13TH ASEAN LAW ASSOCIATION GENERAL ASSEMBLY

THE ASEAN LAW CONFERENCE 2018

A Compendium of Speeches, Papers, Presentations and Reports

25–28 July 2018
Singapore

Editor-in-Chief
Justin Yeo

General Editor
Alison See

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This compendium has been presented variously in British or American English, depending on the version adopted by each contributor. As far as possible, the contributor's original expressions have been retained in the editorial process.

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LIST OF CONTRIBUTORS

Arranged in the order in which the respective contributions appear in this publication.

Speeches

Chief Justice Sundaresh Menon
Chief Justice, Republic of Singapore
President, ASEAN Law Association (2018 to 2021)
Chairman, ASEAN Law Association National Committee of Singapore
(until July 2018)

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Minister for Finance, Republic of Singapore

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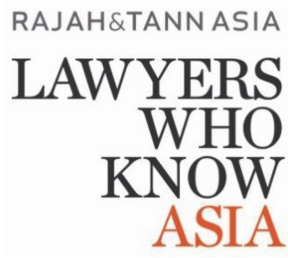

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CHAPTER I

Speeches

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WELCOME ADDRESS BY CHAIRMAN ALA (SINGAPORE), CHIEF JUSTICE SUNDARESH MENON

Opening Ceremony
13th ASEAN Law Association General Assembly and
The ASEAN Law Conference*

Minister for Finance of the Republic of Singapore, Mr Heng Swee Keat,
Representative of the ASEAN Secretariat, Deputy Secretary-General Dr AKP Mochtan,
The President of the ASEAN Law Association, Attorney Avelino Cruz,
The Executive Secretary of the Republic of the Philippines, Mr Salvador Medialdea,
Chairpersons of the National Committees, Heads of Delegations, Chief Justices and Judges of the ASEAN Judiciaries, and Attorneys-General of ASEAN,
Honourable Secretary-General of ALA, Attorney Regina Padilla Geraldez,

Members of ALA and distinguished guests

1 It gives me great pleasure to welcome each and every one of you to the 13th ASEAN Law Association ("ALA") General Assembly and The ASEAN Law Conference. I would like especially to extend a warm welcome to our friends from overseas who have travelled some distance to be with us today.

2 Before I turn to my brief remarks, may I ask that we observe a moment of silence in honour of the lives lost in the collapse of the dam in Attapeu Province in the Lao People's Democratic Republic? We are all saddened by the loss of life, property and livelihood that has been suffered by so many. At times like this, unity and solidarity are most important. Justice Khampha Sengdara and Justice Phomsouvanh Philachanh, please accept our deepest condolences; our sympathies are with those affected during this difficult time.

3 This General Assembly and Law Conference is the capstone of ASEAN Law Week. Over the past few days, Singapore has played host to

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numerous events and conferences ranging from the 2018 Singapore Insolvency Conference and the International Association of Privacy Professional's Asia Privacy Forum 2018 to the Emergence Conference on legal harmonisation. Apart from that, the ASEAN Chief Justices, the ASEAN Attorneys-General, the heads of the ASEAN Bar Associations, and the Asia Pacific Corporate Counsel Alliance have all met or will soon be meeting on the side lines of this conference. All told, hundreds of delegates – lawyers and non-lawyers alike – from all ten ASEAN states and more than a dozen other countries have come to Singapore to debate, discuss and reflect upon the key legal issues that confront us and – just as importantly – to reignite old friendships and build new ones.

4 In many ways, this is a fulfilment of the vision of the ALA Anthem that we have just sung, which calls for bridges of friendship to be built and for ASEAN lawyers to come "together as one".[1] That last phrase – "together as one" – is particularly apt, given that the theme of this conference is "The Power of One: Unlocking Opportunities in ASEAN Through Law".

5 As I sang the words of the anthem, I was reminded – again – that the ASEAN Law Association is an improbable institution. At the time it was first conceived, it would not have been immediately apparent that lawyers from our ten nations of widely differing socio-economic conditions and legal traditions could successfully come together to cooperate in serious and meaningful ways in the mission to promote convergence in our laws and to advance the rule of law. The success of ALA, which we see all around us today, must be attributed, in large part, to the friendship which existed between the amazing men and women who made all of this possible. Time does not permit me to list them all, but of those who have left us, we can think of Prof Mochtar Kusumaatmadja, Dr Teuku Radhie, Senator Angara, Chief Justice Fernan, Chief Justice Teehankee, Lord President Tun Suffian and Justice Harun Hashim. All our ALA pioneers shared not only a deep friendship, but also an abiding belief that while our narratives are singular, our destiny is shared; and that it is only by harnessing "The Power of One"

1 The first stanza of the ALA Anthem reads:

Working together, building the future
Holding a Beacon, the Laws of our region.
Fostering goodwill, bridges of friendship
Lawyers of ASEAN together as one.

The ALA Anthem is available at <http://aseanlawassociation.org/ALAHymn_Lyrics.pdf> (accessed July 2018).

that we can succeed. We are the heirs to that vision, and we have a collective responsibility to realise its promise.

6 As the global trading environment faces a period of turbulence, our ability to hold together as one region and to leverage on our respective strengths will be the key to our mutual prosperity. In this context, it is tremendously encouraging that we have already witnessed significant elements of pan-ASEAN convergence. This is perhaps most notably seen in the successful establishment of the ASEAN Economic Community on 31 December 2015.

7 Of course, a regional economic community cannot be built in a day. It is, and will remain, an ongoing, dynamic process that requires continuous reinvention and the rethinking of systems and concepts that we might have grown accustomed to by the inertia of tradition.[2] And integral to this process of integration is the law, which, I suggest, is both the *instrument* as well as the *guardian* of economic integration.

8 The law will be the "instrument of all transnational economic integration"[3] because all commercial activity is conducted in the shadow of the law, and we depend on the legal system to uphold our bargains and to enforce our agreements. It is said that one campaigns in poetry but must govern in prose. This may be true, but equally, every policy that is first conceived in prose must eventually be birthed in legislation. Economic integration will remain a noble idea until and unless the hard and prosaic work is done to translate that vision into legislation that eliminates trade tariffs, enacts changes to customs procedures and establishes a consistent approach for addressing common commercial disputes. Of course, this is a job not just for the draftsman, but also for academics, practitioners, and members of government who must think deeply about the precise modalities of legal integration.

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2 The official ASEAN Economic Community factsheet (May 2017) states that "community building is not a static end goal but rather a dynamic process that requires continuous reinvention of the region to seek deeper and broader integration as well as ensure its continued relevance in an evolving global economy".

3 Helmut Wagner, "Costs of Legal Uncertainty: Is Harmonization of Law a Good Solution?" in *Modern Law for Global Commerce: Proceedings of the Congress of the United Nations Commission on International Trade Law Held on the Occasion of the Fortieth Session of the Commission* (Vienna: United Nations Office, 2011) at p 53 <http://www.uncitral.org/pdf/english/congress/09-83930_Ebook.pdf> (accessed July 2018).

9 At the same time, if it is not carefully managed, the law can become a hindrance rather than a help. Legal uncertainty created by the heterogeneity of laws has been cited as one of the biggest obstacles to trade and investment in Asia.[4] This uncertainty generates significant transactional costs and acts as a fetter on investment, consumption and growth. This is why efforts to promote legal convergence are so worthwhile and significant, and all those who have an interest in ASEAN economic integration, in particular, must remain vitally engaged in the endeavour.

10 But the law is also the *guardian* of the promise of economic integration. The object of economic integration is not more economic activity for its own sake; rather, it is the betterment of the lives of the citizens of our member states. The law safeguards this promise, because it is only by the creation of a stable system of rules and norms that the rights and benefits secured in this process may be advanced and protected; upheld and enforced. To live under the rule of law is to be in a state where outcomes are consistent instead of capricious; where economic relations between persons are governed by rules instead of the whims and fancies of the powerful; and where the relationship between the government and the governed is marked by transparency and accountability, instead of opacity and abuse. In this way, the rule of law secures the promise of economic integration for all, and not just the few. Minister Heng Swee Keat, who has kindly agreed to deliver the keynote speech, will develop these points shortly and this will also be a recurring theme of the various sessions over the next few days. Let me express a special word of thanks to the Minister. He arrived in Singapore this morning after a 30-hour flight from Buenos Aires and came straight from the airport. This is a heroic gesture and we are all deeply grateful to him.

11 As ASEAN moves forward into a future of greater integration, there is much that we – as a community of lawyers – can do to help that process. I have had a chance to review the drafts of some of the presentations that will be delivered, and I am deeply impressed by the many and varied suggestions that have been delivered as to how the ASEAN legal community can play a role in encouraging greater economic integration and

4 Sundaresh Menon, "Doing Business across Asia: Legal Convergence in an Asian Century", opening address delivered at the launch of the Asian Business Law Institute (21 January 2016) at paras 6–7 <https://www.supremecourt.gov.sg/news/speeches/chief-justice-sundaresh-menon--doing-business-across-asia--legal-convergence-in-an-asian-century> (accessed 23 July 2018).

prosperity in the region. But just let me give you a foretaste of what is to come, and sketch some of the proposals in outline.

12 Let me begin with the view outside ASEAN. Prof Joseph Weiler has proposed that ASEAN domestic courts be given a discrete role in dealing with infra-political, technical administrative infractions of ASEAN law such as the administrative misapplication of licensing rules. He argues that this will give teeth to ASEAN commitments and is a practical way to monitor compliance with obligations. We might see this in action in the course of our moot this afternoon.

13 Mr Stephen Brogan of the US has suggested, citing the example of the Judicial Insolvency Network, that the Bar and Judiciary can play a role in developing effective cross-border insolvency regimes; and Prof Fan Jian from China has proposed a model for the harmonisation of Chinese and ASEAN commercial law through mutual respect and the legal recognition of each other's domestic laws as well as the basic precepts of international law.

14 From within ASEAN, Prof Colin Ong QC of Brunei Darussalam has proposed the establishment of a dedicated ASEAN Centre of Arbitration to tackle persistent problems in arbitration in the region. Mr Supawat Srirungruang from Thailand suggests that the regulator has a role in helping banks survive the impact of disruptive technology on traditional banking. Dr Nguyen Thi Son from Vietnam proposes that ASEAN countries seize the promise of the so-called "Fourth Industrial Revolution" by transforming their payment systems, online marketplaces and logistics platforms into a common regional system. And Mr Cavinder Bull SC from Singapore proposes a protocol for handling requests for non-disputing States to provide input to the arbitral tribunals or courts deciding on the proper interpretation of an investment treaty to which that State is a party.

15 These are but some of the many fascinating proposals that will be discussed over the next few days. I look forward to hearing more from the speakers, and to the discussions of the way forward for ALA when the Governing Council meets on Saturday.

16 Let me close by saying a few words of thanks – and a few will not be enough – for the Herculean efforts of the organising committee led by my colleagues, Justice Lee Seiu Kin and Justice Aedit Abdullah; and the programme committee, led by Mr Charles Lim, for the tremendous work they have done. They have been supported by a large group of officers and

staff of the Singapore Legal Service and lawyers from private practice. Their efforts have been indispensable and I am truly grateful to the entire Singapore legal community that has come together to make this happen. They have all spared no effort in the quest to ensure that you will have a wonderful time in Singapore and it is my sincere hope that you will find that the events and programmes we have lined up live up to your expectations. Finally, my sincere thanks to our sponsors for their generous support and to each and every one of you for coming to this Conference, for without you, none of this would happen.

17 Thank you very much, and I wish you a successful conference.

ADDRESS BY ALA PRESIDENT, ATTORNEY AVELINO V CRUZ

Opening Ceremony 13th ASEAN Law Association General Assembly and The ASEAN Law Conference*

1 A very warm welcome to all ASEAN Law Association ("ALA") members and special guests to the 13th ALA General Assembly – the third such gathering in Singapore (previously held in 1984 and 2003 in Singapore).

2 The theme for The ASEAN Law Conference 2018 is "The Power of One". In mathematics, "one" as an exponent denotes a symbol, by which another number is to be raised. Our theme's integer stands for ASEAN integration – something to raise the ten-nation ASEAN's geopolitical bloc to unbounded prosperity through law.

3 When ASEAN was founded in 1967, most expected it to close down in a few years in what was then a troubled region of the cold war. Today, 51 years hence, the ten-country ASEAN is an unqualified success. The secret of its success? ASEAN was founded on the principle of *Mufakat* or consensus (not majority rule), which it pursued to overcome diversity in race, religion, culture and economic development. In 2007 Singapore's Mr Tommy Koh, Chairman of the High Level Task Force, noted that "in the drafting of the ASEAN Charter, each fought to protect its respective national interest, but were always ready to compromise for the common good".

4 The word "Union" as in "ASEAN Union" was trashed aside. In lieu of supranational bodies, the ASEAN way is indeed give and take amongst friendly neighbors and, beyond that, mediation and arbitration as modes of settlement.

5 With its Charter forged in 2007, ASEAN has moved quickly towards economic integration through the ASEAN Economic Community. Free

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trade in goods and services is almost complete. ASEAN's geopolitical bloc of more than 650 million citizens is poised to become the world's fifth largest economy by 2020, such that Prof Killian Splander, a German political scientist, was moved to write an intriguing article titled "What Can ASEAN Teach the EU?"

6 On the other hand, the rise of the ten-country ALA, founded in Jakarta in 1979, mirrors this success story of ASEAN. As ALA envisions legal cooperation and harmonization of laws, our unique organization binds together the best legal minds in the ASEAN legal community amongst High Court Judges, Bar Society leaders, government lawyers and teachers of law. ALA is not your ordinary client networking Bar Association. It is now the only law organization designated in the 2007 ASEAN Charter as ASEAN's civil society legal adviser, a role defined in 2009 in Vietnam by former ASEAN Secretary General, the late Surin Pitsuwan. ALA has since spawned the holding of the Council of ASEAN Chief Justices ("CACJ") meeting at ALA's sidelines, as many of these distinguished gentlemen are themselves ALA leaders. As in ASEAN, which has 14 external partners, ALA has likewise engaged its dialogue partners – China, ASEAN Inter-Parliamentary Assembly, Inter-Parliamentary Union – and today we have a distinguished delegation led by Mr Vladimir Gruzdev, Chairman of the Association of Russian Lawyers.

7 Thus, I must highlight the successful holding of the year-long ASEAN 50th Anniversary Summit in Manila in 2017 when the ten-country ASEAN interacted with its 14 external partners, for the summit has forged agreements presenting a host of challenges and call to action for ALA and the ASEAN legal community:

(a) a joint statement on climate change addressed to the United Nations, calling to expedite the implementation of commitments under the Paris Agreement;

(b) a declaration by ASEAN and China for a "decade of coastal and marine environmental protection in the South China Sea (SCS)" as well as a framework for multilateral agreement on the "the Code of Conduct of Parties in the South China Sea";

(c) a memorandum of agreement to combat terrorism and ensure regional peace and security;

(d) promotion of regional business activities which include the Focused and Strategic ("FAST") Action Agenda on Investment pursuant to the ASEAN Comprehensive Investment Agreement ("ACIA"), and the Economic Ministers' ASEAN Seamless Trade Facilitation Indicators ("ASTFI"); and

(e) new business initiatives ranging from the ASEAN Work Programme on Electronic Commerce, and the ASEAN Declarations on Innovation, even Economic Empowerment of Women and the Protection and Promotion of the Rights of Migrant Workers.

Indeed, all the above present an overwhelming challenge to the ASEAN legal community. Shortly after the Manila Summit, the Chairman of the ASEAN Business Council, Ms Tessie Sy Coson, remarked to me that they accomplished vital cross-border plans but, and I quote her, "I am afraid they will remain pending as we lack lawyers in the Council". Indeed, only last week at the Dusit Thani Hotel in Manila, the ASEAN Chemical Industry met on Regulatory Norms. In meeting after meeting, there must be hundreds of these initiatives to ease cross-border activities in ASEAN which remain to be fast-tracked by lawyers' participation.

8 Can ALA help fill this vital spot? Certainly, yes. ALA has had years of remarkable success in mutual legal cooperation through general assemblies, standing and *ad hoc* committees, and even golf chapter networking. For ALA to move inexorably towards the "Power of One", however, our organization must take certain proactive steps and confront the following:

(a) intensifying its role as ideas generator particularly in the key ALA objective of harmonization of laws. Thanks to ALA Singapore, the format and substance of this Assembly's program gives this role a running start;

(b) a proactive engagement with the ASEAN Secretariat: At the tenth ASCO ASEAN Secretariat meeting held in Jakarta, Indonesia, on 22 March 2018, our Secretary General, Ms Regina Padilla Geraldez, has forged an understanding for ALA to monitor ASEAN treaties and agreements, as well as compliance thereof; and

(c) support of mediation and arbitration activities to resolve disputes in the manner provided in the ASEAN Charter: An *ad hoc* committee has submitted to the ASEAN Senior Law Officers Meeting

the "ALA Guidelines on Best Practices on the Enforcement of Arbitral Awards within ASEAN".

For these initiatives, ALA, in a special meeting in Cambodia only last June, in the shadows of the Angkor Wat Temple, finalized the setting up of an ASEAN Law Institute under the auspices of ALA. The Institute puts in place an ALA-wide legal infrastructure, a central legal think tank as a work horse of its ALA Governing Council that will promote capacity building, organize exchange programs, host legal forums, handle publications and journals, and monitor ASEAN treaties and agreements. On Saturday, this project awaits confirmation by the ALA Governing Council.

9 And finally, on behalf of ALA, our grateful appreciation for the boundless hospitality of the Singapore National Committee under the able leadership of its Chairman, Chief Justice Sundaresh Menon. I must especially congratulate ALA Singapore, as in the agenda of the next three days are presentations and deliberations by distinguished luminaries of the ASEAN legal community and those invited from the 14 ASEAN partners – a program of diverse substance and a sense of urgency. There is even an unprecedented mock trial on foreign investment disputes spearheaded by ALA members and jurists in the CACJ.

10 May I again commend the Singapore National Committee for its defining vision of law as a "Power of One". Let us all work together to realize that vision.

11 Thank you and good day.

ADDRESS BY DEPUTY SECRETARY-GENERAL OF ASEAN, HIS EXCELLENCY DR AKP MOCHTAN ON BEHALF OF SECRETARY-GENERAL OF ASEAN, HIS EXCELLENCY DATO LIM JOCK HOI

Opening Ceremony
13th ASEAN Law Association General Assembly and
The ASEAN Law Conference*

His Excellency Heng Swee Keat, Minister for Finance of the Republic of Singapore,
Honourable Chief Justice Sundaresh Menon, Chief Justice of the Supreme Court of the Republic of Singapore,
Honourable Attorney Avelino Cruz, President of the ASEAN Law Association,
Honourable Attorney Regina Geraldez, Secretary-General of the ASEAN Law Association,

Distinguished Delegates,
Ladies and Gentlemen,

1 It is my great pleasure and honour to be here on this auspicious occasion that marks the 13th session of the ASEAN Law Association ("ALA") General Assembly.

