006, issued a Hanoi Declaration reaffirming their support for the resumption of the WTO negotiations.

The grouping (Apec) has also agreed to look into ways to provide a model of measures by 2008, that can be used by members in drafting future regional trade agreements and FTAs. At the summit, the US and Singapore proposed a Free Trade Area of the Asia Pacific (FTAAP) as alternative to the Doha Round, in the event it fails. The proposal has been placed on the backburner for now.

It is submitted that regardless of whether the WTO negotiations resume, the liberalisation process in the ASEAN region will continue to progress. Intra- ASEAN and extra- ASEAN trade (reflected in the proliferation of free trade agreements) and the ASEAN Framework

³ Pursuant to Article XIX (2), the process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors.



Agreement on Services will serve as the impetus for the continuing liberalisation in this region.

2.2) *ASEAN FRAMEWORK AGREEMENT ON SERVICES (AFAS)*

Articles II(1) and V of the GATS provide for the formation of agreements between and among member countries to remove discriminatory measures and provide an environment conducive to a free flow of trade in services between and among them. These provisions allow ASEAN Member Countries to enter into an agreement more liberal than the GATS without extending the same concessions to all GATS members.

In moving towards this increased liberalisation of trade in services, ASEAN Member Countries signed the ASEAN Framework Agreement on Services (AFAS) on 15 December 1995. Its objective is to eliminate substantially, restrictions to trade in services amongst Member Countries and to liberalise trade in services by expanding the depth and scope of liberalization beyond that taken by Member Countries under GATS.

Services offers under AFAS are GATS Plus, meaning that it must be improvements over the ASEAN Member Country's existing GATS commitments or the addition of a new sub – sector which was not previously committed under GATS. In the case of non – WTO members , their offers must not be less favourable than its existing regime and must be more favourable than those offered to non- ASEAN countries.

In order to hasten the process of liberalising trade in services, the Coordinating Committee on Services (CCS) formulated an 'Alternative Approach to Liberalization of Services in ASEAN'. The objective of this plan is to set the long term target for liberalisation of services through a free flow of services by 2020. The free flow of services across the region will be achieved through national treatment of services and service providers and the elimination of barriers to market access in the four supply modes. There will be progressive liberalisation under the AFAS, on a three-year cycle, towards full liberalisation of services by the year 2020.

During the signing of the Bali Concord II, concrete goals were drawn up towards realising the establishment of the ASEAN Economic Region (AEC), which envisages a common economic region, with free flow of goods, investments, capital and services by 2020. Liberalisation of legal services is now supposed to take place by 2015 with up to 70% of foreign equity participation in law firms.

2.3) *FREE TRADE AGREEMENTS*

ASEAN is in the process of negotiations with its trading partners, including the following ⁴:

- ASEAN - Japan Framework for comprehensive economic partnership (CEP) signed on 8 October 2003, expected to bring in an FTA by 2012;

⁴ Bilateral /Regional Free Trade Agreements: An outline for elements ,nature and development implications. – by Martin Khor, Third World Network



- ASEAN – China framework agreement on comprehensive economic cooperation signed in 4 November 2002 which is expected to conclude an FTA by 2010 for older ASEAN states and 2015 for newer ASEAN states;
- ASEAN – India agreement signed on 8 October 2003 and to be concluded by 2011;
- US enterprise for ASEAN initiative (announced by US in October 2002) to create a network of bilateral FTAs linking ASEAN with US; and
- Transregional EU-ASEAN economic partnership.

ASEAN countries have entered into bilateral agreements with other countries . e.g. -

- Singapore – has signed FTAs with New Zealand, Japan, Australia, US, European Free Trade Association and Jordan .
- Thailand – has signed or is pursuing FTAs with US, New Zealand, Australia, China , Japan.
- Malaysia has signed an Economic Partnership Agreement with Japan (MJEPA), and is currently in FTA negotiations with the US, Australia, New Zealand and Pakistan. In addition, it was recently announced that Malaysia and Chile will be starting FTA negotiations.⁵

2.3.1) SOME ISSUES ARISING FROM FTA NEGOTIATIONS

There are non-governmental organizations in Malaysia that have raised their concerns concerning the ongoing Malaysia –US FTA for the following reasons⁶ :-

a) Positive/negative List

At the WTO, services liberalisation occurs via a positive list where only those sectors listed will be opened to foreign competition. Furthermore, a country has no legal obligation to liberalise, and can liberalise at its own pace, and under its own conditions. It can even choose not to liberalise certain sectors. In contrast, in some US FTAs, services liberalisation occurs on a negative list basis where all sectors are opened to foreign competition, unless they are listed in a “carve-out” or reservations list.

b) Investment

An investment agreement was consistently and strongly opposed by developing countries, including Malaysia, at the WTO, as they were concerned that this would prevent or reduce

⁵ It was reported in the press that the coverage of the FTA will be comprehensive ,involving liberalization of bilateral trade in goods and services and investments.

⁶ Report by Third World Network on the 'Workshop on Malaysia-US Free Trade Agreement: Issues, Implications and Challenges' which was held at Kuala Lumpur on 6 September 2006.



their policy space to determine their own investment policies. However, the obligations of the investment chapter in US FTAs go far beyond the provisions proposed at the WTO because it requires US investors and investments to be treated at least equal to locals (national treatment), including in pre-establishment rights, which affords national treatment before an investor enters the country, unless the exceptions are listed in the FTA. Performance requirements such as transfer of technology are also prohibited except in certain circumstances or for listed exceptions.

c) Intellectual Property Rights

Malaysia is a member of the WTO, it must abide by the minimum standards of intellectual property (IP) protection set out in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and is afforded flexibilities in its implementation.

US FTAs require stronger levels of intellectual property protection than that stipulated by the TRIPS Agreement. US FTAs also remove the flexibilities provided for in the TRIPS Agreement. The IP chapter of US FTAs also covers trademarks, copyright, patents and other forms of intellectual property. For example, the copyright provisions typically extend copyright protection from 50 years (as obliged under the TRIPS Agreement) to 70 or 95 years after the death of the author.

There is also the concern that the IP chapter of US FTAs will have an adverse impact on access to affordable medicines. Patented medicines will be more expensive than their generic equivalents⁷.

3) DOMESTIC REGULATIONS GOVERNING THE LEGAL PROFESSION

3.1) DISCIPLINES UNDER THE GATS

Pursuant to Article VI (4) of the GATS, the WTO, through its Council for Trade in Services is required to develop disciplines to ensure that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services.

Article VI(4) also states that such disciplines shall aim to ensure that these requirements are, inter alia:

- a) *based on objective and transparent criteria ;*
- b) *not more burdensome than necessary;*
- c) *in the case of licensing procedures, not in themselves, a restriction on the supply of the service.*

The WTO focused on the accountancy sector and came up with the Disciplines for the Accountancy Sector (Accountancy Disciplines) .

⁷ This is the concern expressed by the non-governmental organizations. However, there are also contrary views expressed by pharmaceutical companies in countries that have signed FTAs with the US that the prices of medicines did not escalate.



If the Accountancy Disciplines is extended to the legal services sector, this would effectively mean that a WTO member country could complain that a certain measure imposed by the regulatory body (in a host country) is more burdensome than necessary and is trade restrictive. This complain would be referred to the WTO dispute settlement body. This issue of whether the Accountancy Disciplines should be extended to the legal profession was considered by the Canadian Bar Association, as well as the Council of the Bars and Law Societies of the European Union (CCBE). The Canadian Bar Association in its paper⁸ raised several concerns about extending the Accountancy Disciplines to the legal profession. Their overall concern was that the law society rules relating to the public interest would be subject to review by a third-party dispute settlement body. This would be inconsistent with the principle of self-regulation. The CCBE⁹ was of the view that the Accountancy Disciplines does not take into account the core principles of the legal profession, including the element of independence. The CCBE recommended certain changes to the Accountancy Disciplines if it is to be extended to the legal profession.

At the WTO, there is now no move towards extending the Accountancy Disciplines to the legal profession. However, there is a move towards agreeing to some form of disciplines for the services sector. It is important that the disciplines that comes into force, if at all, is one that is not adverse to the interests of the legal profession. It is important that the law associations work closely with their government negotiating agencies so that the interest of the legal profession is properly reflected in the country's trade negotiations in respect of the disciplines.