2 Just last year we celebrated the 50th anniversary of ASEAN. The Association has come a long way in the past five decades. The region enjoys not only continued peace, stability and security, but also rapid growth and development. ASEAN also continues to play an increasingly important role in the global economy. Moreover, in 2015, we have adopted the ASEAN Charter and realised our vision of establishing the ASEAN Community, consisting of the pillars of Political Security, Economic and Social Cultural. We are now charting our future further with the ASEAN Community Vision 2025 and its corresponding community blueprints.

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3 Since ALA has played an important role in law and legal cooperation in ASEAN, it might be useful for me to update you on the progress of the implementation of the blueprints of the ASEAN Community 2025, in particular those relating to the development and implementation of the ASEAN legal instruments.

4 The implementation of the Blueprint of the ASEAN Political Security Community, or APSC for short, is progressing well. The APSC will be a united, inclusive and resilient community in which peoples of ASEAN live in a safe, harmonious and secure environment, embrace the values of tolerance and moderation as well as uphold ASEAN fundamental principles, shared values and norms.

5 The Treaty of Amity and Cooperation in Southeast Asia ("TAC") remains the principle code of conduct governing inter-state relations in ensuring peace and stability in the region. The norms and principles embedded in the TAC have now been recognised universally in the region and beyond. Currently, in addition to the ten ASEAN Member States, there are 25 non-ASEAN Member States that have become parties to the TAC. Furthermore, many more countries have shown interest and are seeking to accede to the TAC.

6 The Southeast Asia Nuclear-Weapon-Free Zone Treaty ("SEANWFZ") has been the key legal instrument to preserve the region as a Nuclear Weapon-Free Zone and keep it free of weapons of mass destruction. Efforts are being made to ensure the accession of the P-5, the Five Super-Power States, to the SEANWFZ.

7 ASEAN is strongly committed to address transnational crimes and other transboundary challenges. The finalisation of the Model ASEAN Extradition Treaty and implementation of the ASEAN Convention on Counter-Terrorism, the Treaty on Mutual Legal Assistance in Criminal Matters and the ASEAN Convention Against Trafficking Persons, Especially Women and Children, and other cooperation programmes have demonstrated ASEAN's full commitment in such endeavours.

8 ASEAN's vision for economic integration is to achieve, by 2025, an ASEAN Economic Community ("AEC") that is highly integrated and cohesive; competitive, innovative and dynamic; with enhanced connectivity and sectoral cooperation; and a more resilient, inclusive, and people-oriented, people-centred community that is integrated with the global economy.

9 This year's chairmanship theme of resilience and innovation is testament to the region's aspiration for an economic community that is both resilient against external shocks and competitive in the long term, particularly in a digital and innovation age. Efforts to better embrace the opportunities presented by the digital age are underway. Among others, ASEAN is expected to conclude the ASEAN Agreement on Electronic Commerce later this year, a priority deliverable for this year's chairmanship. Other initiatives include the finalisation of ASEAN Digital Integration Framework to monitor the progress of ASEAN's digital integration, and ASEAN Innovation Network to strengthen linkages between innovation ecosystems.

10 In the meantime, the core work for market integration continues. Following the virtual elimination of intra-ASEAN tariffs, the work on trade facilitation is being intensified. In addition to increasing intra-trade and investment within the region, ASEAN is working on strengthening its engagement with other partners. Adding to the existing five ASEAN free trade agreements with various individual partners, ASEAN has recently signed up to free trade and investment agreements with Hong Kong, China, which is expected to enter into force in the beginning of next year.

11 Also high on the ASEAN agenda is the on-going negotiations on the Regional Comprehensive Economic Partnership ("RCEP"), a free trade agreement involving ten ASEAN Member States and Australia, China, India, Japan, Korea and New Zealand, which is seen as the centrepiece of ASEAN's external economic relations strategy. With half of the world's population and covering almost 30% of the world's output and trade, the RCEP will be the world's largest trade bloc, and is expected to offer immense potentials for billions of people.

12 Known as the "people pillar" of ASEAN, ASEAN Socio-Cultural Community ("ASCC") emphasises on human and sustainable development in the region through poverty alleviation, improved welfare and quality of life for the people in areas such as health, education, culture and arts. Notable progress has also been made in the areas of the promotion and protection of human rights including the rights of women, children, persons with disabilities and migrant workers. The ASEAN Agreement on Transboundary Haze Pollution and ASEAN Agreement on Disaster Management and Emergency Response have served as the key legal instruments to support ASEAN's on-going effort in the field of

environment, climate change, disaster management and disaster risk reduction.

13 Various cooperation programmes are being initiated or implemented to support the realisation of ASEAN's goals and objectives. Guided by the ASEAN Chair's themes this year of Resilience and Innovation, the priorities work of the ASCC Pillar for 2018 focus on deepening regional cooperation and coordination mechanisms to ensure that ASEAN remains relevant, vibrant and dynamic in today's and future global economy. Joint efforts on promoting green growth, green jobs, transitioning workers in informal employment to formal employment, occupational safety and health, implementation of the ASEAN Consensus on the Protection and Promotion of the Rights of Migrant Workers, and promoting cyber wellness, and many others, will contribute towards building an ASCC that is inclusive, sustainable, resilient and dynamic.

14 I am delighted to take note of the remarkable achievements and important work of ALA in the area of law and legal and judicial network and cooperation among ASEAN Member States. In this connection, I shall also like to inform you that there are over 200 ASEAN legal instruments concluded by ASEAN Member States to support the ASEAN integration and community building agenda. Many of those ASEAN legal instruments are in force after having been ratified by ASEAN Member States and are in different stages of implementation.

15 Besides the process of initiating and concluding those legal instruments, it is also the task for ASEAN to ensure their entry into force as well as full and effective implementation. In an effort to realise a rules-based ASEAN, the Secretary-General of ASEAN is not only entrusted to be the depositary of ASEAN legal instruments, but also to regularly report the status of their implementation to the ASEAN Leaders. To fulfil this mandate, the ASEAN Secretariat will need to work closely with ASEAN Member States, relevant ASEAN Sectoral Bodies and various stakeholders in ensuring accurate and reliable reporting on the implementation of the ASEAN legal instruments. With expertise of members of ALA in legal and judicial matters, I believe that monitoring the implementation of selected ASEAN legal instruments could be an area where ASEC and ALA could work together in supporting and promoting the rules-based ASEAN. This effort will be complementary to the overall efforts of strengthening the

monitoring and evaluation of the implementation of ASEAN Community Blueprints.

16 As you might be well aware, ASEAN, as mandated by the ASEAN Charter, has put in place various dispute settlement mechanisms through the conclusion of the legal instruments such as the ASEAN Protocol on Enhanced Dispute Settlement Mechanism and the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms. To ensure the effective operation of those dispute settlement mechanisms, there could be a need for ASEAN to seek support and cooperation with ALA whose many members are well versed in effective management of disputes.

17 The ASEAN Secretariat stands ready to facilitate ASEAN, in particular the ASEAN Law Ministers' Meeting and ALA to explore possible areas of cooperation as called for by the ASEAN Community Vision 2025 in strengthening the rule of law, judicial cooperation and legal infrastructure in ASEAN.

18 I wish you all a very successful Assembly and fruitful deliberations.

19 Thank you.

KEYNOTE ADDRESS BY MINISTER FOR FINANCE (SINGAPORE), HENG SWEE KEAT

Opening Ceremony
13th ASEAN Law Association General Assembly and
The ASEAN Law Conference*

Representative of the ASEAN Secretariat, Deputy Secretary-General Dr AKP Mochtan,
President of the ASEAN Law Association ("ALA") Attorney Avelino Cruz,
Executive Secretary Salvador Medialdea of the Philippines,
Chairpersons of the ALA National Committees, Heads of Delegation, Chief Justices and Judges of ASEAN Judiciaries,
ALA Secretary-General Attorney Regina Padilla Geraldez,

Members of ALA and Distinguished Guests,

A. INTRODUCTION

1 Welcome to the 13th ALA General Assembly and The ASEAN Law Conference. To our friends from the region and beyond, a very warm welcome to Singapore, and thank you for joining us in what will be a very meaningful few days for the ASEAN legal fraternity.

2 ASEAN has come a long way in the past half a century. Our region is growing at an impressive rate, and there is much cause for optimism.

3 As the world around us changes at an unprecedented pace, a united ASEAN stands us in good stead to rise to new challenges, and to seize opportunities to improve the lives and livelihoods of our peoples.

4 Remaining committed to regional economic integration and development will help to ensure ASEAN's continued relevance and competitiveness in a global economy.

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* The 13th ASEAN Law Association General Assembly and The ASEAN Law Conference, with the theme "The Power of ONE: Unlocking Opportunities in ASEAN Through Law", was held on 25 to 28 July 2018. The Opening Ceremony was held on 26 July 2018.

5 In this regard, the theme of this conference is very apt, calling us to unleash "The Power of One", with a focus on "Unlocking Opportunities in ASEAN through Law".

B. THE ROLE OF LAW

6 Indeed, the law is one of the "keys" to unlocking opportunities in our region.

7 The rule of law enhances:

(a) consistency in outcomes;
(b) socio-economic stability; and
(c) transparency and accountability between the public and private sectors.

8 Moving towards a greater focus on laws and institutions – or what some have called "legalification", "formalisation" or "institutionalism" – facilitates economic development in a few ways.

(a) It encourages trade and investment, by boosting investor confidence and reducing transactional costs.
(b) It also creates an enabling environment for greater participation and engagement from both the public and private sectors.

9 Of course, it is not straightforward to do this at the *regional* level.

(a) Different States have different priorities and face different socio-economic realities.
(b) ASEAN, in particular, has a combined population of more than 600 million, with immense diversity in legal traditions and systems.

10 It is helpful to approach the issue of ASEAN integration through law, from three different perspectives:

(a) looking *astern*;
(b) looking *afield*; and
(c) looking *ahead*.

1. Looking Astern

11 First, we look *astern*. By this, I mean that we look back at ASEAN's development since its establishment in 1967, to see how the role of law has evolved in our regional interactions.

12 ASEAN originated as a loosely-bound platform for maintaining regional peace and stability. We were united by our shared foundational principles of "non-interference" and "consensus" – or what has been called "the ASEAN way". There was minimal use of formal and legally binding instruments in the early years.

13 Towards the end of the 20th century, ASEAN had a renewed focus on regional economic integration through the adoption of legal frameworks and instruments. As seen in the "ASEAN 2020 Vision" of December 1997, respect for justice and the rule of law were recognised as preconditions to a peaceful and stable region.[1]

14 A landmark development occurred in 2008, when the ASEAN Charter was ratified as the constitutive legal framework for ASEAN.

(a) The Charter provided legal status and an institutional framework for ASEAN, codifying ASEAN norms, rules and values.[2]
(b) It expressly referred to the "rule of law",[3] the conferring of "legal personality"[4] and the establishment of dispute resolution mechanisms.[5]
(c) It also called upon Member States to implement the provisions of the Charter, including by enacting "appropriate domestic legislation".[6]
(d) This heralded a new "self-understanding" for ASEAN.

15 More recently, in late 2015, we witnessed the historic establishment of the ASEAN Economic Community.

16 By looking *astern*, we appreciate how ASEAN has moved steadily towards greater "legalification", "formalisation" and "institutionalism".

1 <http://asean.org/?static_post=asean-vision-2020>.
2 <http://asean.org/asean/asean-charter>.
3 ASEAN Charter, Preamble and Arts 1(7) and 2(2)(h).
4 ASEAN Charter, Art 3.
5 ASEAN Charter, Arts 24 and 25.
6 ASEAN Charter, Art 5.

This has promoted cross-border trade not just within ASEAN, but also between the ASEAN bloc and other key economies.

2. Looking Afield

17 It is, however, still early days of the ASEAN Economic Community, and much remains uncharted territory for us. This is why we also consider a second perspective: looking *afield* at developments elsewhere, to draw valuable lessons from the experience of other economic communities.

18 I focus, today, on the experience of the European Union ("EU"), being the largest regional integration undertaking in history.

19 The EU approach, called "deep integration", developed a "single market" of unprecedented size, by:

(a) establishing supranational legal standards and institutions;
(b) designing collective policies;
(c) facilitating relatively borderless populations;
(d) introducing a common currency in the "eurozone";

and so on.

20 However, in recent years, the EU has faced some pressures and difficulties.

(a) We have witnessed the Brexit movement, growing migratory pressures and refugee-related issues, as well as debt problems.
(b) Commentators have observed that the EU may have tried to integrate "too far, too fast", with some developments being less suited for certain Member States.
(c) Recognising these difficulties, the Rome Declaration of March 2017 expressed an intention for Member States to move "at different paces and intensity where necessary".

21 In contrast, as mentioned earlier, the ASEAN way is a relatively informal consensus-driven approach, involving small and incremental steps. We have traditionally sought to find common ground and achieve a measure of regional *unity* without requiring *uniformity*.

22 This approach has its obvious benefits given the immense diversity of our region. But there is also room to move forward on integration in more areas.

23 Looking *afield*, to other examples such as the EU, offers us lessons and practices for doing so – a greater role for law, developed with sensitivity to the unique circumstances of our region, provides immense potential for enhancing economic integration and development.

3. Looking Ahead

24 This leads me to the third perspective: looking *ahead* to how the legal sector may contribute towards designing a model of economic integration that works for ASEAN, particularly at a time where ASEAN has booming infrastructure needs. Indeed, the Asian Development Bank has estimated that from 2016 to 2030, ASEAN's infrastructure investment needs will total US$2.8trn.

25 To meet these needs, it is a movement in the right direction for us to develop – to the best of our abilities – an ecosystem that enhances "the ASEAN way" with a greater emphasis on suitable laws, legal instruments and frameworks.

26 In recent years, we have witnessed many encouraging movements in this direction.

(a) For instance, our region has seen the emergence of informal and voluntary mechanisms, such as the "ASEAN Consultative Committee on Standards and Quality", which help to develop stable and predictable standards.

(b) We have also seen the creation of legal frameworks and instruments which facilitate cooperation in specific areas, including the "ASEAN Single Window", the "ASEAN Trade in Services Agreement", and so on.

27 These initiatives have been developed in a way that is uniquely ASEAN – they remain very much cognisant of ASEAN's shared foundational principles, but seek to formalise collaboration and understandings with elements of legal quality.

28 Looking ahead, it is clear that the law and the ASEAN legal fraternity play important and varied roles in the integration effort. Many of these issues will be discussed and debated during this conference. I propose to start the ball rolling by touching briefly on three areas:

(a) law and technology;
(b) the convergence of laws, regulations and practices; and
(c) the active participation of the private sector.

(a) Law and Technology

29 First, law and technology.

30 In this age of the Fourth Industrial Revolution, we see:

(a) unparalleled interconnectivity across national borders;
(b) increased capabilities of artificial intelligence and big data;
(c) the proliferation of e-commerce; and
(d) the emergence of new technologies.

31 Our laws and practices have to respond effectively to technological changes, and do so more quickly than ever.

(a) In order to effectively regulate the technology realm, both the public and private sectors must keep up-to-date on rapidly changing trends.
(b) Our laws must be kept current and sufficiently flexible to accommodate unforeseen technological changes. They must also accord due regard for the laws of other jurisdictions, given that technology issues increasingly cross national boundaries.
(c) Our legal industries must embrace technology to remain competitive, while our legal professionals must recognise the changing nature of legal services and role of the profession.

32 On a related note, I understand that the ASEAN judiciaries have successfully collaborated on an excellent technology initiative which will be launched tomorrow: an online portal that promotes greater understanding of ASEAN laws and fosters deeper cooperation amongst ASEAN judiciaries.

33 We have much to learn from each other in the realm of law and technology. No single person, entity or jurisdiction has a monopoly on ideas in this rapidly-evolving space. Distilling lessons from our collective experience provides an excellent foundation for navigating the imminent challenges brought about by technology.

(b) Convergence of laws, regulations and practices

34 Second, we can work together to facilitate the convergence of laws, regulations and practices. Early international success in legal harmonisation efforts may be seen in the highly-successful New York Convention, which has significantly enhanced the cross-border enforceability of *arbitral awards*. More recently, we have witnessed the coming into force of the Hague Convention on Choice of Court Agreements, which further strengthens the cross-border enforceability of *court judgments*. And just earlier this week, it was reported that a new United Nations treaty – the Singapore Convention on Mediation – promises to do something similar in the context of *mediated settlements*.

35 Of course, other than cross-border enforcement, there are other obvious areas for convergence, such as those where the substantive legal principles are of a fairly universal nature.

(a) One such area is the law governing commercial contracts.
(b) With an increasing occurrence of cross-border projects and transactions governed by contracts, meaningful convergence in this area will reap rich benefits for the parties involved.
(c) The growth of international commercial arbitration is evidence, in itself, that commercial contract law is an area which lends itself particularly well to convergence across national borders.

36 There are also areas of commercial law where convergence may be considerably more challenging, but which are nonetheless very important for ASEAN's continued economic integration and development.

(a) One such area is that of intellectual property ("IP"), which provides a legal framework for supporting innovation and enterprise.
(b) In general, IP rights are largely "territorial" in nature, with each country having its own policies, and understandably so.
(c) But if we can explore deeper collaboration, or even seek meaningful convergence in these areas, we can facilitate a conducive environment for further economic growth.

37 All in, it bodes well for us that ASEAN has already begun moving towards common standards and legal instruments. Continued progress on this front will facilitate the integration and development of ASEAN economies.

(c) Active participation of the private sector

38 The third area is the importance of the private sector's active participation in regional initiatives and conversations.

39 State and non-State actors working together in a regional public-private partnership is important aspect for achieving ASEAN integration through law. State actors traditionally lead in implementing and interpreting laws, while the private sector can serve as a valuable springboard for fresh ideas and solutions.

40 To this end, ALA – which brings together the different branches of the legal profession – is well-positioned to facilitate close cooperation in the ASEAN legal fraternity. Indeed, this important aim finds expression in ALA's Constitution.[7]

41 Regional conferences and dialogues such as this Conference bring together members from both the public and private sectors and across diverse areas of expertise for an exchange of ideas. We all look forward to a range of innovative suggestions, cross-cutting ideas and practical recommendations emerging from these discussions.

42 Apart from regional events and conferences, it is also excellent that ASEAN lawyers are increasingly seeking collaborative opportunities with counterparts from other jurisdictions.

(a) In recent years, we have seen an increase in strategic law partnerships across the ASEAN bloc.
(b) Earlier this year, the Asian Business Law Institute ("ABLI") launched an important publication on the recognition and enforcement of foreign judgments in Asia.[8] It is the culmination of the work of a diverse range of legal professionals, including ASEAN lawyers.

43 These examples of regional collaboration remind us of our potential for growth when we work together.

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7 The ALA Constitution recognises that close cooperation in the ASEAN legal fraternity would "help promote the aspirations, objectives and principles of the ASEAN". It also expresses ALA's desire to "help maintain peace and promote prosperity … through legal cooperation and the advancement of the principles of the Rule of Law".

8 *Recognition and Enforcement of Foreign Judgments in Asia* (ABLI Legal Convergence Series) (Adeline Chong ed) (Asian Business Law Institute, 2017), launched at the Opening of the Legal Year 2018.