3.2) CODE OF ETHICS

There is no international 'model code of ethics' that has regulatory force throughout the world. Lawyers practising in foreign jurisdictions or lawyers in multijurisdictional firms will be subject to different regulations, rules of ethics, and standards. In the EU, the EU lawyer who practices in another EU country is subject to the Code of Common Conduct of the CCBE. There are some differences between the CCBE Code of Common Conduct and the U.S. ethics code. For example, on conflict of interest, the US ethics code focuses on whether new client's matter is 'substantially related', whereas the CCBE Code discusses the 'risk of breach of confidence' and whether the new client will receive 'undue advantage'.¹⁰

To assist ASEAN lawyers who may be exporting their service within the region, what is required is a readily accessible compilation of the different regulations and standards of the ASEAN countries. In this regard, links between the regulatory bodies in different countries is necessary. For example, the International Bar Association recently set up a Bar Issues Commission (BIC) to support member organizations and to give them a platform to discuss issues of common interest, including multijurisdictional practice. Another example of

⁸ ' Submission on The General Agreement on Trade in Services and the Legal Profession: The Accountancy Disciplines as a Model for the Legal Profession November 2000'

⁹ CCBE Response to the WTO Concerning The Applicability of the Accountancy Disicplines to the Legal Profession May 2003

¹⁰ Paper by John Bean presented at the UIA/ABCNY colloquy in the WTO negotiations concerning international legal services held in New York on 30 January 2003.



grouping of law associations that is looking into providing the necessary linkages is the Organisation of Commonwealth Caribbean Bar Associations (CCBA). The CCBA members meet on an annual basis. It is currently looking into promoting greater convergence in the ethical codes of conduct for the legal profession.¹¹

3.3) *MUTUAL RECOGNITION AGREEMENTS*

With a view to facilitate the free flow of professional services in the ASEAN region by the year 2020, ASEAN leaders at the 7th Summit held on 5th November 2001 in Bandar Seri Begawan instructed officials to commence negotiations on Mutual Recognition Agreements (MRAs). AN MRA is a bilateral or multilateral agreement to establish mechanisms of equivalency that recognise qualifications of professionals (in a certain sub-sector) from another jurisdiction as equivalent to that of domestic qualifications. Its purpose is professional equivalency and reciprocity and it is recognized under the Framework Agreement on Services (Article V).

An example of a MRA is the recommended guideline by the International Union of Architects on MRAs which provides that if the eligibility for recognition is based on qualification, the MRA should state: -

- i) the minimum level of education required (entry requirements, length of study, subjects studied);
- ii) minimum level of experience required (location, length and conditions of practical training, internship, licensing, certification);
- iii) how professional knowledge and ability are demonstrated in the home jurisdiction;
- iv) whether possession of a certain qualification allows for recognition of all or just some of the activities that architects are entitled to practise in the guest jurisdiction.

At the WTO, the Working Party on Professional Services (WPPS) issued its Guidelines for Mutual Recognition Agreements or Arrangements in the Accountancy Sector. These Guidelines are nonbinding. The purpose of which is to provide suggestions to WTO Members States about how they might negotiate bilateral or multilateral recognition agreements.¹²

In moving towards an integrated region by 2015, with free flow of services, it appears inevitable that the law associations will have to (at some point of time) begin discussions and negotiations on an MRA with one, or more of their ASEAN counterparts.

¹¹ 'We Are Sailing :Multi –National Legal Practice And Overseas Bar Associations - The Commonwealth Caribbean Prospective' – Nancy Anderson (Commonwealth Law Bulletin – Volume 31, No 4, 2005).

¹² General Agreement on Trade in Services - A Handbook for International Bar Association Member Bars.



With MRAs, there will be some freedom of movement for lawyers in the region. However, the freedom of movement brings with it the issue of professional indemnity insurance¹³, and this is a factor for consideration.

Although ASEAN governments have agreed to the deadline of 2015 for the legal services sector, there does not appear, at this stage, to be a clear mechanism as to how this process will take place. It has in fact been raised at CCS meetings that it is difficult to move forward and liberalise the legal services sector due to the differing legal systems, unless there is firstly, harmonisation of laws.

4) HARMONISATION OF LAWS

The laws and legal systems in the ASEAN region vary greatly. Some countries practise the common law system, while others are influenced by continental Roman and Napoleonic legal systems, Dutch continental law, Adat laws and Islamic laws¹⁴.

The call for harmonisation of laws was made at the first ASEAN Law Association (ALA) Meeting in Manila in 1977 by the then Minister of Justice of Indonesia. He proposed that steps be taken to harmonise the laws of contracts and the company laws. He advised against trying to harmonise laws in matters where cultural values play a part, e.g. marriage and divorce laws of ASEAN member countries. He was of the view that chances of success for efforts at regional harmonisation are much greater if the subject is culturally neutral.¹⁵

The former Prime Minister of Singapore, Goh Chok Tong, once said that process of globalisation will compel ASEAN to move in the direction of harmonisation and coordination. Without some degree of harmonisation, the long-term credibility of ASEAN as a regional organisation will be difficult to maintain. Investors tend to rate ASEAN as a region, and not only as individual countries. He was of the view that ASEAN countries must seek a balance between their own distinctive national legal structures and the need for more harmonisation and institutionalisation in some common legal areas.¹⁶

The experience of the EU serves as a useful reference for the harmonisation of laws. There is a diversity of European contract laws and the diversity is seen to be an impediment to cross-border trade. In his article,¹⁷ Tony Ridge explains that in 2003, the EC unveiled a project, to run until 2009, to create a 'Common Frame of Reference' with a view –

¹³ In the EU, pursuant to the Establishment Directive, bars are obliged to recognise the PII of the lawyers from another member state, although it requires a top-up when the home insurance falls short of the requirements of the host state.

¹⁴ Speech by the (former) Prime Minister of Singapore, Goh Chok Tong, at the 4th ASEAN Law Ministers Meeting held on 5 November 1999.

¹⁵ Professor Mochtar Kusuma –Atmadja: Harmonisation of Laws in the Region.

¹⁶ See footnote (14) above

¹⁷ Tony Ridge – 'Contract Law – Will a Euro Code oust English Law?' – Commonwealth Law Bulletin Volume 31, No 4, 2005 ISSN 0305 - 0718



Implication for ASEAN

- i) to improving EC lawmaking in the area of contract law;
- ii) to finding solutions to the diversity of European contract laws.

This may have major implications because English mercantile law is used the world over and is often specified as the applicable law in contracts that have no connection with England. Because of the diversity of contract laws, rules derived from the *acquis*¹⁸, are applied in different ways in different Member States - e.g.:

- different rules about the formation of contracts ;
- different ways of calculating loss and damages;
- limitation periods.

The Network for the Common Frame of Reference on European Contract Law (CFR – Net) comprises experts from private practice, representatives from interest groups, the judiciary and academics.

Tony Ridge suggests that the Euro Code should be as close as possible to what the ‘reasonable European man in the street’ would expect it to be. The object should be to consolidate, not to innovate. Secondly, the Euro Code should remain optional. This would mean that it would have to compete in the market with existing system of choice , i.e. English law.

In ASEAN, it would be beneficial if the laws that facilitate foreign and intra-ASEAN investment are consistent. Apart from company and contract laws, intellectual property laws is also an area that could be considered for purposes of harmonisation. Since the Trade Related Aspects of Intellectual Property Rights (TRIPs), there have been a number of treaties that have been signed or ratified, e.g. the WIPO Copyright Law Treaty 1996, and the 1996 Treaty on Intellectual Property in Respect of Databases. A commentator has expressed his opinion that as a consequence of this, any harmonisation will have to start not from where the ASEAN member states find themselves but from the position that their trading partners, particularly those in the WTO, have reached. ASEAN harmonisation will have meaning only if a start is made by adopting the contents of, if not all, at least the major international IP treaties, whether relating to substance of procedure as the foundation.¹⁹

However, as seen in the EU, where the process is ongoing, the harmonisation of laws is a difficult task, but one that may be inevitable for ASEAN.

5) DEVELOPMENT OF NATIONAL LAWS

As a result of the requirements and developments under the WTO and other international trends, there is a need for ASEAN countries to develop their national laws accordingly.