44 Looking *ahead*, a legal fraternity committed to unlocking regional opportunities will facilitate further economic integration and development in ASEAN.

C. CONCLUSION

45 An old African proverb tells us: "If you want to go fast, go alone. If you want to go far, go together".

46 The first 50 years of the ASEAN experience have borne this out.

(a) We have immense potential, and it is extremely encouraging to know that there is so much room for us to go *further*.
(b) But to do so we must, as those before us did, go *together*.
(c) Only then, will we unleash "The Power of One".

47 We are moving in the right direction by developing shared legal frameworks, instruments, standards and understandings.

48 Of course, we may face challenges and disruptions in our journey.

49 But amidst all these –

(a) may we work together to find the sweet spot for achieving both State and regional interests;
(b) may history record our effort as a bespoke approach in designing a flourishing model of regional economic integration; and
(c) may we press on in our worthwhile endeavour to unlock opportunities in ASEAN through law.

50 I wish you a productive and fruitful conference. Thank you.

ADDRESS BY RETIRING ALA PRESIDENT, ATTORNEY AVELINO V CRUZ

Reconvening of General Assembly 13th ASEAN Law Association General Assembly and The ASEAN Law Conference*

1 I must say a few words as a final address to the ASEAN Law Association ("ALA") General Assembly. As we all know, our General Assemblies end with renewal, an event that ushers in a new ALA administration. We welcome the new administration and the takeover by Singapore's Chief Justice Menon. But that's not the end of today's proceedings, something more important will be happening tonight. We can't wait to hear Justice Lee sing his songs. So, I hope all of you will be present there.

2 But levity aside, as we now conclude this ALA General Assembly, I would like to think that the very concept of the Power of One, designed by Singapore, has just raised the level of energies of the entire ALA and its membership, something that will succeed in propelling ALA to new heights of integration through law. I want to add for the record, that the Assembly's proceedings witnessed a certain sense of urgency. Prof Tan Cheng Han ran through the myriad of really substantial topics, some of them never before taken up in an ALA setting. For that, we have to thank the Singapore National Committee under the leadership of Chief Justice Menon. I have no doubt that ALA, as the designated legal advisor in the ASEAN Charter, will succeed in doing its job under its new administration.

3 So, let me reiterate that ALA now fully embraces its ideas-generating capacity. We should at the proper time move forward towards engaging those beyond ASEAN borders, beyond ASEAN legal technicians, and to engage more ALA external partners. As I told the Governing Council this morning, I was astounded to read the reports from my staff on the kinds of things that have been going on between ASEAN and its 14 partners. Apart from the 14, there will be more partners to come. This is something really

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cut out for Chief Justice Menon's team as it assumes leadership in the Governing Council, given the vast experience in the law practice and in the Judiciary of ALA President Chief Justice Menon, and his unparalleled dedication to work.

4 Finally, I want to thank those who have helped me in fulfilling my duties as ALA President over the past three years, particularly the ALA Secretary-General Regina Padilla Geraldez. Let us give her a round of applause. Also, Chief Justice Panganiban who came out of retirement to head the Philippine National Committee and, of course, the incumbent Heads of ALA National Committees and their representatives in the ALA Governing Council. A round of applause please. Finally, let us wish Chief Justice Menon and his team more power and success in the coming years. May I now call upon Chief Justice Menon to deliver his inaugural address.

ADDRESS BY INCOMING ALA PRESIDENT, CHIEF JUSTICE SUNDARESH MENON

Reconvening of General Assembly 13th ASEAN Law Association General Assembly and The ASEAN Law Conference*

1 Before I say anything else, I would first like to express, for the record, the deep appreciation of the General Assembly and Governing Council of the ASEAN Law Association ("ALA") to Attorney Avelino Cruz, the immediate past President, and Attorney Regina Padilla Geraldez, the immediate past Secretary-General, for their faithful and dedicated service to this Association over the course of these past three years. May I please ask that this be recorded in a formal resolution of this Assembly and unanimously approved now by acclamation? If you would, please join me in rising to give them a resounding round of applause to thank them for the wonderful work they have done!

2 Thank you, Ave, and thank you very much, friends, for this tremendous honour that you have accorded me. ALA is an organisation that I really only came to learn something about after I came into office as Chief Justice of Singapore, and I recall that I was initiated into the organisation by my dear friends, Justice Chao Hick Tin and Justice Lee Seiu Kin, who had worked with Mr T P B Menon and other long-time stalwarts of the Singapore ALA community for many years. They spoke to me and suggested that it would be very good for the work of the Singapore National Committee and the Singapore ALA community for me, as the new Chief Justice, to understand the work of ALA and to get involved. They conveyed a couple of key messages to me on that occasion, I recall. But if I were to boil it down to one or two points, the following really stood out.

3 The first related to the business side of things. They said that ALA is a powerful platform that brings together a pan-ASEAN community of judges, lawyers, prosecutors, law professionals, and law teachers – we see

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that in the hymn of the ALA that we sing at these events which speaks about bringing together these different parts of the ALA community. They said that because of the reach of this organisation, it really affords us an opportunity to do wonderful things given the unique privilege and position that we have as lawyers to effect change. If you think about it, all change in society ultimately has to be done through the law. Of course, you talk about social change and attitudinal changes and so on and so forth, but they really get their force and expression through law. Lawyers have that unique opportunity and unique privilege to be able to effect change for the good, and ALA is uniquely positioned in being able to bring together the entire legal family across all ten ASEAN member states. The point they made to me, which I was completely sold on, was that this was an organisation with a tremendous ability and potential to do good; and that at the time we first spoke about this, it had already been doing that for 35 years. They encouraged me to learn more about the organisation and to get involved.

4 The second thing they told me, which has also stayed with me, is that unlike any other organisation, it is ultimately rooted in the friendships and the personal relationships amongst its members. I never quite understood this until I attended my first ALA function, and then I understood what they meant. I recall speaking to a non-ASEAN person who was there at that first event who could not get his head around the fact that here was a function where chief justices were getting on the floor dancing with each other. He was European, and he said that while people talk about the intensity of integration in Europe, "something like this would *never* happen in Europe – you have something very special here in ASEAN". I saw that with my eyes, and that is a feature of ALA that I have come to cherish.

5 That was six years ago, and it is a truism for those of us in the Singapore legal community that when Justice Chao tells you something, he's right! And so, I discovered that everything he and Seiu Kin told me, was absolutely correct. ALA has come, over the course of the last five or six years, to be an institution that I am not only acquainted with, but one that I, too, am firmly committed to. In the course of the last several years, I have really enjoyed getting to know and interact with so many of you in so many different capacities.

6 My interaction with the ALA community has grown in different ways. In fact, the first thing we did in 2013 – if you recall – was to establish the

inaugural meeting of the ASEAN Chief Justices. That whole initiative has taken on a life of its own. The Chief Justices spent the whole of yesterday at a meeting, and we now have six – soon to be seven – working groups actually pursuing concrete initiatives. This just goes to show how relationships and friendships, when applied to a worthwhile endeavour, can have tremendous results. In the same spirit, when we were going to host this event, I encouraged our Attorney-General to convene a meeting of the Attorneys, which he did, and the Attorneys-General of all ten countries met here over two days earlier this week. I also encouraged our Law Society president, Gregory Vijayendran, to get the bar presidents together and he did. He told me that they have made such good progress that they are hoping to sign an MOU with a view towards establishing an ASEAN bar council, if that can come to pass.

7 I see that sort of initiative as a tremendous way of advancing a couple of goals. One is to increase the footprint of ALA by bringing together all these key stakeholders from different parts of the legal establishment, and in particular by energising the law firms. I think that if there is one area where ALA could really look to expand, it is by penetrating and energising the law firms to get them really excited about what ALA offers them. This is something which Ambassador Crit has said to me twice over the last couple of days, and I completely agree with him. The second point that he made to me was that we should be getting the universities and students involved, because they are our future. That is why, as Cheng Han noted in his summary of proceedings, I believe that if we could get this moot off the ground, we would be sensitising law students from ASEAN to the realities of ASEAN as a significant part of the legal framework and community, and it would also be sensitising them to a whole new way of thinking. This would be an investment in our future. These are wonderful opportunities, and they are unusual because they are rooted in warm relationships, friendships, and that magical trust which was referred to by Justice Slaikate in one of his earlier interventions, when he talked about the power of trust to bring people together.

8 There is a great deal that I want to say about my hopes and aspirations for ALA, but I won't do that now. I will take the floor for about ten minutes this evening at the dinner to speak to the gathered audience about some of my reflections and thoughts, and I think it is much better that I do that there rather than stand in the way of all of us getting back to rehearsals and our getting ready for the events of this evening. But I do

want to close with this thought. We are really privileged to have these friendships; to have this ability to understand each other across borders. Cheng Han referred to the moot, and I have to say that for me personally, that was one of the real highlights. To sit in a hearing (not just with young lawyers whom I particularly have an interest in) but with a colleague from the Philippines, another from Thailand, and to find at the end of arguments concerning a nuanced and complex problem that all three of us came to the same answer; and that all three of us reasoned along broadly similar lines – that is the promise of convergence! At the end of the day, it is going to be very difficult to get all ten states to enact identical laws, because laws are a function of where our societies are, and they are instruments of policy. All of us are at different stages of the development cycle, and our policies will reflect that. But when judges deal with the same problem, and reason and come to the same broadly convergent answers with broadly convergent reasoning, it goes to show that there is promise in this ideal that we are committed to. I think that if we look forward with that in mind; if we look forward to harness some of the terrific suggestions that have come up over the last three days which Cheng Han has so helpfully summarised for us; and if we try to see how we can use the platform that ALA offers us to do more good for ASEAN then I think this will be a worthwhile chapter in each of our lives. This is what I hope we will continue to do in the years to come.

9 I want to close once again by saying how privileged I feel to be entrusted with this responsibility. I pledge to do my very best, and I am very grateful that Paul Quan, who is a member of our staff, has volunteered to take up the post of Secretary-General – although he did tell me that it wasn't exactly put to him as if he had a choice! But I kid, because I know how hardworking he is, and I know how enthusiastic he is, and I know that he will support me to the nth degree to get this done well. But beyond that, I have the terrific support of my friends and colleagues in the Singapore National Committee, and I know that I have the support of my friends in the ALA community. I do say that that is the greatest source of comfort and assurance that this will be a very happy three years for me, and I thank you for trusting me to do that. Thank you.

ADDRESS BY ALA PRESIDENT, CHIEF JUSTICE SUNDARESH MENON

Gala Dinner
13th ASEAN Law Association General Assembly and The ASEAN Law Conference*

1 Thank you very much for allowing me to address you; and let me begin by asking you to forgive me for keeping you from dinner and the much-anticipated entertainment lined up for this special evening. Recognising the considerable competition for attention that I am up against, I shall endeavour to keep this reasonably short.

2 First and foremost, on behalf of all ASEAN Law Association ("ALA") members, I would like to again express our heartfelt gratitude to the outgoing president of the ALA, Attorney Avelino V Cruz, and the Secretary-General of ALA, Attorney Regina Padilla Geraldez, for serving with such distinction these past three years. In his speech at the 12th ALA General Assembly in 2015 as the incoming President, Attorney Cruz exhorted ALA to contribute to the effort to overcome the wide development divide among the ASEAN Member States by being ASEAN's legal "think tank".[1] At the 39th Governing Council Meeting last year, he built on this theme when he challenged ALA to make real progress in promoting the harmonisation of substantive laws in the region.[2]

3 Since then, ALA has answered this call. I am absolutely delighted to announce that, this morning, the Governing Council approved the establishment of the ASEAN Law Institute subject to the finalisation of some details pertaining to its implementation. This will be a dedicated

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1 Attorney Avelino V Cruz, Chairman, Philippine National Committee, closing address given immediately after his election as new ALA President (28 February 2015) <https://www.aseanlawassociation.org/12GAdocs/avespeech2.pdf> (accessed 23 May 2018).

2 Attorney Avelino V Cruz, ALA President, address by the ALA President at the 39th Governing Council Meeting (23–25 March 2017) <https://www.aseanlawassociation.org/presidentaddress2017GC.pdf> (accessed 23 May 2018).

centre that will effectively support ALA's work and further its objectives. I have no doubt it will be a valuable resource and we will work to carry out the Governing Council's resolution to develop the Institute on the basis of some key principles which were agreed to by the Governing Council this morning. The most important of these is that the work of the Institute will be subject to the approval of the Governing Council of ALA and to that end we expect, for instance, that it will submit for approval each year a work plan setting out the key priorities and goals that it will focus on in the coming year. This will enable ALA to ensure that we are moving strategically towards the fulfilment of our wider goals and mission.

4 Under Attorney Avelino's presidency, the various working groups have made considerable process. For instance, the Working Group on ALA at the Crossroads, chaired by my colleague Justice Lee Seiu Kin, and the Working Group on Harmonisation of Commercial Laws, chaired by Attorney Llewellyn L Llanillo, have both completed their work and presented their recommendations. I will not rehearse the details of their proposals and will only say that these give us a coherent vision of what the future of ALA should entail.

5 As we look to the next three years, I propose that we focus on a few areas to build on the progress that has already been made.

6 First, we should focus on strengthening links within ALA. Article II of the ALA Constitution lists four key objectives, but these may be summarised into two broad points.[3] First, ALA exists to sustain and develop relationships. As the coordinating body for lawyers in ASEAN Member States, it aims to promote closer relations, cooperation and mutual understanding amongst lawyers in the region. Second, ALA exists to generate constructive ideas. It serves as a think tank that promotes collaboration and research on the various issues faced by Member States. To this end, it organises conferences and symposia, such as this Congress, to provide a venue for the active exchange of views and ideas and to promote action.[4]

7 We should strive to take further steps to achieve both of these goals. In the area of relationships, we should further strengthen the links between legal practitioners in ASEAN by encouraging them to meet on the sidelines

3 Constitution of the ASEAN Law Association (1979) (amended 1 June 2004) <https://www.aseanlawassociation.org/ALA_Constitution.pdf>.

4 See the ALA website <https://www.aseanlawassociation.org/about.html>.

of the ALA General Assembly, as the Chief Justices of ASEAN have been doing for some time. We mooted this to the various Attorneys-General of ASEAN and the Presidents of the ASEAN Bars sometime last year and I am gratified and delighted that they have all responded so enthusiastically. Throughout the course of this week, the Attorneys-General of ASEAN, the Bar Presidents, and the Asia Pacific Corporate Counsel Alliance have all organised meetings either before or on the sidelines of the ALA General Assembly and I am given to understand that they have all had very productive and fruitful discussions. Indeed, I am told that most of the Bar Associations have agreed to look into institutionalising their links and they hope to meet regularly. The connections that are built today will, as Stephen Brogan mentioned in his keynote address yesterday morning, be key to the development of stable, predictable legal systems grounded in the rule of law. Looking ahead, I think we should continue to encourage these meetings so that in time ALA might come to be seen as the preeminent champion of ASEAN legal connectivity.

8 In this regard, it would be remiss of me not to mention the moot on the role of national courts in ensuring compliance with ASEAN obligations which I had the privilege of judging together with Acting Chief Justice Carpio and Justice Vichai. I thought it was a wonderful way of encouraging lawyers to develop a consciousness of ASEAN law and the role that the national courts can play in enforcing it and I am deeply grateful to Prof Joseph Weiler, a dear friend of ASEAN, and also of me, who both suggested the idea and then worked with Mr Ong Chin Heng of the Attorney-General's Chambers of Singapore to prepare the problem for the moot. Prof Weiler and Chin Heng were driven in this regard by the conviction that law without courts is meaningless, and the moot has demonstrated a very plausible way in which domestic courts can afford private plaintiffs relief from unnecessary harm caused by usually unintentional infractions of ASEAN rules and norms by public authorities. Over the years, competitions like the Philip C Jessup International Law Moot and the Willem C Vis International Commercial Arbitration Moot have played an integral role in introducing students to areas of the law that once may not have formed part of the regular curriculum. If we could make this moot a regular feature of the General Assembly – perhaps by partnering with various universities throughout ASEAN – students will likewise be sensitised to ASEAN law and to the possibility of applying convergent approaches to dealing with common commercial problems in ASEAN.

After all, there is nothing like friendly competition to stimulate learning! This would also bring students into the fold and be a wonderful investment in the future of ALA!

9 Turning to the subject of ideas, we should look to better harness each Member State's expertise and experience. One of the biggest assets we possess is our diversity. We can leverage on this by exposing our lawyers to training, attachments and internships with law firms in other Member States. We already have the infrastructure to do this. The ALA website currently houses directories on Member States and their law firms. We can use these contacts to set up a "marketplace" for training, attachments and internships. What I have in mind is that law firms, universities, and research organisations will list internship and placement opportunities on this website, and applicants will likewise indicate their desire and availability to take up such opportunities. By matching supply with demand, the opportunities for learning and collaboration will be increased.

10 My second suggestion is that we focus on fostering greater cooperation between ALA and other stakeholders in the legal industry. This builds on a suggestion made by David Rivkin, the former president of the International Bar Association and a long-time member of the American Law Institute, who thought that the best way to advance the cause of legal convergence would be to focus on both soft law instruments as well as international conventions and model laws. In particular, we should look to partner like-minded organisations that also conduct research on comparative ASEAN law to champion the cause of legal convergence in ASEAN commercial laws by identifying worthwhile projects and, after undertaking the requisite research and study, putting these across to the Law Ministers for them to consider enacting legislative change.

11 For instance, the Asian Business Law Institute, or ABLI, published the first two volumes in its Legal Convergence Series this year. The first is on the recognition and enforcement of foreign judgments; while the second is on the regulation of cross-border transfers of data. Both are collections of country reports written by legal scholars and practitioners on the laws governing the recognition and enforcement of foreign judgments and the regulation of cross-border data transfers in Asia, including many of the

ASEAN Member States.[5] Building on this, ABLI intends to move to the next phase of these projects, where the team of experts will make recommendations for meaningful convergence in substantive laws. These reports are freely available and are valuable resources which I think we can and should use as a springboard for our own efforts in harmonising dispute resolution mechanisms and substantive business laws.[6] This will not be a goal that can be achieved overnight, but strengthening our links with research institutions will be an important next step towards our goal of advancing legal convergence within ASEAN.

12 Third, I would suggest that ALA strengthen its links with other ASEAN institutions. ALA is presently an accredited civil society organisation listed in Annex 2 of the ASEAN Charter, and we should strive to strengthen our ties and possibly develop working protocols with other key ASEAN institutions. This could extend to working with the ASEAN Secretariat to develop a system for monitoring compliance, at the national level, with ASEAN instruments and agreements or offering feedback on proposed instruments, if this was thought to be useful.