¹⁸Technical term used for the body of EU law and regulations as it exists at any given time

¹⁹ Assafa Endeshaw (Senior Lecturer)

Nanyang Business School, Nanyang Technological University

Singapore - ‘Harmonization of Intellectual Property laws in ASEAN :Issues and Prospects’



5.1) E-Commerce

ASEAN entered into an e-ASEAN Framework Agreement in November 2000 to facilitate the establishment of the ASEAN Information Infrastructure in order to promote the growth of electronic commerce in the region. As envisioned, the ASEAN Information Infrastructure would link ASEAN with other major ICT efforts in the region and in the world, such as the Asia-Pacific Information Infrastructure and the Global Information Infrastructure. It would build upon the ICT plans of individual ASEAN member countries, such as Brunei Darussalam's RaGAM 21, Indonesia's Nusantara 21, Malaysia's Multimedia Super Corridor, IT21 of the Philippines, and IT2000 of Singapore.²⁰

The e-ASEAN Working Group, through its sub-working group on legal infrastructure, has been established to promote coordination in the formulation of e-commerce laws and regulations.

In Malaysia, the E-Commerce Act 2006 was introduced to reaffirm the validity and legal effect of transactions by electronic means, to provide certainty in electronic communication, and to remove legal obstacles to e-commerce. As to cross border transactions, there are no specific provisions under this Act. However, the issue is being studied at the ASEAN level. Among the current initiatives being undertaken are the following –

- Harmonization of E-Commerce laws in ASEAN;
- Malaysia will carry out bilateral arrangements/discussions on enhancing cooperation on consumer protection with Singapore, Thailand, Indonesia, Brunei Darussalam, and Philippines;
- Regional cooperation on consumer protection.²¹

5.2) Intellectual Property Rights

Most of the ASEAN countries have in place, intellectual property (IP) laws. As a result of WTO members countries' obligations under the TRIPs, some of the ASEAN countries have revised their IP laws.

As far back as 1995, ASEAN leaders adopted the 'ASEAN Framework Agreement on Intellectual Property Cooperation' including the setting up of a regional patent and trademark office. That was followed by another agreement reached in April 1996 on a two-year plan for IP cooperation. The plan was to work towards the establishment of a regional

²⁰ Based on the ASEAN official homepage as maintained by the Public Affairs Office of the ASEAN Secretariat

²¹ Arunan Kumaran (Senior Assistant Secretary)
Policy and Planning Division, Ministry of Domestic Trade and Consumer Affairs
MyICMS 886 WORKSHOP - 'Broadband for All Malaysians
Realising MyICMS 886 Goals' (8 August 2006)



electronic information network, an IP database and a common system of protection for industrial designs, patents and copyright.

Currently, the ASEAN IPR Action Plan 2004-2010 is designed to build on the progress which has been achieved in collaboration among ASEAN governments, ASEAN dialogue partner countries and institutions, and civil society organizations²².

In line with the obligations under the TRIPs, Malaysia amended the Copyright Act, the Patents Act and the Trademarks Act as well as introduced legislation on layout designs of integrated circuits and geographical indications. In 2004, Malaysia passed the Protection of New Plants Varieties Act 2004 in line with the requirements under TRIPs.

Malaysia is now a contracting state of the Patent Cooperation Treaty (PCT). The Malaysian Patents Act 1983 was amended by the Patents (Amendment) Act 2003 to give effect to the provisions of the PCT. A further Patents (Amendment) Act 2006 is currently tabled before Parliament. Under the PCT, there is a procedural framework which allows for multiple applications to the designated members states. As of the enforcement date of 16 August 2006, Malaysia will be one of the 132 contracting states, including the USA, the European countries and Asian countries in offering applicants a choice to designate Malaysia for protection of their invention.²³

5.3) Competition Laws

In line with the regional developments, there is a need to provide effective protection against unfair competition. The harmonisation of ASEAN competition laws, rather than shaping separate and diverse competition laws in each ASEAN country, would ensure that competition is evaluated on a regional basis, thus maintaining the principle of open regionalism²⁴ in ASEAN.²⁵

Dr Lawan Thanasillapakul in his article, writes that in an emerging ASEAN free market economy, monopolies and restrictive business practices are viewed as undesirable, since they are likely to distort prices and inhibit the efficient allocation of resources. As regards foreign investment, the implementation of competition law in ASEAN countries would yield further advantages apart from liberalising the entry of, establishment and operation of foreign investors. It would regulate and control mergers and acquisitions as well as abuse of dominant market positions in the ASEAN economy.

²² See footnote (20) above

²³ Lim Pui Keng, Tay & Partners Malaysia – ‘Malaysia’s Accession to the Patent Cooperation Treaty – ASIAN LEGAL BUSINESS Issue 6.9.

²⁴ “Open regionalism” represents an effort to resolve one of the central problems of contemporary trade policy: how to achieve compatibility between the explosion of regional trading arrangements around the world and the global trading system as embodied in the World Trade Organization. The concept seeks to assure that regional agreements will in practice be building blocks for further global liberalization rather than stumbling blocks that deter such progress. Bergsten, C.F. / Institute for International Economics (IIE), USA , 1997

²⁵ Dr Lawan Thanasillapakul - *The Harmonisation of ASEAN Competition Laws and Policy from an Economic Integration Perspective*



As a result of the liberalisation of trade in good and services, developing countries must formulate and implement effective mechanisms to enable them to compete on a level playing field and they must have effective avenues for fair trade and fair practices in the global market place.²⁶

Currently, not all ASEAN countries have competition laws in place. In Singapore, the Competition Commission of Singapore administers and enforces the Competition Act. There is no statutory obligation to notify particular agreements/conduct to the Competition Commission of Singapore. The onus is on the parties to an agreement to ensure that their agreement or business practices do not infringe the prohibition against anti-competitive agreements and abuse of dominance.²⁷

Currently, Malaysia does not have a comprehensive competition law. There are a number of legislation in force, that deal with consumer protection, e.g. the Hire Purchase Act, Consumer Protection Act and the Price Control Act. However, there are no controls/regulations over contracts relating to matters such as exclusive dealings, monopolies and price fixing.

Under the Eighth Malaysia Development Plan, the Government announced that "...a fair trade policy and law will be formulated to prevent anti-competitive behaviour such as collusion, cartel price fixing, market allocation and the abuse of market power...". At the recent National Convention on the Ninth Malaysian Plan, one of the speakers announced that a Fair Trade Bill is being drafted and it may be completed by end 2006 or early 2007.

6) SELF REGULATION

Certain recent developments have resulted in an intrusion into the domain of self – regulation of the legal profession. One example of such an intrusion, is the money laundering requirements which now require solicitors to report transactions. In Malaysia, there is now an obligation to report suspicious transactions pursuant to the Anti-Money Laundering Act 2001. There is a specific provision in the Act that overrides the obligations of an advocate and solicitor as to confidentiality of information and professional privilege.

An illustration of the erosion of the rights to self regulate is the development in England & Wales. Sir David Clementi was appointed to carry out an independent review of the regulatory framework for legal services in England and Wales in July 2003. The terms of reference were:

²⁶ Paper by Dato' Seri Talaat bin Hj Hussain Secretary General Ministry of Domestic Trade and Consumer Affairs & Professor Dr Rugayah Mohamed Universiti Teknologi Malaysia

²⁷ Sandra Seah – Partner, Competition Practice Group, Alban Tay Mahtani & de Silva - 'Increasing awareness of competition rules – ASIAN LEGAL BUSINESS ISSUE 6.9



Implication for ASEAN

- To consider what regulatory framework would best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector.
- To recommend a framework which will be independent in representing the public and consumer interest, comprehensive, accountable, consistent, flexible, transparent, and no more restrictive or burdensome than is clearly justified.