13 One such institution is the ASEAN Inter-Parliamentary Assembly, or AIPA, which serves as a forum for ASEAN parliamentarians to share and discuss policies. The AIPA has the same aim that we do, which is to build common standards by promulgating domestic laws that are in line with ASEAN agreements and commitments.[7] During the 39th Governing Council Meeting last year, Mr Isra Sunthornvut, the Secretary-General of the AIPA, presented a concept note that proposed two points of possible cooperation between ALA and AIPA to facilitate the harmonisation of laws

5 See *Recognition and Enforcement of Foreign Judgments in Asia* (ABLI Legal Convergence Series) (Adeline Chong ed) (Asian Business Law Institute, 2017) <http://abli.asia/PUBLICATIONS/Foreign-Judgments-Project> (accessed 23 May 2018).

6 See Sundaresh Menon, "Doing Business across Asia: Legal Convergence in an Asian Country", opening address delivered at the launch of the Asian Business Law Institute (21 January 2016) at paras 11–14 <https://www.supremecourt.gov.sg/news/speeches/chief-justice-sundaresh-menon--doing-business-across-asia--legal-convergence-in-an-asian-century> (accessed 23 May 2018).

7 Report on the 38th AIPA General Assembly, *AIPA and ASEAN: Partnering for Inclusive Change* (14–20 September 2017) <http://www.aipasecretariat.org/article/detail/174/4> (accessed 23 May 2018).

in ASEAN.[8] First, he suggested that ALA could serve as AIPA's think tank by recommending policies to AIPA that it could, as the primary legislative group within ASEAN, translate into implementable resolutions. Second, he suggested that ALA could make recommendations as to the AIPA resolutions that could be converted into concrete laws in order to hasten implementation.

14 In closing, I return to Attorney Cruz's exhortation for ALA to be ASEAN's legal think tank. In order to be useful, a think tank must not only produce scholarship of the highest level, but must also strive to offer workable solutions to the problems it has identified. In this regard, I think we can take heart in the many and varied suggestions which were raised during the conference. It is not possible for me to do justice to all of them, but let me just briefly highlight some:

(a) Dr Nguyen Thi Son and Prof Locknie Hsu both spoke powerfully of the power of digital trade facilitation and the potential to reap significant trade cost reductions by leveraging on technology. In order to fully realise the potential of digital trade and electronic commerce, which is something which ASEAN is paying particular attention to, the legal infrastructure for electronic contracting and dispute resolution will have to be harmonised. And in a similar vein, yesterday, a panel comprising lawyers from ASEAN and Mr Sriram Raghavan from IBM agreed that disruptive technology, like AI and blockchain, would bring dramatic changes to our businesses and personal lives, and that it was crucial that the right frameworks, principles, and policies be developed to ensure that these are used responsibly. This will require collaboration between technologists, lawyers, policymakers and academia. The task of bringing the relevant players together in the drive to develop solutions to these challenges is something which ALA could consider undertaking.

(b) In their presentations, Prof Colin Ong QC from Brunei and Prof Fan Jian from China both stressed that international arbitration continues to be a very critical mode of cross-border

8 Isra Sunthornvut, "Collective Collaboration between AIPA and ALA in Facilitating the Harmonization of Laws in ASEAN", concept note presented during the 39th Governing Council Meeting of ALA, Part II (2017).

> dispute resolution within and beyond ASEAN, and attention should continue to be paid to it. It is therefore with great interest that I noted the proposal of Mr Cavinder Bull SC that the various ASEAN Member States subscribe to a common protocol for handling requests for non-disputing States to provide their input on treaty interpretation. Mr Bull has already done much of the hard work by drafting a protocol. It seems to me that this is another suggestion that warrants further study and consideration by ALA.

15 This is just a tiny sampling of the many issues and solutions that have been generated in the course of the last three days from more than 50 speakers and panellists. The Rapporteur-General, Prof Tan Cheng Han SC, presented an outstanding report of the various sessions at the final session of the General Assembly this afternoon. We will carefully study that final report and then decide on the appropriate follow-up actions.

16 This is the final announcement that it is my absolute pleasure to make this evening. I believe that one of the key responsibilities of leadership is succession planning, and on that subject, I am delighted to inform you that the next president of ALA will likely be from Malaysia as my friend Tan Sri Datuk Seri Panglima Richard Malanjum, Chief Justice of Malaysia, has kindly agreed that Malaysia will host the next General Assembly in 2021!

17 We have achieved much, but there is much that we can yet do. If we continue strengthening the links both within and without and if we continue steadfastly on this path of legal convergence and harmonisation, I have every confidence that we will live up to the theme of this Conference, which is to unlock the manifold opportunities in ASEAN through the "Power of One".

18 By any measure, this has been an immensely successful week for the cause of the ASEAN legal community. I am deeply grateful to the organising committee led by my colleagues, Justice Lee Seiu Kin and Justice Aedit Abdullah; the academic committee led by Mr Charles Lim; the speakers, moderators, chairs and sponsors; the tremendous team of lawyers, staff and colleagues who have worked so very hard to make this a very successful week; and each and every one of you who have participated and so have made this all possible. From the bottom of my heart, I thank you all.

19 But as successful as the week has been, I am delighted to say that the absolute highlight of the week, the inimitable and incomparable ALA Gala Dinner, lies before us. This special and unique evening of good drinks, company and entertainment is about to commence, but before that, there is a group of persons that we must not forget. As the organising committee grappled with the immense challenge of organising all these events, there was always one thing which they knew they would not have to worry about. Having decided to hold the event at the Raffles City Convention Centre, they knew that matters would be impeccably run, and their faith has been amply repaid. I am sure that you would agree with me that the facilities have been excellent, and the service has been outstanding. The management and staff have been unfailingly accommodating and helpful; and the staff have toiled unceasingly and uncomplainingly to attend to our every need. Would you all join me now in giving a warm round of applause to the management and staff of the Raffles City Convention Centre for their incredible work – please! All that remains is for me to invite you now to sit back and enjoy the night! Thank you very much!

CHAPTER II

Plenary and Parallel Sessions

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ASEAN LAW, THE ASEAN WAY AND THE ROLE OF DOMESTIC COURTS

Prof J H H Weiler
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A. LAW AND COURTS

1 The giving of the Ten Commandments, as an historical reality or as a founding myth, is considered a momentous occasion in the history of law, the importance of which transcends the cultures which are part of the Abrahamic religions – Christianity, Islam and Judaism. Little noticed, however, is the singular fact that before Moses ascends Mount Sinai to receive the Law he has an encounter with his father-in-law, the Midianite priest Jethro. Jethro, an icon of wisdom, advises and then instructs Moses that it is essential that a system of courts (not just one court!) be put in place, a system resembling that which we find till this day in practically all civilizations – lower courts, intermediate courts and supreme courts. Grant me the singularity of this sequence of events: courts and judges are to be put in place even before the Law is given.

2 Singular but neither surprising nor shocking. For what is law if there are no courts to interpret it, apply it, enforce it? What are legal obligations if there are no remedies in case these obligations are breached? There are some extreme manifestations of this, ontological, relationship between law and courts. In the common law countries, at law faculties, students essentially learn the law through a study of judicial decisions, leading students to an overly court-centric view of the law. The teaching of law in civil law countries adopts a more balanced approach putting the norms themselves, constitutions, legislation, administrative law at the core of the curriculum, but even there, courts are not epiphenomenal but central to the overall understanding of law and the legal system, an indispensable component.

3 Thus, thousands of contracts, whether simple (any purchase of a car for that matter, a loaf of bread or a bowl of rice) or complex (mega mergers of multinationals), are made day in and day out. Most are executed faithfully. Only a tiny fraction of these will ever end up in court. But it is the existence of courts, always there, promising and menacing at the same

time, which accounts for this record of faithful compliance. I would go as far as saying, given the human condition, and aware that not all legal philosophers will agree but confident that all practicing lawyers and judges will, that to imagine law without courts is to imagine something other than law.

B. ASEAN LAW AND THE EXCLUSION OF THE JUDICIAL BRANCH

4 Let me now challenge and shock you. I am addressing a gathering of the ASEAN Law Association. We have here lawyers and judges from all ASEAN countries. How many of you can put your hand on your heart and claim to be experts in ASEAN law in the same way and with the same confidence that you would say that you are experts in, say, corporate law, commercial law, criminal law, constitutional law or even international law? Am I wrong in suggesting that very few of you would profess such expertise? Having conducted a major research project with participation of experts from all ASEAN countries over the last six years, I can say that this is true even of many public officials whose portfolio includes the implementation and application of ASEAN law. I would respectfully suggest that a better appellation of the gathering should be the Association of Lawyers from ASEAN Member States.

5 If we reflect for just a short while, this should neither embarrass nor surprise us. And this for the simple fact that ASEAN law, as it has been conceived and perceived to this very day, is a law which has by design and by default excluded from its reach, with very, very few exceptions, any contact with the courts in the ASEAN countries, the very courts where the business of law takes place, the very courts which make the "law" of our countries real law.

6 Why should a practicing lawyer ever busy himself or herself with ASEAN law if no case having a breach of ASEAN law as cause of action will ever reach his or her desk? How would a judge develop an expertise in ASEAN law if no case pleading ASEAN law as a cause of action, civil, commercial or administrative, ever reaches his or her courtroom?

7 Now, I will grant you that in order to capture your attention I might have overstated the case, somewhat. But you grant me that what I have just

stated is largely true and that any disagreement regarding the factual veracity of what I have argued is on the margins.

8 I want to mention what could be the most serious challenge to the reality I described. One might argue that since in important ways ASEAN has changed the conditions for doing business, trading and investing, surely ASEAN law will inform the decisions of enterprises and their legal advisers. Yes, ASEAN law has changed the framework for doing business to the benefit of all ASEAN citizens. But, I would argue, both enterprises and their legal advisers do not look to ASEAN law itself. They look to the national law which implements, when it does, ASEAN obligations. In the reality of business planning and legal advice, ASEAN law is present only as refracted through its implementation, not infrequently absent or faulty, by national law. And, again, this is understandable and natural given that ASEAN law as such will never, the legal adviser tells the enterprise, provide an enforceable remedy through the courts. At best a polite letter to the administration involved will be sent; and from the little data we have, this last recourse is rarely effective.

C. ASEAN LAW AND THE ASEAN WAY

9 Why is this so? Why have courts played no appreciable role in the interpretation and enforcement of ASEAN law?

10 There are several reasons. The first is generic and not ASEAN related. Since ASEAN law is rooted in international treaties and agreements, it is a reflection in many systems of the weak position of international law within the domestic legal orders.

11 The second reason is the fact that in creating obligations through a myriad of decisions and agreements there is not infrequently a certain confusion and even neglect in clarifying the precise legal nature of the commitments taken therein. Are they aspirational or legally binding commitments? This creates a penumbra of uncertainty over the "hardness" of ASEAN obligations.

12 But, I think, the third reason is the most important. "Going to court is not the ASEAN Way" one all too often hears. There are as many versions as to what exactly the ASEAN Way is, as there are people you ask. But there seems to be a tacit consensus around the following propositions which I shall paraphrase as follows:

(a) In ASEAN we work by consensus. We move ahead when we find unanimous consent among our Members.

(b) We in ASEAN do not solve our disputes by going to courts. We resolve disputes by negotiations which finally lead to amicable solutions.

(c) The cardinal sin, according to the ASEAN Way is to shame a State in public. Honor plays a very important part in ASEAN interstate relations.

13 Judicial decisions result in winners and losers. And that is precisely what the ASEAN Way is not about. So, even the idea of a role for courts in the universe of ASEAN is frowned upon and thus *de facto* excluded. ASEAN has interstate procedures for dispute settlement but these procedures are distinguished by the great reluctance to put them into use, for the very same reason.

D. RECONSIDERING THE ROLE OF COURTS AND THE ASEAN WAY

14 What I am about to suggest now might not be what you expect. I am not going to challenge the ASEAN Way. I think there is much wisdom in it and in many ways it has served ASEAN well. And I am certainly not going to argue for a wholesale juridification of ASEAN not only because such would be politically laughable but mostly because I do not think that deep juridification would work well in ASEAN, and serve ASEAN well. Instead I want to outline a discrete role for national courts which in my view is not only consistent with the ASEAN Way but can even enhance it.

1. The Infractions

15 The infractions in relation to which I see a role for national courts are not of high political significance or visibility. When those occur, should those occur, they should be dealt with politically or, rarely, by the ASEAN dispute settlement mechanisms. But the truth is that those high visibility infractions are not only rare but they do not constitute the real challenge to ASEAN. The infractions I have in mind are the ones that take place below the political radar. Those are not the result of conscious governmental decision (say at Cabinet or Ministerial level) to deny or postpone the

implementation of an ASEAN commitment but are the result of administrative inertia, administrative ignorance of ASEAN commitments and/or administrative error. A misclassification of a good, a misapplication of the highly technical rules of origin, a defective procedure for licensing not following ASEAN rules put in place to facilitate doing business are examples of the infractions I have in mind. They are ubiquitous. They may also be the result of special interest capture, protectionism in disguise, which may help a certain sector but harm all citizens in this or that ASEAN country.

16 If you were to consult the experts, they would tell you that infraction at this infra-political level is both widespread and harmful not to some abstract "rule of law" principle but the very interest of the citizens in the country in which they take place, denying these citizens some of the benefits ASEAN is designed to produce. This is a case where, indeed, the devil is in the detail. These are not the types of infractions which normally would be on the radar of our leaders when they meet in Ministerial meetings, and if they were to be raised at that level, it would violate the spirit of the ASEAN Way since a minor technical administrative breach would suddenly be elevated to a political issue inviting contention, national prestige and the like. It is also not practical since the sheer number of such would just be throwing sand into the system – our Ministers and top civil servants have better things to do than deal with such.

2. Tackling This Category of Infraction – The Role of Domestic Courts

17 It is, thus, consistent with the ASEAN Way that such issues not be "internationalized", that they remain local and be dealt with within the system where the infraction takes place. Here is one of the paradoxes of law and courts. International tribunals politicize and dramatize issues: for one State to take another State "to court" is a dramatic move, in some respects even hostile. Very alien to the ASEAN Way. To resolve an ASEAN infraction by a State, whether a result of non-implementation or erroneous application, by that State's own courts, de-politicizes the issue, de-dramatizes it, makes it part of the normal administration of justice on par with a challenge by a citizen to an allegedly wrongful tax assessment, or refusal to grant a license and the like.

18 Giving a role to national courts has two further great advantages.

19 First, it is the most effective way to give teeth to ASEAN commitments. ASEAN commitments, as mentioned above, are adopted by consensus, by unanimous agreement, an article of faith of the ASEAN Way. In reaching such consensual agreement, States negotiate, they bargain, there is give and take. ASEAN agreements, in the economic arena, are often complex package deals where States in a spirit of mutual cooperation make concessions to each other. Subsequent failure to implement or faithfully comply and execute, damages the consensus-based system. What kind of consensus is it if States solemnly agree, after hard negotiations, and then this or that State fails to honor the consensus in the implementation phases? This is not least the case whether that uneven implementation and application is, as I emphasized, not a result of a deliberate government decision, but a result of the vagaries of administration, ubiquitous North and South, East and West? Administrations, after all, regularly slip in the implementation of decisions of national parliaments and governments. And what better way to ensure compliance than the national judiciary? The compliance pull of local national courts is, paradoxically, often times greater than that of fancy international tribunals. Most of the time, most governments obey most of the decisions of their local courts.

20 Second, ASEAN law suffers from a challenge common to the law of all regional trade agreements of which, in today's world, there are more than 400 – the challenge of monitoring. These agreements are hugely detailed and the infractions take place at the micro-level: a wrongful application by a customs official, a failure to amend arcane administrative law by some parliamentary committee, *etc*. We cannot put a "compliance officer" at every post where ASEAN law is to be implemented. But we can turn individual stakeholders into "private compliance officers" by giving them – and their legal advisers – legal redress in case they are faced with an infraction. And the only way we can do that is by empowering the national judiciary to become, in these discrete areas, the ASEAN judiciary.

E. EMPOWERING NATIONAL COURTS – THE LEGAL TECHNIQUES

21 Being a pragmatist, I am not about to propose some constitutional revolution – giving, say, ASEAN constitutional status in its Member States or anything like that. I am proposing, instead, harnessing existing legal principles and processes to serve ASEAN law. In some countries, even in

ASEAN, treaties have already the status of law and can be pleaded directly before national courts. But what of all the rest?

22 I want to make three proposals – conservative, moderate and the last somewhat more radical. But even if the radical proposal is not likely to be adopted, embracing the first two will represent a veritable and meaningful change.

1. The *Charming Betsy* doctrine

23 The *Charming Betsy* is a timehonored principle of interpretation enunciated by Chief Justice Marshall of the United States Supreme Court back in 1804 and ubiquitously adopted in most legal systems. At its simplest, the doctrine provides that in interpreting national measures – parliamentary acts as well as administrative law – courts within the margin of interpretative discretion available to them will endeavor to interpret such so as to make them compatible and compliant with the international treaty obligations of the State. Let's imagine a national licensing procedure which an ASEAN rule is meant to simplify. Let's further imagine that an ASEAN Member State has failed to implement the ASEAN rule by rewriting the national procedure to offer the simpler form. An individual affected by the non-implementation could seize a domestic court challenging the complicated conditions imposed by the extant, unamended national procedure. This would be a standard action for judicial review of administrative action under domestic law, similar to an action if the administrator in question was misinterpreting a national provision. Under the *Charming Betsy* doctrine, the national court would look carefully at the national procedure and investigate whether it would be possible, without doing violence to its normal cannon of interpretation, to interpret it in a way which would be consistent with the ASEAN obligation. It could, for example, come to the conclusion, *under normal national standards*, that some of the language and conditions in the extant national procedure were superfluous to achieve the objectives of the regulation and thus fail a proportionality test, and in this way bring the national procedure into compliance with the ASEAN rule. No fuss, no compromising of "sovereignty", no political conflict, no big deal. Just doing justice and giving, indirectly, teeth to the ASEAN commitment and rule.

2. Judicial review of administrative action

24 Most of our legal systems recognize, in one way or another, some form of judicial review of administrative action. There are two fundamental tests which, under different guises, one finds in all jurisdictions where judicial review of administrative action is concerned – be it an administrative act or an action of a state official. The first is whether the administrator acted *ultra vires* – beyond the limits of authority granted to him or her. The second principle is whether the administrative act or action was such that no reasonable administrator could act in that manner in the execution of his or her duties. The courts do not turn themselves into administrators and insist on a measure which they think would be most or more reasonable. They leave the administration wide discretion. But some acts of the administration are such that the court will find that they are so unreasonable as to be struck down. It is, if you wish, a form of substantive *ultra vires*.

25 I want to remind you that I am talking of infractions, by omission or commission, which are not the result of deliberate government action consciously deciding, for political or other reasons, to negate their ASEAN commitments. We are dealing instead with infractions the result of inertia, ignorance, or error. At the core of my argument, at the core of this legal technique, is the proposition that for a civil servant, through commission or omission, to bring his or her State into violation of their international legal obligations thereby engaging their international legal responsibility would, *ipso facto* and *ipso jure*, be an unreasonable exercise of his or her legal authority. It would, arguably, fall foul of one or both of the substantive tests.

26 Note that to adopt this legal technique is hardly radical. It is simply to say that a court, in examining the reasonableness or otherwise of an administrative act, can add to the factors it takes into consideration also the question whether the act brings the State into violation of its ASEAN legal obligations.

27 Note too that, for example, should the Government, at trial, aver before the court that it was aware of the violation at the time the challenged act took place, or having been made aware of it now, still stands by its practice for political reasons which are within the province of the Government, the court could defer and not overturn the act, on the condition that such affirmation comes from the political level and not be

confined to the administrative level. In other words, the courts would not be in the business of thwarting the political discretion of the Executive Branch, but in the business of ensuring that bringing the State into violation of its international legal obligation was not the result of inadvertence, inertia or error.

28 Knowing the universe of ASEAN infractions, I am confident that, in most cases, the Government will say, to its own courts, "Oops, our mistake" and do the necessary correction. They might even do such before the case reaches a court. But they would never do such, or do such far more reluctantly or tardily, if there was no risk of finding themselves before one of their courts. In other words, I do not predict a floodgate of cases. The principal role of the national court would be deterrence.

3. Nudging incorporation

29 Non-implementation is one of the major afflictions of ASEAN – though as stated it is typically not a result of defiance but of busy legislative schedules, inertia and the like. Correctly implemented ASEAN law would, *ipso facto*, give a role to domestic courts since in this case they would be implementing and supervising the application of domestic law. My proposal is simple enough. For the appropriate instruments, the ASEAN decision or agreement should be drafted in a way that would facilitate its implementation by allowing the State to bring it into domestic law without the need for any further elaboration. The ASEAN measure would, as such, thus become domestic law enforceable before domestic courts.

30 I am further suggesting, and this might seem to some somewhat radical, that such measures would have a clause stating that if they are not implemented within a predetermined time (say 12–18 months), they would automatically become part of the law of the Member State in question unless its legislature specifically interdicted such. This is not in fact as radical as it seems. We are, after all, talking about consensus decision-making. The content of the measure must, by definition, be acceptable to everyone. And so must there be consensus that the measure should be part of domestic law. And there is also the safety valve that if an unforeseen problem arises, the Member State always has the last word and can block the automatic incorporation. So in the final analysis, the Member State retains its full sovereignty. But why should we object to automaticity if all it

does is to prevent non-implementation by inertia and not by the will of the sovereign State?

F. CONCLUSION

31 What I have suggested here is a discrete and modest role for domestic court in the implementation and application of ASEAN law within the Member States in a manner that is consistent with the ASEAN Way. I do not expect a flood of cases – it is the possibility of judicial enforcement which will provide an incentive to better implementation and application of ASEAN law. The suggestion may be modest and discrete but they could contribute very significantly to a better ASEAN.

PROMOTING LEGAL COOPERATION AND COMMERCIAL LAW CONFORMATION THROUGH LEGAL RECOGNITION BETWEEN CHINA AND ASEAN

Prof Fan Jian
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1 I would firstly like to thank all my fellow panellists for your valuable insights and thank you ASEAN Law Association ("ALA") again for inviting me to such a wonderful event. My name is Fan Jian and I am from Nanjing University of China. I'd like to take this opportunity to share with you some of my thoughts on how to achieve regional legal cooperation given the unique China–ASEAN context.

2 With efforts of more than 50 years, ASEAN has become an important force in the current economic structure of the world. "ASEAN Way" is gradually being recognized by all countries of the world, especially among developing countries. The establishment of the ASEAN Economic Community ("AEC") in 2015 marked the beginning of a new stage in the development of ASEAN's unified economy and trade; it is also conducive to the conformation of the commercial law institute. ASEAN is a close neighbor of China. In recent years, the economic and trade exchanges have reached an unprecedented scale between the two, contributing to a renewed phase of interdependence and market expansion. It is against such a background that the conformation and coordination between China's and ASEAN's commercial laws have evolved into a practical issue which requires our close examination.

A. ACHIEVEMENTS IN COMMERCIAL LAW COORDINATION BY THE ASEAN ECONOMIC COMMUNITY

3 Since the 1980s, for the purpose of market unification within the economic community, ASEAN has promoted the actions on cooperation and unification of commercial system within the community through multilateral agreements. And so far, a number of specialized multilateral agreements have already covered areas such as trade, services, investment, logistics, cross-border licensing and regional integration. Meanwhile, integrating plans have been made for fields like currency, finance and

intellectual property. More recently, ASEAN has focused its effort on legal cooperation at national levels. In the Asian Conference of Commercial Law Integration in January 2016, His Honor Mr Sundaresh Menon, Chief Justice of the Singapore Supreme Court, promoted the idea of integrating the commercial laws among Asian countries. Moreover, research institutions, led by the ALA and Asian Commercial Law Institute, are committed to seeking a pathway for the coordination and unification of commercial law systems within ASEAN countries. These excellent efforts marked the achievements in commercial law cooperation in the AEC.

B. HISTORY OF CONFORMATION OF COMMERCIAL LAW

4 In the past 50 years, the process of globalization and regional integration greatly impacted the development of international laws, regional laws and domestic laws. Recently, while worldwide trade barriers are being raised and trade protectionism emerging, regional economic integration is still in a booming state. Encouraged by numerous achievements of law coordination from regional economic organizations such as the European Union ("EU") and Organization for the Harmonization of Business Law in Africa ("OHADA"), regional economic integration and commercial law conformation has become the new hot topic in place of globalization. EU and OHADA undertook a mode of spontaneous regional conformation in respect of commercial law which is rooted in the equality of sovereignty within regional community. Their frameworks, therefore, provide value reference for the AEC.

5 At present, the coordination and conformation of international commercial law mainly occurs in two ways. One is driven by the global treaties or model laws made by international organizations, and the other is led by the community laws made by regional organizations. Although scope-wise, international conformation appears to have a broader impact, yet in practice, regional conformation yields better results due to its flexible organizational model. Regional law conformation has become an essential trend for the development of the commercial law in our world today in the context of regional economic integration.

C. INITIATIVE FOR REGIONAL CONFORMATION OF COMMERCIAL LAW: FROM LAW RECOGNITION TO COMMERCIAL LAW CONFORMATION

6 This year marks the 27th anniversary for the establishment of dialogue between China and ASEAN. With a working relationship of more than 20 years, China and ASEAN have developed mechanisms of cooperation in regional economy, politics and culture. ASEAN has always been highly regarded by China in terms of foreign cooperation and exchanges. Along with China's "one belt one road" initiative and Asia's economic integration, regional trade and economic cooperation between China and ASEAN will step up to a new level. At the same time, disputes in trade and investment caused by the difference in legal systems, especially in commercial law systems, are mounting. Resolving inter-regional law conflicts between China and ASEAN merely by applicable laws fails to meet the demands of modern dispute resolution on the requirements of expedience and consistency. Therefore, how to settle commercial disputes promptly via a model devised from commercial law conformation should become a key point of discussion in the inter-regional law cooperation between China and ASEAN.

7 Early commercial law conformation was mainly pushed by the colonial powers of western countries. This forced conformation model has the advantage of speedy adoption of laws by the recipient countries, but almost always destroys and reconstructs the legal traditions and origins of the developing countries. The intrinsic limitation of this model is that the recipient country would have difficulty reconciling its laws with the initiating country and the neighbor countries; and there would lack the necessary mutual trust between these countries in regard to each other's legal systems, which eventually leads to an unstable relationship. China has realized from its long legal history that the native legal traditions and legal cultures of one country have profound effect on the formulation of its legal system. The forced model which neglects native legal traditions and sovereignty is no longer an option. Moreover, China and ASEAN countries have their differences in legal traditions, cultures and structures. Therefore, the concept of legal recognition would assist both China and ASEAN countries to reach commercial law conformation, hence better economic cooperation on the premise of mutual respect for each other's domestic laws and basic principles of international laws.

8 ASEAN is a diverse community with Members who share distinct national economic structures, development modes, industry scales, politics and religions. This reality determines that China and ASEAN should not just simply copy the EU or OHADA mode in the process of commercial law conformation, but should establish a unique mode of their own. Currently, within the ASEAN community, a single market structure without the central execution institute (similar to the EU Committee's role in EU) has been in contemplation. Furthermore, a dispute resolution mechanism is being introduced while a unified law system is still under construction. This mode is based on the non-intervention principle of domestic affairs which ASEAN holds for all its Members. This is the "ASEAN mode", as we normally call it, which is also described as the most fitting model for the regional cooperation between Southeast Asian countries. Similar to the ASEAN mode, China promoted for the first time the "Five Principles of Peaceful Coexistence" which includes the non-intervention of internal affairs, equality and mutual benefit early in 1953, and this principle had been kept as an important criterion in China's foreign affairs. Under the notion of cooperation, law recognition can help both China and ASEAN countries to erase prejudices in ideologies and political regimes, to fully respect, recognize and trust rational regulations and traditions in each other's legal systems, and at the same time, seek consensus in the national laws and realize the conformation of regional commercial law eventually by seeking common ground, reserving differences as well as nurturing mutual trust in regard to one another's legal systems.

D. EFFORTS IN THE DEVELOPMENT: CHINA'S SELF-RECOGNITION OF COMMERCIAL LAW

9 Ever since China envisioned the founding of a socialist market economy, it has been striving to build a commercial law discipline that is compatible with the market mode. Up until now, China has promulgated a large number of commercial laws and regulations involving companies, enterprises, securities, finance, trusts, funds, insurance, commercial bills, electronic commerce and bankruptcy, and has hence built a complete set of commercial legal system. In recent years, China is actively engaged in the codification of a civil code. At the same time, Chinese jurists are also promoting the formulation of "General Principles of Commercial Law," under the ambit of which research on drafting of "commercial codes" are

also underway, all in response to the needs of a rapidly developing market economy. For the judiciary, courts have been taking note of the unique characteristics of commercial case judgments and promoting the development of international commercial arbitration. This year alone, three international commercial courts were created in Beijing, Xi'an and Shenzhen. The Supreme People's Court also attaches great importance to the cooperation of commercial law with the ASEAN community, pushing mutual recognition and enforcement of civil and commercial judgments between China and ASEAN countries.

E. CONCLUSION

10 Conformation of commercial law between China and ASEAN through legal recognition will provide more stable, relatable and predictable commercial law rules in the legislative field. At the same time, it will promote better construction of a regional commercial dispute settlement mechanism and cross-border enforcement mechanism in the judicial field. This series of coordination and unification efforts will provide important institutional support for the cultivation of China–ASEAN Regional Comprehensive Economic Partnership, serve as a model for the grand blueprint of East Asian Economic Community, and enrich the experiences of regional cooperation worldwide by providing the China–ASEAN perspective.

RAPPORTEUR REPORT FOR PLENARY SESSION I

A New Phase (and Face) of Law: Opportunities and Challenges in the ASEAN Economic Community*

A. SUMMARY OF SPEECHES

1. Justice Chao Hick Tin (Senior Judge, Supreme Court of Singapore)

1 In any civilised society, there needs to be law and enforcement. This is where the courts come into the picture. The ASEAN Economic Community ("AEC") and AEC Blueprint sets in motion a ten-year plan. By 2025, it is hoped that ASEAN will be an integrated and cohesive bloc working towards the vision of shared prosperity.

2. Prof J H H Weiler (Professor of Law, New York University and the National University of Singapore)

2 ASEAN has well over 200 instruments, yet we rarely hear people speak of ASEAN law in a tangible way. Is ASEAN law truly law if it were merely viewed as a collection of soft obligations? Prof Weiler issues a challenge – to rethink the role of ASEAN law in domestic courts. But if ASEAN law is to be applied in any shape or form, how can this be done, considering that the "ASEAN Way" prefers negotiations over litigation?

3 Domestic courts have a role to play in correcting mistakes made in the exercise of administrative decisions. These mistakes, or "micro infractions", arise because an administrator is either unaware of an ASEAN obligation bearing on his decision or has misunderstood the relevant laws. Two orthodox techniques are proposed. First, ASEAN law

* The 13th ASEAN Law Association General Assembly and The ASEAN Law Conference, with the theme "The Power of ONE: Unlocking Opportunities in ASEAN Through Law", was held on 25 to 28 July 2018. This session was held on 26 July 2018, 1.30pm to 3.00pm.

may be relevant to a domestic court when a question of interpretation is involved, by applying what the US courts call the *Charming Betsy* principle of interpretation (*ie*, that courts should prefer an interpretation that is consistent with a State's international legal obligation over an interpretation that does not). Second, an aggrieved private individual may have a cause of action in judicial review. A common test in both civil and common law is that an administrative decision is to be set aside if the court thinks that no reasonable administrator would have come to that conclusion. The relevant ASEAN obligation features as a factor to consider in deciding if the decision were reasonable.

3. Prof Fan Jian (Professor of Commercial Laws and Doctoral Supervisor, University of Nanjing Law School)

4 The AEC has made strides in developing cooperation among Member States on various fronts. Much has also been done regarding the harmonisation of commercial law within ASEAN. Going forward, ASEAN should look to developing legal frameworks in tandem with China. Harmonisation of commercial law between China and ASEAN would have a positive impact on the economies of the States concerned and serve as a backbone for wider regional cooperation.

4. Prof Hikmahanto Juwana (Independent Commissioner, Unilever Indonesia)

5 Realistically, domestic courts in ASEAN cannot play the role that Prof Weiler is advocating. First, while ASEAN law is in place, they have not been given effect to and incorporated into domestic law. Unless and until ASEAN law has been incorporated into domestic law, it cannot be applied by domestic courts. Second, most ASEAN countries are still struggling to integrate ASEAN law into their domestic legal systems. Many ASEAN countries are still in the process of harmonising their domestic laws by subscribing to international agreements or adopting model laws.

5. Luca Castellani (Secretary, UNCITRAL Working Group IV (Electronic Commerce), UNCITRAL Secretariat)

6 ASEAN should be praised for not adopting a separate subset of legislation when adopting UNCITRAL texts. ASEAN has achieved uniform adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("the New York Convention"). However, the challenge remains that there is no absolute uniformity in the interpretation of the New York Convention across the states parties.

7 Matters are trickier with model laws, as there is not only a problem of uniform interpretation but also one of uniform enactment. The adoption process of model laws has been slow. This may be because of competing legislative priorities. This issue may need more visibility and better coordination of existing resources.

6. Minn Naing Oo (Managing Partner, Allen & Gledhill (Myanmar) Co Ltd)

8 Prof Weiler's ideas should be welcomed and relate to real concerns felt by business people on the ground in ASEAN Member States. It also accords with the ASEAN Way of not shaming other States or taking them to court. From a business perspective, there is a reluctance to use investor-state dispute settlement mechanisms in ASEAN because these businesses often feel that the host State is their neighbourhood and a place that they will always be in. Bringing domestic courts into the equation would help in achieving greater uniformity among ASEAN Member States in enforcing treaty obligations and would also be in line with the commercial aspirations of ASEAN Member States. Myanmar has entered into a new phase since 2011 and there are tremendous opportunities for these new ideas to be implemented and tried out.

9 Resources should be put into training judges and lawyers and familiarising them with ASEAN law.

B. COMMENTS/QUESTIONS FROM PARTICIPANTS AND RESPONSES FROM PANELLISTS

S/No	Questions and responses
1	**Chief Justice Sundaresh Menon (Chief Justice, Supreme Court of Singapore)**: Prof Weiler's suggestion addresses problems faced daily by business people on the ground. It is important to situate this thesis in its proper place: it does not concern State-to-State disputes, intentional enactment of legislation which breach a treaty, situations where domestic courts enforce treaty obligations in the way that they do in investor-State arbitration, or the enforcement of ASEAN agreements between two private parties. Prof Weiler's point is that when a mistake is made in the implementation of an ASEAN policy, business people should be able to go to the court. If the ASEAN policy amounts to an express statement of policy by a State, its domestic courts should give effect to that. **Prof J H H Weiler**: Lawyers should be encouraged to go to the courts and ask for relief. Nobody knows what will happen until someone asks.
2	**Justice Chao Hick Tin**: An international agreement does not form part of the domestic law of an ASEAN Member State. How do you translate that agreement into domestic law? **Prof J H H Weiler**: This is not an issue unique to ASEAN. The relevant cause of action in such a case is that the State's administrators must act reasonably. No court in an ASEAN Member State has said that there are difficulties with interpreting domestic law in line with international obligations. This is just about giving to the Member State's own citizens the benefits which ASEAN is meant to give. There is nothing radical about this; it just has to be tried out. **Prof Hikmahanto Juwana**: If businesses cannot resolve the dispute, it is unclear whether they should then seek recourse under the ASEAN enhanced dispute settlement mechanism, in the home State domestic courts, or in the host State domestic courts.
3	**Jeffrey Chan SC (Former Principal Senior Consultant, Attorney-General's Chambers of Singapore)**: Should all ASEAN treaties be enforced in domestic courts, or only the treaties accepted by that ASEAN Member State? The Australian government did not accept the proposition stated by the High Court of Australia that the ratification of a treaty creates a legitimate expectation that the treaty will be enforced. Ratification of a treaty by a government does not create the basis for recognising any legal rights.

	Prof J H H Weiler: My thesis is a minimalist first step. I am only saying that where there are two possible interpretations, the interpretation in compliance with ASEAN obligations ought to be preferred. This should apply to agreements that ASEAN Member States accept as legally binding.
4	**Krit Kraichitti (Former Director General, Department of Trade of Thailand)**: Article 26 of the Vienna Convention on the Law of Treaties provides for the principle of *pacta sunt servanda*. The best means for harmonisation of ASEAN Member States' legal systems is to comply with the terms of the treaties and adjust their domestic laws accordingly.

Ashley Ong and Daniel Ho
Rapporteurs
26 July 2018

FAIR, EFFECTIVE AND EFFICIENT DISPUTE RESOLUTION TO FACILITATE THE SUCCESS OF THE ASEAN ECONOMIC COMMUNITY*

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A. PART 1: INTRODUCTION TO CURRENT ASEAN DISPUTE SETTLEMENT MECHANISMS ("DSMS")

1. The ASEAN Declaration 1967

- ASEAN was established on 8 August 1967 with the signing of the ASEAN Declaration
- The declaration has only five articles aimed at promoting:
  - accelerated economic growth, social progress, and culture;
  - regional peace and stability in Southeast Asia;
  - collaboration on common interest matter;
  - assistance to members in training/research;
  - improvement in agriculture, industries, trade, transportation, communications and living standards;
  - Southeast Asian studies; and
  - closer cooperation with international and regional bodies with similar aims, exploring all avenues for closer cooperation.

2. Treaty of Amity and Cooperation 1976

- ASEAN held its first summit meeting in Bali in 1976
- The Treaty of Amity and Cooperation has six principles:
  - mutual respect, independence, sovereignty, equality, territorial integrity and national identity of all nations;

* This is an adaptation of the presentation slides used at The ASEAN Law Conference.