In December 2004, Sir David published a Report following his Review. The government broadly accepted the main recommendations of the review. These were:

- Setting up a Legal Services Board - a new legal services regulator to provide consistent oversight regulation of front-line bodies such as the Law Society and the Bar Council.
- Statutory objectives for the Legal Services Board, including promotion of the public and consumer interest.
- Regulatory powers to be vested in the Legal Services Board, with powers to devolve regulatory functions to front-line bodies, subject to their competence and governance arrangements.
- Front-line bodies to be required to make governance arrangements to separate their regulatory and representative functions.
- The Office for Legal Complaints - a single independent body to handle consumer complaints in respect of all members of front-line bodies, subject to oversight by the Legal Services Board.
- The establishment of alternative business structures that could see different types of lawyers and non-lawyers managing and owning legal practises.²⁸

The rationale for the alternative business structures is to create a more consumer – orientated market within the legal profession. It is perceived that this will increase competition in the legal sector and allow an influx of fresh capital that would drive down solicitors' prices. Sir David Clementi believed that liberalisation could allow new types of legal practices that would improve access to justice by lowering prices.²⁹

The erosion of self regulation is also seen in the move towards allowing non-lawyers to provide legal services. In England, Halifax has become the first major bank to enter the legal services market with the launch of Halifax Legal Solutions . The bank is offering legal products that include discounted conveyancing, will preparation, and a 24 hour legal helpline. It will also provide access to a Web site where customers can prepare their own documents, including tenancy agreements, powers of attorney and also letters of complaint about faulty goods.³⁰

²⁸ Official website of the Department of Constitutional Affairs

²⁹ ' We Are Sailing :Multi –National Legal Practice And Overseas Bar Associations - The Commonwealth Caribbean Prospective' – Nancy Anderson (Commonwealth Law Bulletin – Volume 31, No 4, 2005).

³⁰ UK Law Society Gazette 2 November 2006



This trend is not confined to England & Wales. New Zealand has passed legislation that could pave the way for ‘Tesco law’. The Lawyers and Conveyancers Act 2006 will establish a new statutory framework for the legal profession. Lawyers will no longer have exclusive right to carry out conveyancing work. Under the Act, a professional licensed conveyancer will be able to work in competition with lawyers. It will also allow non-legal organizations such as banks and accountancy firms to offer a range of services including advice on contracts, tax and wills. It is to come into effect in mid 2008.

In light of this trend of establishing environments where there is fair competition, a number of measures imposed by regulatory bodies may be seen to be anti-competitive, e.g. rules that prohibit MDPs, or rules regulating conflict of interest, or confidentiality. It could also be argued that professional privilege, which applies only for lawyers is itself anti-competitive.

The CCBE takes the position that there are certain areas where competition should not be the sole judge of the activities of the legal profession, as lawyers are involved in the field of administration of justice, which has values that go beyond the economic. The core values of the legal profession can take priority over competition considerations. A regulation that restricts such freedoms can also be justified if it serves the core values of the profession or access to justice and maintenance of the rule of law as public interest aspects³¹.

It is submitted, in line with the position taken by the CCBE, that the rights to self regulation is an important aspect that must be maintained and the international trends should not be a basis on which to remove or to diminish such rights.

7) CONCLUSION

The developments under the WTO and regional developments cannot be viewed in isolation. International developments and trends must also be considered when considering the wider implications for ASEAN.

The domestic and external forces, the logic of globalisation, and the imperatives of regionalism will move ASEAN to resemble the EU more closely than it does today, and as ASEAN evolves, more closely than we can foresee today.³² Linkages and cooperation between law associations in the region is vital. Law associations must be vigilant and they must guard against the introduction of any undesirable elements that will affect the legal profession.

ALA could play an important role in promoting cooperation and mutual understanding amongst lawyers in the region. ALA could play a role in compiling the rules of ethics of the different ASEAN countries, and carrying out a comparative study of the various rules. Another area that could be looked into is the harmonisation of laws. A study should be undertaken to determine whether harmonisation is in fact necessary, and if so, the laws that

³¹ CCBE Response To The Clementi Consultation Document

³² Remarks by Rodolfo C. Severino, Secretary-General of the Association of Southeast Asian Nations at the European Policy Center Brussels, 23 March 2001



could be harmonised. After which, an action plan as to the mechanics of undertaking such an exercise should be prepared.

A close working relationship between the law associations and their respective government agencies involved in the trade negotiations is an important factor. Law associations should play a role in shaping policies so that the interests of the legal profession are preserved. On certain issues, a position taken by ALA, as the representative of ASEAN lawyers, may be effective in lobbying governments on certain issues, for example, on the issue of disciplines for the legal services sector.

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(The views expressed in this paper are personal views and should not be ascribed to the Bar Council.)

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