- right of every State to lead its national existence free from external interference, subversion or coercion;
- non-interference in internal affairs of one another;
- settlement of disputes in a peaceful manner;
- renunciation of threat or use of force; and
- effective cooperation among the States themselves

3. Singapore Declaration – The Framework Agreement on Enhancing ASEAN Economic Cooperation [AFTA Agreement 1992]

– On 28 January 1992, the AFTA agreement was signed in Singapore
– The objective was to increase ASEAN's competitive advantage as a production base for the world market
– It required liberalisation of trade through elimination of tariffs and non-tariff barriers among ASEAN Members
– The permanent secretariat (Jakarta) is headed by a secretary general
– The position rotates every five years. After AFTA Agreement 1992 concluded, ministerial rank was accorded to the office
– The occupant is designated as "the Secretary-General of ASEAN"

4. The ASEAN Charter 2007 (20 November 2007)

– It was the new legal identity and constitution of ASEAN
– The Charter turned ASEAN into a rule-based organisation
– The ASEAN Community would consist of three pillars:

  - ASEAN Political-Security Community ("APSC");
  - ASEAN Economic Community ("AEC"); and
  - ASEAN Socio-Cultural Community ("ASCC").

– The aim was to establish ASEAN Community by 2020
– AEC was to be a single market/production base of the region

5. An earlier 2004 ASEAN Enhanced DSM ("EDSM")

- An earlier 2004 ASEAN Protocol on EDSM
- Article 4(1) of EDSM 2004 permits Member States at any time to engage in conciliation or mediation
- EDSM was a time-bound mechanism to resolve economic disputes under ASEAN regime
- Central pillar of EDSM is a mandatory panel and appellate panel procedure, *if* mediation fails to resolve the controversy. EDSM has never been used
- EDSM is not practical as Art 1(3) states as follows:

> The provisions of this protocol are without prejudice to the rights of the member states to seek recourse to other fora for the settlement of disputes involving other member states. A member state involved in dispute settlement can resort to other fora at any stage before a party has made a request to the SEOM to establish a panel pursuant to paragraph 1 Article 5 of this protocol.

- This non-exclusive jurisdiction allowed members to use other fora to resolve disputes until a request for the setup of a panel is made to the SEOM (Senior Economic Officials Meeting)
- There was confusion on choice of forum for dispute settlement
- ASEAN countries brought trade and other disputes against each other in forums like the International Court of Justice and World Trade Organization
- A new DSM had to be developed to break impasse

6. The ASEAN Charter 2007 (20 November 2007)

- The Charter conferred legal personality on ASEAN
- It established the ASEAN Commission on Human Rights
- Ten Member States ratified the Charter (in force – December 2008)
- It increased frequency of ASEAN summit meetings
- AEC is to create a stable, prosperous and highly competitive economic region. Free flow of goods, services and investment. Freer flow of capital by 2020
- There was no formal institutionalised DSM until the Charter. Member States had adopted peaceful consensus to settle disputes

- AEC came into being on 31 December 2015
- The Charter required new appropriate DSMs to resolve disputes concerning interpretation of the Charter
- Section 25 of the Charter states as follows:

> 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.

- The protocol on DSM (9 April 2010) signed in Hanoi by the ten ASEAN leaders completed this commitment

7. 2010 Protocol DSM

- The 2010 Protocol now automatically applies to disputes concerning interpretation or application of the ASEAN Charter and ASEAN instruments that expressly provide that the 2010 Protocol is to apply
- Protocol will also apply to other ASEAN instruments unless other means of settling such disputes have already been provided for to those instruments
- Article 5 of the Protocol dictates that a complaining party is first asked to file a request for consultations
- Article 6(1) allows disputing parties to use mediation or conciliation if they are likely to help
- Complainant must first file request for consultations
- If there is no response from other party within 30 days from request for consultation, or consultation fails to settle dispute within 90 days, Art 8(1) of Protocol applies
- Complainant may then send written notice to other party a request to set up an arbitral tribunal
- Follow Protocol terms and Arbitration Rules annexed to Protocol

8. Annex 4 to 2010 Protocol to DSM (Arbitration Rules)

- Article 15(1): Award of arbitral tribunal is final and binding on the parties and must be fully complied with

- *Problem*: What if arbitrator bias, fraud or bribery of arbitrator is discovered after the award is issued?
- Rules of arbitration contained in Annex 4 of 2010 Protocol
- Rule 8(1) Annex 4 states as follows:

> The arbitral tribunal shall apply the procedures provided for in these Rules. The arbitral tribunal may adopt additional procedures which do not conflict with this Protocol or these Rules.

- Rule 12(1) Annex 4 states as follows:

> Unless the Parties to the dispute agree otherwise, the place of arbitration shall be the ASEAN Secretariat, Jakarta, the Republic of Indonesia.

- It is clear that the physical venue is ASEAN Secretariat
- *But* does it mean Indonesia is the seat of arbitration?
- If so, does "Law No 30 of 1999 Arbitration and Alternative Dispute Resolutions" apply to ASEAN arbitrations?
- Law No 30 of 1999 Arbitration and Alternative Dispute Resolutions is *not* based on United Nations Commission on International Trade Law ("UNCITRAL") Model Law
- Rule 16(3) Annex 4 states as follows:

> In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in its final award.

- Question: Is the award enforceable if there is no real jurisdiction?

9. Current ASEAN DSMs are limited in scope

- ASEAN Charter was meant to create legal framework for ASEAN as a rules-based organisation like the WTO
- DSMs under ASEAN instruments are limited in scope
- They do not allow personal individuals and non-ASEAN States to arbitrate against each other
- Majority of arbitrations involve non-State actors
- ASEAN needs to cater towards non-government party and improve collective due process and shared jurisprudence
- Why was not a single case brought up to ASEAN DSM?

- Good offices, mediation, inquiry and conciliation essentially are non-legal modes of DSM
- Non-binding DSM needs political negotiations
- Rule 14 of the Treaty of Amity and Cooperation in Southeast Asia Procedural Rules states that non-ASEAN Members may appear as observers at meetings of High Council
- If unfair or too political, non-ASEAN States can give their opinion at meetings under the Treaty of Amity and Cooperation in Southeast Asia DSM

B. PART 2: PROPOSAL FOR ASEAN CENTRE OF ARBITRATION (ASEAN RULES)

1. Timely to update ASEAN DSM? Current ASEAN DSMs are limited in scope

- DSM Protocol provides for consultations within a fixed time frame. Failing which, complainant may request appointment of an arbitral tribunal
- If respondent does not agree to appointment of arbitral tribunal, matter will be referred to the ASEAN Coordinating Council (foreign ministers of ASEAN)
- ASEAN Coordinating Council can direct parties to settle the dispute by good offices, conciliation, mediation or arbitration

2. Complex legal issues involved in cross-border transactions

- How can they resolve their legal disputes efficiently?
- There are complex legal issues involving cross-border laws
- There is a diversity of ASEAN countries and legal systems
- Are there increased prospects of legal systems colliding?
- State-owned enterprises should resolve legal disputes with other ASEAN in a cost-efficient and fair manner
- Are there "international standards" of laws?
- Joint-venture partners from different countries prefer a neutral DSM
- Neutral, non-politicised independent tribunal
- Quality of the decision-making process

- Career judges *versus* experienced arbitrators
- Possibility of preserving relationships
- Speed of the arbitral process
- Reduced overall costs in arbitration (no appeals)
- Confidentiality and avoidance of negative publicity

3. Challenges faced by ASEAN parties to arbitrate disputes

- Different legal systems and commercial norms
- Different mandatory laws of seat or venue
- Different cultures and different legal cultures
- Different languages
- Different arbitral institutions and rules of arbitration
- Different styles and culture of arbitration
- Different treatment – enforcement of arbitral awards

4. 1958 New York Convention

- 1958 New York Convention adopted by 157 countries
- UNCITRAL Model Law in many countries
- Arbitration laws of Indonesia, Vietnam
- Desirable to have an ASEAN Arbitration Centre
- Enforcement of court judgments – bilateral treaties limited in comparison to New York Convention (159 countries)

5. Arbitration is effective way to resolve intra-ASEAN disputes

- All ASEAN countries are members of 1958 New York Convention
- Arbitration is the fastest and most logical path
- Arbitration is already a designated DSM for ASEAN
- It is a neutral and fair way to resolve cross-border disputes
- International Council for Commercial Arbitration ("ICCA") and International Chamber of Commerce ("ICC") have the best practices to guide State court judges
- Reduced scope of "public policy" – Art V(2)(*b*) of New York Convention
- Widened scope of arbitrability – Art V(2)(*b*) of New York Convention

6. Proposal for ASEAN Arbitration Centre and Rules

- Hard for parties/insurers to assess legal risk
- Cost of doing business increases and passed on. Both ASEAN countries want to protect their respective nationals, companies, *etc*
- May want special rules built into the existing 2010 UNCITRAL Rules to deal with specific industries (*eg*, protection of intellectual property secrets, information technology and life sciences, *etc*)
- How to set up confidentiality clubs, *etc*
- May need to add separate rules for State-to-State contracts or where State-owned enterprises are involved
- Good opportunity to deal with both investment and commercial arbitration at same time by way of treaty
- New York Convention more appropriate for commercial activities
- Legal and commercial certainty for there to be a permanent seat of arbitration for AEC activities

7. Timely to update ASEAN DSM?

- 2004 DSM and Protocol to ASEAN Charter cannot cover disputes between non-government and non-government contracting parties
- Desirable for ASEAN to have a "neutral" permanent seat for non-government to government/non-government and non-government *versus* government
- This will lower the costs of doing business
- Will also accelerate ASEAN Arbitration Centre/Rules
- New York Convention would apply. Easier for ASEAN to have joint control over ASEAN Centre. Much harder to agree permanent seat of arbitration in one city/country

C. PART 3: PROPOSED ASEAN ARBITRATION CENTRE AND RULES: PROPOSED RULES AND SOFT LAW FOR PROPOSED ASEAN ARBITRATION CENTRE

1. Conflict of laws vital to lawyers in intra-ASEAN disputes

- It is impossible to prevent disputes in domestic projects. More so in cross-border ASEAN transactions
- Parties may agree on the United Nations Convention on Contracts for the International Sale of Goods ("CISG") as the law to define sales of goods obligations where parties are in different countries
- *But* cross-border transactions are complex and multi-jurisdictional. There are other contractual obligations and laws
- Conflict of laws: important role to deal with same facts. Different laws are applied in different countries

2. Different countries at different stages of development

- Cross-border transactions involve many layers of domestic regulations for financing and contracts
- Different ASEAN countries are at different stages of development. Same goes for the court legal systems
- When deciding applicable law, courts apply different judicial principles for resolving conflict of law issues
- It is desirable for ASEAN parties to have a permanent ASEAN Centre to deal with complex disputes

3. Too long to harmonise ASEAN legal systems

- ASEAN countries may try to adopt similar multilateral treaties and conventions such as CISG. *But* it only applies to sale of goods but not other complex legal disputes
- It will take too long to harmonise ten different legal systems, political systems and cultures
- It can adopt Singapore law as legal *lingua franca*, like how English law is used as governing law in contracts

– It is much more difficult to agree on the permanent seat of arbitration

4. Neutral seat outside ASEAN to resolve disputes?

– It is natural that each ASEAN party prefers disputes to be resolved in accordance with its own laws in its own country
– Parties would have unfair advantage in litigating before State judges employed by the same State
– In international arbitration disputes, it is usual practice for contracting parties to agree on choice of a neutral seat of arbitration
– In intra-ASEAN context, a neutral seat should ideally not be in any city in ASEAN. Neutral judiciary is needed. All parties are entitled to expect a truly neutral forum as a place for settling legal disputes
– If there is no permanent seat, there would be different contracts stipulating different arbitration seats and arbitration rules. This increases overall costs
– Even if a party obtains a favourable court judgment from an ASEAN court, most ASEAN courts do not enforce each other's judgments
– Reciprocal Enforcement of Foreign Judgments Acts are limited
– Simultaneously, work on the Hague Convention on Choice of Court Agreements ("HCCCA") but HCCCA may take too long. Nine other ASEAN Members have to sign up to the Hague Convention and then ratify and implement the same
– Singapore is the only ASEAN Member to have signed up to HCCCA

5. Desirability for permanent ASEAN Arbitration Centre

– Perhaps more ASEAN States could eventually adopt HCCCA but when will this happen?
– ASEAN should consider a new multilateral treaty – provide for DSM to be expanded to include non-government *versus* non-government parties. Arbitration is the only practical way forward

- It is desirable to have a dedicated building to deal with all ASEAN arbitrations that fall under such a multilateral treaty
- Fixed building for all arbitrations taking place within any regional group will reduce overall costs
- Peace Palace in The Hague – Permanent Court of Arbitration/ International Court of Justice share the building
- It is ideal for a new ASEAN Arbitration Centre
- Jointly owned and operated by all ASEAN countries, each owning and responsible for 10% of the costs
- It can be in any ASEAN city that has best connectivity and easy labour/immigration rules
- It is ideal to have a new set of Arbitration Rules, based on UNCITRAL 2010, to be custom-made to serve the needs of the AEC
- Automatic enforcement of arbitral awards unless any exception under New York Convention exists
- Define and restrict the breadth of "public policy"

6. Proposed ASEAN Centre Rules of Arbitration

- Proposed ASEAN Arbitration Rules based on 2010 UNCITRAL Rules with modifications, opt-out option
- ASEAN governments may want to build in certain conditions into the arbitration rules
- The ASEAN Arbitration Centre could be in Singapore but it could be granted special status and owned and controlled equally by all ten ASEAN countries
- The benefit of going in this direction and nominating Singapore is that there is no need for the ASEAN Member States to continue to debate for another 20 years as to which city the Arbitration Centre should be sited in

7. Desirability for permanent ASEAN Arbitration Centre

- It is up to ASEAN if it wishes to limit the list of limitations under the UNCITRAL Model Law for setting-aside awards
- New treaty or framework agreement between ASEAN will need to be signed

- Limit grounds of setting aside before (neutral country) courts on bias or bribery or fraud or lack of jurisdiction
- Use ASEAN 2010 Protocol criteria when each country submits list of arbitrators for panel of ASEAN Centre Rules

8. Panel of arbitrators

- Article 11(2) of the ASEAN Charter provides that all arbitrators shall:
    - have expertise in law, other matters covered by ASEAN Charter or relevant ASEAN instrument, or resolution of disputes arising under international agreements;
    - be chosen strictly on the basis of objectivity, reliability, and sound judgment;
    - be independent to any party to the dispute;
    - not have dealt with the matter in any capacity; and
    - disclose information which may give rise to justifiable doubts as to independence or impartiality.
- ASEAN may also wish to increase numbers of arbitrators for new panel. *Eg*, r 5(3) Annex 4 to 2010 Protocol to ASEAN Charter provides that:

    > If at any time the individuals nominated by a Member State in the list are fewer than ten, that Member State shall be entitled to make further nominations as necessary.

- Perhaps more than ten names for ASEAN as need a larger pool of arbitrators for commercial disputes
- Each ASEAN State may nominate 25 arbitrators to the panel of a new ASEAN Arbitration Centre
- ASEAN Arbitration Centre may adopt similar requirements as those set out in the ASEAN Charter 2007
- Include additional requirements for arbitrators – with experience in conflict of laws, comparative laws and international laws, *etc*, and with higher academic qualifications
- With 15 years minimum active practice as lawyer
- With experience of written minimum ten arbitration awards

9. Shared ownership and costs of running any new ASEAN Arbitration Centre

- Criteria – evidence of ten sanitised arbitration awards dealing with commercial or investment cases
- National arbitration institutions may propose names of leading arbitrators to their respective governments
- The selected country could provide plot of land to ASEAN to build a new arbitration centre
- Ten ASEAN countries are to share costs of running the Centre
- That country must be prepared to allow visa waiver applications to ASEAN nationals to enter the country for cases as arbitrator or counsel (*eg*, Singapore)
- Adopt similar position towards ASEAN nationals who have to appear as witnesses or expert witnesses
- Allow fly-in/fly-out ASEAN counsel but no right to practice local law connected to court proceedings
- Allow counsel of any nationality to act as counsel

10. Investment treaty arbitration and international commercial arbitration: adoption of UNCITRAL Rules 2010 for both investment treaty and international commercial arbitration

- UNCITRAL Arbitration Rules (2010) with modifications if any
- No judicial intervention allowed
- ASEAN Centre to maintain repository of awards
- Sanitised if they are international commercial arbitration awards but not for investment treaty arbitration
- Awards for discussion to develop jurisprudence
- Centre to also function as arbitrator training centre
- Five hours per year continuing professional development requirement for all arbitrators

11. Investment treaty arbitration and international commercial arbitration: adoption of best practices and established soft law

- International Bar Association ("IBA") Guidelines on Conflicts of Interest in International Arbitration 2014

- IBA Rules on the Taking of Evidence in International Arbitration 2010
- Chartered Institute of Arbitrators' Protocol for Use of Party-Appointed Expert Witnesses in International Arbitration
- ICC Arbitration Commission Report on Techniques for Controlling Time and Costs in Arbitration (2012)

12. Investment treaty arbitration

- Countries have been disillusioned with International Centre for Settlement of Investment Disputes ("ICSID") and bilateral investment treaties ("BITs")
- Indonesia is not extending expired BITs nor entering into new ones
- ICSID system is often said to be abused by investors against States
- ASEAN should consider it as an opportunity to go its own way
- ASEAN Arbitration Centre can run investment treaty arbitration
- UNCITRAL Arbitration Rules (2010) as default rules
- Parties are free to choose choice of law in contracts
- No judicial intervention is allowed
- Default number of three arbitrators. Each party to appoint one arbitrator and both to agree on third arbitrator
- All three arbitrators must be a neutral ASEAN national and not the same national to any of the parties in dispute
- Create ASEAN self-contained regime for annulment
- Annulment under ASEAN investment treaty regime must be distinguished from an appeal. It may only proceed under annulment grounds provided for in investment treaty regime

13. Investment treaty arbitration: Annulment proceedings

- Parties should be free to choose choice of law in contracts
- Default number of three arbitrators. Each party to appoint one arbitrator and both to agree on third arbitrator
- All three arbitrators must be a neutral national and not the same national to any of the parties in dispute

- Five arbitrators from panel to decide challenges to arbitrators and appoint arbitrator in default situation
- Annulment decisions are final and binding
- All five arbitrators deciding appointment or challenge must be neutral nationals to the parties in dispute
- Decision-making process of the arbitrators and the five appointing arbitrators are to be final and binding
- All investment treaty awards, decisions and annulments must be upheld by ASEAN courts
- ASEAN courts are not entitled to injunct arbitrators or counsel or parties to investment treaty arbitration

14. Commercial arbitration: permanent seat needed

- If awards are between non-government to non-government persons, then the right to challenge should be retained
- It needs a perceived neutral seat (judiciary) outside ASEAN to resolve challenges (arbitrators) and awards
- Each ASEAN country would want to be the permanent seat of arbitration
- ASEAN parties are unlikely to agree to arbitrate against the party in an arbitration seated in jurisdiction of a party, *eg*, a Malaysian party is unlikely to agree to arbitrate against an Indonesian party in Jakarta as seat
- Sovereignty and national pride. Perceived ultimate control of judiciary of seat of arbitration over DSM
- Without joint ownership and control by all ASEAN, there will be rounds of endless debate as to seat
- There will never be any DSM to deal with parties who matter most of all in ASEAN – the people
- AEC businesses have no DSM choice – current commercial arbitration. But no convergence of AEC DSM
- Radical proposal: select permanent seat outside ASEAN. What about a neighbouring non-ASEAN country to be seat? HK, Japan, Korea as possible neutral seat?
- Courts of non-ASEAN seat to have very limited powers – challenges and jurisdiction. Define "public policy" in any treaty that is also to set up new Arbitration Centre

- This might even actually accelerate the proposed ASEAN Arbitration Centre and ASEAN Arbitration Rules
- Arbitration is to take place at the proposed ASEAN Arbitration Centre under proposed ASEAN Arbitration Rules
- Setting aside and dealing with challenges are to be in a non-ASEAN seat
- It will require a treaty with government of such a seat
- Decisions of courts of such a seat has no power over anything outside the parties to the arbitration
- It cannot direct ASEAN governments to do something
- Decision of such courts of a neutral seat as to challenges and setting aside should be respected
- ASEAN courts should not try to take jurisdiction and hear "appeals" of awards rendered for international commercial arbitration cases
- It would be easier for a non-ASEAN court to hold the mantle of neutral seat; there is no scope to invoke other earlier ASEAN treaties (including Treaty of Amity and Cooperation in Southeast Asia) against it
- Non-ASEAN seat courts cannot be subject to politics

D. PART 4: CULTURAL DIFFERENCES IN INTERNATIONAL ARBITRATION – PROPOSED CENTRE TO HELP BUILD UP DATABASE OF ARBITRAL AWARDS

1. Arbitration Centre to help build up database

- Another reason for a new ASEAN DSM Agreement is to reduce time and costs in arbitration
- Cultural differences in international arbitration can be misunderstood
- It may make the difference between success and losing
- The arbitration is only as good as the arbitrator
- Courts of the seat of arbitration should understand cultural differences if bias challenge is made at setting-aside applications

2. Legal culture in international arbitration

- "Some thinkers have described diversity of culture as leading to an inevitable clash among civilisations", said Samuel Huntington in *The Clash of Civilizations*
- Very different cultures exist in arbitration
- Essence of legal culture is expressed in codes and rules
- In civil law, rules of law are articulated through opinions of famous professors on the interpretation of law
- In common law, principles and rules of law are articulated by judicial decisions from supreme courts
- Parties, their lawyers, and arbitrators who are not aware of this problem may fall into a trap
- Cultural backgrounds influence how people approach arbitration and what they expect of it in substance and in procedure
- It is impossible to lay down rules for arbitrators to have cultural neutrality; one would never find a perfect arbitrator at all
- Legal culture is also affected by local arbitration institutions
- There is a false perception that neutrality of arbitrators is safeguarded by choosing an arbitrator or chairman from a country other than that of the parties, *eg*, dispute between Singapore and Indonesian parties before an Indian or English arbitrator/chairman. How meaningful is this kind of neutrality?

3. Hard to have total absence of preconceptions

- "If a lack of bias is defined to mean the total absence of preconceptions in the mind of a judge, then no one has ever had a fair trial and no one ever will"

— US Justice Frank
in *Re Linahan* 138 F 2d 650 at 651 (2nd Cir, 1943)

4. Civil law *versus* common law divide

- As decision-makers, arbitrators are only limited by dictates of international public policy

- An arbitrator will be guided by what he personally feels is fair. But his sense of justice is largely influenced by one legal system only – his own
- Lawyers who appoint arbitrators also need to be aware of cultural neutrality
- An arbitrator may not be able to see the limits of his knowledge and understanding

5. Cultural differences in international arbitration?

- The fact that two teams of lawyers may be trained in different systems with different skills is one matter
- An arbitrator who adopts a procedure that favours one of them is another matter. Some procedures may be alien to civil law legal traditions
- There are usually at least three legal systems in play in an arbitration:
    - the law of the contract;
    - the law of the place where the contract is to be carried out; and
    - the law where the arbitration is conducted

6. Advocacy and clash of cultures - common law *versus* civil law divide

- There are diverse views of meaning and function of advocacy
- A crucial difference between civil law and common law systems is the role of the judge and counsel
- The civil law system is "inquisitorial" in nature
- The common law system is "adversarial" in nature
- The role of judge in common law is acting as a referee
- ASEAN panel must have these different considerations to be able to deal with parties fairly

7. Arbitrators who are experts in comparative law

- Common law lawyers expect a highly adversarial approach to be taken by the arbitral tribunal and the opposing party

- Civil law lawyers expect an inquisitorial approach
- Such basic differences affect timing, expectations of submission of evidence, witness statements, record-keeping, and procedural matters
- Common law lawyers expect an adversarial approach where the arbitrator has a limited role. The adversarial approach is now pervasive in many jurisdictions
- Generally, lawyers and arbitrators consider their own legal system to be the only system in arbitration
- Those with minimal experience as arbitrators or as counsel in international cases tend to lack a balanced view
- They may have pre-set views of procedural law and how to deal with the taking of evidence
- They may not know how to position their case and how to present witness in arbitrations outside their country

8. ASEAN Centres have own preference for common or civil law arbitrators in default situations

- It is the preference of Singapore International Arbitration Centre ("SIAC") to appoint English national arbitrators or common law national arbitrators (excluding Singapore nationals). Look at the SIAC panel arbitrators and their appointment statistics – mainly common lawyers. Nationals of ASEAN countries such as Brunei, Cambodia and Laos are completely excluded and only one Thai and one Vietnamese national were invited onto the SIAC panel of arbitrators
- It does not usually happen in ICC arbitrations seated in Singapore. The ICC ensures that Civil law lawyers are appointed to civil law cases and Common law lawyers are appointed to common law cases and it has an extremely inclusive and deep pool of arbitrators from different nationalities to select from
- Singapore judiciary will not interfere with arbitration process as they are extremely pro-arbitration. Will not set aside awards on errors of fact or errors of law. The tribunal's failure to apply or understand the proper law cannot be a ground for challenge or setting aside of award

- This means that one is stuck with arbitrators, including those appointed by institutions
- International law firms involved in international arbitration tend to be common law lawyers
- There is sometimes a lack of understanding as to how to apply civil law (governing law)
- There are no corresponding concepts of "good faith" and "fairness" in the common law system. Arbitrators who are unfamiliar with these concepts ignore them completely
- In absence of agreement, SIAC tends to appoint common law/ English arbitrators as sole arbitrator or chair. SIAC is unsuitable for civil law ASEAN end users. Conversely, in the absence of agreement, arbitral institutions like Vietnam International Arbitration Center ("VIAC") or the Indonesian National Board of Arbitration ("BANI") appear to have a preference for appointing civil law arbitrators even in matters governed under common law. There is therefore a need for a new neutral institution that commands the trust of all ASEAN Member States, end users and counsel in appointing the right experienced arbitrator to each case

9. ASEAN countries with a stake in proposed ASEAN Arbitration Centre

- A new ASEAN DSM Agreement can assist the AEC to grow faster and fairly. It is helpful to have a permanent arbitration centre, like Peace Palace, controlled by ASEAN
- There should be a diversity of ASEAN board and panel arbitrators to allow appointment of appropriate arbitrator
- ASEAN Arbitration Centre doubles up as training ground for panel of arbitrators and board members. There should be continuing professional development for all arbitrators on the panel idea
- All awards will be sanitised but are to be accessible to the panel of arbitrators for a start. Later on, one can consider releasing even more sanitised versions to the public
- National arbitration centres are all in competition with each other

- Each has its own local politics, cultural way of working, ideas of DSM, ideals of how arbitrators are to act
- Appointment of civil or common law arbitrators?
- Each has his own ideals of how to interpret ASEAN instruments
- Common ownership/control of ASEAN Arbitration Centre requires cooperation rather than competition
- ASEAN Centre can bridge different conflicts in legal thinking and different ways of handling disputes
- It is jurisprudence for interpretation of legal instruments
- It can double up and be used as training centre with collection of books and sanitised awards and train younger arbitrators
- It has collective interest for success; joint ownership by all ten ASEAN countries fosters trust and a sense of belonging
- The ASEAN Centre can co-exist with national centres for international commercial arbitration work
- It can compete with ICSID for intra-ASEAN investment treaty arbitration disputes
- It has collective scrutiny and adoption of similar public policies towards challenges/setting-aside applications
- Seat is initially problematic but if ASEAN Centre is successful and has high standards, the seat will also be not an issue
- It is helpful to have a judiciary seated outside ASEAN countries that is seen to be fair to all ten ASEAN countries. Limit the scope of the judiciary by treaty to only hear challenges and deal with setting aside of awards
- Question then is which non-ASEAN country? HK, Japan or Korea?

FAIR, EFFECTIVE AND EFFICIENT DISPUTE RESOLUTION TO FACILITATE THE SUCCESS OF THE ASEAN ECONOMIC COMMUNITY*

Pasit Asawawattanaporn
Managing Director, Thailand Arbitration Centre

1. Current Dispute Resolution Framework within ASEAN

- Dispute settlement mechanisms under ASEAN agreements provide for dispute resolution between Member States
- The ASEAN Comprehensive Investment Agreement (2009) is only available for foreign investors from another ASEAN country where the investment is a covered investment under the agreement
- Differences in procedures for seeking annulment and enforcement of arbitral awards between ASEAN countries, even if the grounds upon which the application is to be decided, are similar
- ASEAN has a mix of common law, civil law and mix law jurisdictions. The civil law jurisdictions include Cambodia, Lao PDR, Indonesia, Thailand and Vietnam. The common law jurisdictions include Myanmar and Singapore. The mixed jurisdictions include Brunei Darussalam, Malaysia and the Philippines
- There are differences in the conflict of law rules in the jurisdictions for the determination of the applicable law to the dispute
- There is no neutral choice for parties, except in a third State with the prospect of unfamiliarity with respect to the *lex arbitri*
- There is no single treaty for the enforcement of foreign judgments among ASEAN States

* This is an adaptation of the presentation slides used at The ASEAN Law Conference.

2. Proposal for ASEAN Arbitration Centre ("AAC"): A single arbitration institution with predictable rules and procedures familiar to ASEAN parties

- The AAC may have arbitral rules that combine procedures common to practices from the various legal systems with ASEAN
- As there are differences in language, a common centre can have expertise in all languages represented by the ASEAN countries
- There should be a single list of expert arbitrators from all ASEAN countries or an arbitrator that has presided over cases in connection with a dispute where one of the parties was from an ASEAN country

3. Benefits of the AAC: Promoting a user-friendly centre taking into account different practices from ASEAN Member States

- Every member of ASEAN country will be treated with equal respect and has a part-ownership in the AAC
- AAC will foster more cooperation and solidarity among all ten ASEAN countries, which is far better than competing with each other
- There should be certainty in the appointment of independent and impartial arbitrators with a track record of having had significant experience in arbitration
- There should be simple and clear rules for the conduct of the arbitration in line with local traditions relating to dispute resolution
- There should be scrutiny of awards by members of a court composed of ASEAN expert arbitrators
- There should be relatively inexpensive administrative fees and other costs
- There should be predictable advance costs of the arbitration, such as through *ad valorem* institutional and arbitrator fees

4. Notes

– The seat of the AAC

  - seat in a neutral country could reduce controversies among ASEAN countries
  - ASEAN must enter into negotiation with the third country which might by a complicated process
  - the negotiation must include the minimisation of the difficulties that regulate the entry and exit of foreign arbitrators, counsel and other persons coming for the purpose of an arbitration
  - also, it may need an agreement between ASEAN and a third country which would bring more complication

– Annulment and enforcement of the awards

  - the proposal to limit the setting-aside grounds or even the definition of "public policy" may not be possible if a non-ASEAN Member will be the seat
  - differences and inconsistency in the interpretation of provisions relating to enforcement in domestic courts cannot be fixed by the AAC
  - ASEAN may need an agreement to recognise and enforce the seating court's judgment to bypass the United Nations Commission on International Trade Law ("UNCITRAL") model law implemented in each ASEAN country or
  - the model of the Common Court of Justice and Arbitration ("CCJA") in Organization for the Harmonization of Corporate Law in Africa ("OHADA")

5. OHADA Framework for arbitration

– One of its objectives was the promotion of arbitration in its 17 Member States
– There are two separate regimes for arbitration under the OHADA framework:

  - institutional arbitration under the CCJA Arbitration Rules which are similar to the International Chamber of Commerce ("ICC") Rules of Arbitration where an

arbitration may be commenced under these rules if at least one party is domiciled or if the contract is wholly or partially performed in an OHADA Member State

- *ad hoc* arbitration under the Uniform Act on International Arbitration 1999 administered by an institution other than the CCJA if the seat of arbitration is located in an OHADA Member States

– CCJA acts as an administering authority similar to the ICC International Court of Arbitration

6. CCJA and an ASEAN Court

– The CCJA judicial court rules on challenges to the validity and enforceability of arbitral awards rendered pursuant to the CCJA arbitral proceedings
– CCJA awards are enforced by an order of exequatur issued by the CCJA
– One question that may be raised is whether there is a need for a supervisory judicial court to the AAC similar to the OHADA structure whereby there is consistency in the review of arbitral awards

RAPPORTEUR REPORT FOR PARALLEL SESSION 1

Fair, Effective and Efficient Dispute Resolution to Facilitate the Success of the ASEAN Economic Community*

A. SUMMARY OF SPEECHES

1. Prof Dr Colin Ong QC (Senior Partner, Dr Colin Ong Legal Services (Brunei); Counsel, Eldan Law LLP (Singapore); Queen's Counsel at St Philips Stone Chambers (London))

1 Prof Dr Ong QC proposed the creation of an ASEAN Arbitration Centre ("AAC") to complement and augment the current dispute resolution infrastructures that exist in ASEAN, such as the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (2004) and the ASEAN Charter (2007). The proposed AAC will deal with commercial disputes between private parties and investor-State disputes in ASEAN. Each tribunal will be drawn from a group of 250 arbitrators, comprising 25 arbitrators nominated by each ASEAN State. Arbitrators should be sufficiently familiar with civil and common law systems, comparative law and conflict of law rules. The AAC will have a permanent base within ASEAN, and shall be jointly owned by all ASEAN States (provided for by treaty) so that every State will have both a stake in the project and a say in how the AAC is run. The cost of running the AAC shall also be shared. With such an arrangement, information can be shared easily and arbitrators can have access to the same training opportunities. There can also be a joint group of arbitrators from the different States to scrutinise AAC awards. The rules of the AAC will be informed by international best practices, such as the International Bar Association Rules on the Taking of Evidence in International Arbitration and the Chartered Institute of Arbitrators Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration.

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* The 13th ASEAN Law Association General Assembly and The ASEAN Law Conference, with the theme "The Power of ONE: Unlocking Opportunities in ASEAN Through Law", was held on 25 to 28 July 2018. This session was held on 26 July 2018, 3.30pm to 5.30pm.

2 The juridical seat for AAC arbitrations is to be located in a neutral non-ASEAN State to avoid disputes between ASEAN Member States over whose judiciary should exercise supervisory jurisdiction. Such neutral States could include Hong Kong SAR, the Republic of Korea, or Japan. Additionally, the ASEAN Member States should work towards defining the scope of the public policy exception as well as matters that are susceptible to arbitration (such as the protection of intellectual property or life sciences) with a view to limiting the grounds on which arbitral awards can be challenged. This would also help to harmonise the various Member States' approaches towards enforcement, as they presently interpret arbitrability and public policy differently. The neutral seat will also have to be a party to such a treaty.

2. Pasit Asawawattanaporn (Managing Director, Thailand Arbitration Centre)

3 Mr Pasit agreed that Prof Dr Ong QC's proposal was viable as there is currently no ASEAN-wide institution to resolve disputes between private parties. The ASEAN Protocol on Enhanced Dispute Settlement Mechanism (2004) ("DSM") only applies to interstate disputes, while the dispute settlement mechanism under the ASEAN Comprehensive Investment Agreement (entered into force in 2009) is only available to investors within ASEAN and has never been tested before. While all ASEAN Member States are party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("the New York Convention"), different States adopt different procedures for the annulment and enforcement of arbitral awards and interpret the Convention provisions differently. Though it is possible for intra-ASEAN disputes to be arbitrated in a neutral third country, parties and counsel might be unfamiliar with the *lex arbitri*. The AAC can therefore contribute to the resolution of intra-ASEAN disputes by adopting rules and procedures familiar to ASEAN parties, accommodating the various ASEAN languages, and drawing upon ASEAN arbitrators who are familiar with the culture and legal frameworks of the different Member States.

4 Mr Pasit raised two issues for consideration. First, locating the seat of the AAC in a neutral third country might give rise to complications. ASEAN, as a whole, would have to negotiate with this third country to arrange for the entry and exit of foreign arbitrators, counsel and other

persons. Secondly, it might be difficult to obtain the agreement of the neutral third country to narrow the grounds for setting aside and the definition of "public policy". Moreover, domestic courts within ASEAN might still adopt differing interpretations of the provisions relating to enforcement. Mr Pasit suggested that the AAC agreement could potentially be modelled on the Organization for the Harmonization of Business Law in Africa, which subjects the recognition and enforcement of arbitral awards to the oversight of the Common Court of Justice and Arbitration.

3. Prof Choong Yeow Choy (Professor of Law, University of Malaya; Executive Council Member, ASEAN Law Association of Malaysia)

5 Prof Choong made three comments. First, while the various ASEAN Member States had made laudable efforts to support and encourage arbitration, there was no escaping the supervisory jurisdiction of national courts. He proposed more judicial training to acquaint ASEAN judges with the underlying principles of international commercial arbitration and the approaches of the international community, particularly *vis-à-vis* the recognition and enforcement of international arbitral awards. Secondly, Prof Choong suggested that the Singapore International Commercial Court could also play a significant role to facilitate the success of the ASEAN Economic Community, as it incorporated the best features of litigation and arbitration and could overcome the trust deficit with its pool of international jurists. Its sole drawback was that none of its international jurists hailed from within the ASEAN region. Thirdly, the Hague Convention on Choice of Court Agreements 2005 (which Singapore recently ratified) had strengthened the enforcement of judgments between contracting States. However, its success was impeded by two factors. First, no other ASEAN Member States had acceded to it. Secondly, even if they did, its application in reality would depend on how the provisions of the convention (particularly the limited grounds on which contracting parties were entitled to refuse enforcement) would be interpreted by national courts.

4. Prof Dr Colin Ong QC (Senior Partner, Dr Colin Ong Legal Services (Brunei); Counsel, Eldan Law LLP (Singapore); Queen's Counsel at St Philips Stone Chambers (London))

6 Responding to the other panellists' comments, Prof Dr Ong QC pointed out that the provisions of an ASEAN treaty would take precedence over domestic legislation. The treaty would also have to be signed with the neutral third country in which the AAC was seated, thereby narrowing the bases on which an AAC award might be set aside for lack of arbitrability or public policy. Prof Dr Ong QC also agreed that judicial training should continue and reiterated that the AAC was only intended to complement, and not substitute, other dispute resolution institutions.

5. Francis Xavier SC, PBM (Regional Head of Dispute Resolution, Rajah & Tann Singapore LLP)

7 Mr Xavier SC recognised that a rules-based AAC might be more popular than the DSM, which was regarded by some as overtly political because situations of non-compliance and impasse were referable to the ASEAN Summit, a political body. However, he questioned the demand for the AAC, given that private parties already enjoyed a diverse range of dispute resolution options to choose from, such as the Singapore International Arbitration Centre, London Court of International Arbitration, Hong Kong International Arbitration Centre and Asian International Arbitration Centre. Intra-ASEAN investor-State disputes could also be resolved by a wide range of dispute resolution mechanisms under the ASEAN Comprehensive Investment Agreement and had in the past been referred to the World Trade Organization and International Court of Justice. Mr Xavier SC questioned what disputing parties might gain by choosing the AAC instead. He also questioned if the volume of disputes (only about one investor-State dispute a year and one interstate dispute every decade) would justify the establishment of an AAC.

8 Mr Xavier SC also suggested that the AAC need not be seated in any particular jurisdiction, but could (like International Centre for Settlement of Investment Disputes awards) be delocalised, with an internal annulment procedure. If not annulled, the award would be enforceable in every ASEAN Member State in the same way as a judgment of a superior court. He also exhorted ASEAN to observe the progress of the Union of South

American Nations Arbitration Centre, launched in 2016, which has jurisdiction to determine investor-State disputes.

6. Dr Hop X Dang (Arbitrator and Academic, Hop Dang's Chambers)

9 Dr Dang emphasised the importance of identifying the precise problems which the AAC sought to address and considering whether other solutions were available to address those problems. For example, if the quality of arbitrators was felt to be lacking, ASEAN could consider regional training for ASEAN arbitrators. If the problem was enforcement of awards, this could perhaps be remedied by unified legislation throughout ASEAN to make arbitral awards issued by various arbitral institutions in ASEAN States more easily enforceable than they would be under the New York Convention. The higher chances of enforcement might then incentivise ASEAN parties to arbitrate.

B. COMMENTS/QUESTIONS FROM PARTICIPANTS AND RESPONSES FROM PANELLISTS

S/No	Questions and responses
1	**Anil Changaroth (Changaroth Chambers LLC)**: Are cultural issues the key factors that are stopping us from being in sync? Where does the Asian International Arbitration Centre fit in? **Prof Dr Colin Ong QC**: You cannot bridge cultural differences if you have ten different countries. The only way we can get together is if we are in the same arbitration centre, we share information, run the centre, have lots more meetings like these. You need a place like the Peace Palace in the Hague, a point of contact where we can debate.
2	**His Excellency Krit Kraichitti**: Will the AAC still have to come under international rules such as the New York Convention and UNCITRAL rules? National courts cannot depart from the provisions of the New York Convention because they are treaty obligations. **Prof Dr Colin Ong QC**: The UNCITRAL Rules 2010 would be a starting point for the ACC rules, which can be further modified. As for the New York Convention, if the award was set aside, it may not stop other countries outside ASEAN (like France) from enforcing it notwithstanding the setting aside. However, such incidences would be quite rare. If we say

	that we have agreed to this protocol, and we should comply unless it is set aside for those narrow reasons, we will not have a problem with the New York Convention. It comes down to where the party's assets are, and that would often be in ASEAN.
3	**The Honourable Justice Dato' Mary Lim Thiam Suan**: Surely there would be an available State within ASEAN for the arbitration to be seated, rather than seating the AAC in a non-ASEAN country. Can we consider balloting the remaining States that are not involved in the dispute? **Prof Dr Colin Ong QC**: It is going to be difficult for one ASEAN country to be nominated and for that country's judiciary to be allowed to decide setting-aside applications. A neutral seat will only be allowed to deal with certain issues, such as whether the arbitral award is tainted with fraud, bribery, *etc*, and with the limited public policy exceptions and issues of arbitrability that have been defined by treaty.

Damien Chng and Sarah Siaw
Rapporteurs
26 July 2018

RAPPORTEUR REPORT FOR PARALLEL SESSION 2

The Role of National Courts, if any, in Ensuring Compliance with ASEAN Obligations – A Mock Trial Judged by Chief Justice Sundaresh Menon, Acting Chief Justice Antonio T Carpio and Justice Vichai Ariyanuntaka*

A. SUMMARY OF SPEECHES

1. Chief Justice Sundaresh Menon (Chief Justice, Supreme Court of Singapore)

1 Amongst the three jurisdictions represented, the Philippines adopts the incorporation theory where international law becomes part of its domestic law once ratified, Thailand is a civil law jurisdiction and Singapore is a common law jurisdiction that takes the dualist approach. It is a source of optimism that the three judges who come from three different legal systems arrived at the same conclusion, albeit with different reasoning. This is an encouraging sign for the promise of convergence within ASEAN. This is especially so given that the legal conclusions reached by the three judges were within the bounds of orthodox reasoning.

2 The mock trial, which took place in the context of a domestic court, shows that it may be worth asking national courts to look to ASEAN instruments in appropriate cases. This is not to say that domestic courts are ever in a position to deal with State to State disputes or to overwrite executive or legislative decisions to breach a treaty. But the latter is seldom the case. In most circumstances, the problem arises out of, amongst other reasons, mistakes, lethargy or unawareness of changes. In these cases, going to the domestic court and alleging that the administrator was wrong because of the position that the State has taken within the ASEAN context can, as the mock trial illustrated, make a difference to the outcome. In this

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regard, it may be worth conducting ALA moot competitions on ASEAN law to sensitise law students to this way of thinking to make it the norm to think about these issues, and perhaps there would not be the need to ponder and reflect so hard as to whether ASEAN instruments can play a role in domestic courts.

2. Acting Chief Justice Antonio T Carpio (Acting Chief Justice, Supreme Court of the Philippines)

3 The Philippines adopts the incorporation doctrine; this means that upon ratification, an international treaty becomes the law of the land. It is likely that the national courts would adopt a reading that would lean in favour of conforming to the relevant ASEAN obligation.

3. Justice Vichai Ariyanuntaka (Senior Judge, Central Intellectual Property and International Trade Court of Thailand)

4 The courts in Thailand allow the assistance of international conventions such as the ASEAN instruments when interpreting domestic law. In order to interpret domestic law, the courts seek the spirit of the law, rather than sticking to literal interpretations. The best place to find the spirit of the law of a treaty is the treaty itself. It would be interesting to hear counsel argue ASEAN law in domestic disputes.

Daniel Ho and Kang Jia Hui
Rapporteurs
26 July 2018

Appendix†

The Role of National Courts, if any, in Ensuring Compliance with ASEAN Obligations – A Mock Trial

Judged by Chief Justice Sundaresh Menon (Singapore), Acting Chief Justice Antonio T Carpio (the Philippines) and Justice Vichai Ariyanuntaka (Thailand)

Counsel for Plaintiff: Ms Lee Hui Yi, Mr Nicholas Poon, Mr Kenneth Lim Chi Shen and Ms Tee Su Mien

Counsel for Defendant: Mr Fu Qijing, Ms Ng Kexian, Mr Ramasamy Nachiappan and Ms Vanessa Yeo

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The purpose of the Mock Trial (Moot) is to test before a Bench of distinguished ASEAN judges the degree to which, if at all, a private plaintiff harmed in his business operations as a result of an alleged violation of ASEAN norms by his national authorities, may receive some relief from his own domestic courts.

Naturally all the facts are fictitious.

The Moot sets up three distinct scenarios. In the first, the Registrar of Companies insisted that a resident representative of an ASEAN corporation in Singapore had to have Singaporean nationality or permanent residence status to be registered, allegedly in violation of ASEAN rules on treating foreign investment. In the second, an ASEAN norm which allowed a customs filing by electronic means in addition to the traditional paper method, was transposed by the Singaporean legislator as mandating exclusively an electronic filing. In the third, there is a dispute whether the importation of a product containing a mixture of beer and lemonade should be classified as Beer (as determined by the Singaporean administrative authority) or Shandy as petitioned by the Plaintiff and as allegedly required by ASEAN norms.

All disputes are of a relatively trivial nature hardly having the potential of rising to the level of a "Dispute" among the Member States of ASEAN;

† This Appendix contains the document handed out to the audience at the mock trial on 26 July 2018.

they are however of potentially important economic value to private individuals. In a way they represent the commercial "nuts & bolts" of ASEAN, the precise type of norms meant to facilitate doing business in ASEAN to the benefit of all as well as representing the run of the mill type of "benign violation" which is quite common and which would hardly merit being escalated to an inter-State dispute.

The important thing to note that the main issue is not whether there has been a violation of ASEAN norms but whether when a violation of this common nature takes place, there may be a role for domestic courts in providing relief and ensuring compliance with ASEAN norms.

The arguments of opposing Counsel will flesh out the legal principles and rules involved and we all await the ruling of the court.

We hope the exercise will be both interesting and entertaining.

LAW AS AN INSTRUMENT TO FACILITATE THE SUCCESS OF THE ASEAN ECONOMIC COMMUNITY: THE IMPORTANCE OF THE RULE OF LAW IN CROSS-BORDER INSOLVENCY AND RESTRUCTURING REGIMES

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1 Legal scholars, practitioners and corporate leaders from around the world gather in Singapore this week to discuss how law can be used to unlock opportunities for economic development in the ASEAN Economic Community ("AEC"). It is an important and timely topic, as it has been widely predicted that the 21st century will be an "Asia century". And the advancements in Asia during the last few decades bear this out.

A. THE IMPACT OF GLOBALIZATION AND THE RULE OF LAW

2 The development of the ASEAN region is, of course, not a de-coupled phenomenon. It is a direct result of the march of globalization. Globalization drives today's world with a force that is not only unstoppable, but accelerating at an unprecedented pace. No institution, country, or collection of politicians can resist it, other than at their peril.

3 We have had a first-hand view of this at Jones Day. Over the last twenty years, our clients' businesses have grown exponentially outside the United States. By 2009, US domestic companies owned and operated foreign affiliates with a collective US$4.8trn in sales, employing over ten million workers.[2] And as these businesses have grown, so have their demands for legal services that cross jurisdictions and national boundaries. We, too, have grown in response to that demand, opening more than

1 The author is indebted to Justice Kannan Ramesh of the Singapore Supreme Court for his insightful comments on this topic, many of which have been incorporated into this paper.

2 News Release, US Department of Commerce, Bureau of Economic Analysis, "Summary Estimates for Multinational Companies: Employment, Sales, and Capital Expenditure for 2009" (18 April 2011) <https://www.bea.gov/newsreleases/international/mnc/2011/pdf/mnc2009.pdf> (accessed 3 July 2018).

15 new offices during the last twenty years, including our office here in Singapore and four in Australia.

4 Of course, like any phenomenon, globalization has its adherents and its detractors. The detractors mostly hail from the academic, media and political left. They say globalization makes inequality worse and creates a world where the rich get richer and the poor poorer. The adherents are mostly spokespersons for the great business enterprises of the world who are leading the way in global investment. They see a world in which billions of people have moved from abject poverty to a life that begins to resemble the middle class as viewed from a western perspective. In reality, both are true: while globalization has caused unprecedented rises in the standard of living across the world, at the same time, there are undoubtedly millions of people who have been left behind and have not benefitted from the gains made to date.

5 Most people who study the paths and policies to speed economic and human development tend to see it only as an issue of *availability* of capital. But the world is awash in private capital that sits idly on the so-called sidelines while badly needed infrastructure and other investment opportunities in emerging markets go unfinanced because the risk of the investment cannot be adequately assessed and managed. In the end, private capital gravitates towards more predictable, reliable, and less risky opportunities, most often in already-rich countries.

6 If the world is to extend the maximum benefits of globalization to the greatest percentage of the world's population, then the most important undertaking will be aggressive fostering of the authentic development of the rule of law. We don't need the advancement of the rule of rules that can be arbitrarily abused by men, but a genuine system of law administered by an impartial accomplished judiciary served by able members of the Bar who present with integrity the evidence and thoughtfully argue the applicable law. It is a straightforward system long ago explained brilliantly by such great jurists as Benjamin Cardozo in *The Nature of the Judicial Process*.[3] Any good lawyer recognizes what is needed.

3 See Benjamin N. Cardozo, *The Nature of the Judicial Process* (Yale Univ. Press, 1960).

B. THE IMPORTANCE OF THE RULE OF LAW IN CROSS-BORDER INSOLVENCY REGIMES

7 In many ways, the impact of globalization and the importance of the rule of law can be seen most clearly during a crisis. As the world economy has become increasingly global, so also have recessions. Financial distress in one country no longer stays in that country – disruptions in one region's economy now ripple across the world, even as nations try to limit the fallout. Similarly, because the world's leading companies have businesses, operations, and assets around the globe, when a company faces financial distress or – in the worst-case scenario – insolvency, the effects are felt all around the world by the company and its various stakeholders.

8 The financial distress of global enterprises, however, raises unique problems. For one, the insolvency of a major global company might require the reorganization of operations or the adjudication of rights to property in many jurisdictions, often with different, if not competing, priorities. When this occurs, it is often not clear which law applies, which court (if any) should take the lead in administering the business and assets of the insolvent enterprise, and whether representatives of the insolvent company or its creditors will be able to participate in proceedings in foreign courts or protect their interests in collateral. The necessity of resolving claims against the multinational enterprise in various jurisdictions creates expense, causes delay, and raises the possibility of inconsistent judgments. Even the simple fact that proceedings may be conducted in several different languages, within court systems pursuing different national and public policy goals, adds challenges. Piecemeal liquidation of a global enterprise in competing local jurisdictions cannot be the right outcome.

9 Given this reality, it is crucial that countries develop cross-border rescue and insolvency regimes grounded in the rule of law – that is, schemes that prioritize access to the courts, respect for foreign proceedings, preservation of the troubled enterprise's assets, protection (if possible) of its operations, and a fair resolution of claims. This is neither a pro-debtor nor a pro-creditor position – all stakeholders will benefit from such a system. The goal in any insolvency proceeding is to efficiently rehabilitate the company whenever possible, providing for a just payment of creditors while returning corporate assets and resources back into the productive economy in the least costly manner. Absent a well-functioning cross-border insolvency regime, this goal cannot be met – economic resources will

remain underutilized, delay and cost will reduce the recovery available for creditors, and jobs will be needlessly lost.

10 Make no mistake, both companies and investors are paying close attention to the legal regimes in which they do business. When deciding where to invest capital, companies and investors invariably look for four things: (a) a commercial law which they understand, are familiar with, and accept; (b) a strong legal ecosystem of quality judges and practitioners; (c) a strong and efficient dispute resolution system; and (d) a strong system of restructuring laws, enabling investors to understand the risks to the return of their capital.

11 In particular, when it comes to restructuring, certainty of outcome and transparency of process are important to both companies and their investors. Companies want to know that the jurisdictions in which they have chosen to do business or locate capital have legal regimes that will preserve the enterprise to permit rehabilitation. Investors want to know that their rights in collateral and their priority over equity will be protected even if the enterprise becomes the subject of insolvency proceedings.

12 Similarly, when a company's operations cross national borders, so also will its insolvency. The company will want to know that it will not become enmired in duplicative, expensive proceedings in every jurisdiction in which it has assets. Absent such an assurance, the company will limit the jurisdictions in which its capital is located. Creditors, likewise, demand transparency and coordination among courts. As the United Nations Commission on International Trade Law ("UNCITRAL") has observed, "[t]o the extent that there is a lack of communication and coordination among courts and administrators … it is more likely that assets would be dissipated, fraudulently concealed, or possibly liquidated … not only is the ability of creditors to receive payment diminished, but so is the possibility of rescuing financially viable businesses and saving jobs".[4]

13 The result is, as in so many areas of law, that capital flies to jurisdictions with clear, predictable rules and a legal system that fairly applies those rules without bias. Capital demands that countries develop cross-border insolvency regimes that are grounded in an authentic

4 UNCITRAL, *Legislative Guide on Insolvency Law* (2005) at p 21 <https://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf> (accessed 3 July 2018) ("[T]he absence of predictability in the handling of cross-border insolvency cases can impede capital flow and be a disincentive to cross-border investment").

application of the rule of law and that pursue comity and coordination with other jurisdictions. Countries that cannot offer these things will be left behind.

C. RECENT EFFORTS TO ADVANCE THE RULE OF LAW IN CROSS-BORDER INSOLVENCIES

14 Many around the world have recognized the importance of developing insolvency regimes guided by the rule of law and international coordination. These commentators often note that the convergence of commercial laws across political boundaries is a necessary first step in the development of legal regimes that are maximally attractive to private capital. And there are good reasons for this: companies and investors are notoriously wary of adding legal risk to investments. A convergence of legal standards provides added certainty of outcome, which helps to allay the concerns of investors as to whether the economic potential of an investment can be realized, which, in turn, reduces the cost of investment.

15 Great strides have already been made towards convergence of cross-border insolvency laws. One prominent example is the UNCITRAL Model Law on Cross-Border Insolvency ("Model Law CBI").[5] Model Law CBI makes an invaluable start towards multinational consensus and international cooperation.

16 Model Law CBI applies where the debtor has assets in countries other than the seat of primary insolvency. The centerpiece of Model Law CBI is the establishment of a particular jurisdiction that will serve as the "center of main interest" or COMI for the restructuring. The COMI presumptively provides the primary law and forum for the insolvency proceedings, and the Model Law CBI encourages cooperation between the COMI jurisdiction and other locations in order to maximize the debtors' assets, rescue troubled companies, and protect investments and jobs.

5 See UNCITRAL, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* (2014) <https://www.uncitral.org/pdf/english/texts/insolven/1997-Model-Law-Insol-2013-Guide-Enactment-e.pdf> (accessed 3 July 2018).

17 Model Law CBI describes itself as being built on four principles: access, recognition, relief, and coordination.[6] Foreign representatives need *access* to proceedings in other jurisdictions. Courts in different countries must *recognize* the related proceedings going on elsewhere. Debtors should be able to obtain *relief* in courts administering the debtor's insolvency. And courts and professionals should make an effort to *coordinate* as much as possible to ensure that the debtor's estate is administered fairly and efficiently.

18 *Adopting* a model law is of obvious importance. But the rule of law also demands that the law is *applied* in a fair and uniform way. To that end, UNCITRAL has also sought to standardize the interpretation and application of Model Law CBI by developing a Practice Guide on Enactment. And it has created a database to compile abstracts and judicial opinions from jurisdictions that have adopted Model Law CBI.

19 Over 40 countries have already adopted some form of Model Law CBI.[7] The United States, for example, adopted Model Law CBI with only minor changes, making it Chapter 15 of the US Bankruptcy Code. Within the ASEAN Economic Community, both the Philippines and Singapore have adopted Model Law CBI. And, in the Asia-Pacific region more broadly, it has also been adopted by Australia, Japan, New Zealand, the Republic of Korea, and Vanuatu.[8]

20 Of particular note is that Singapore, last year, adopted a new restructuring law which enacts both Model Law CBI and many of the concepts in Chapter 11 of the US Bankruptcy Code. These include key debtor and creditor protections such as a worldwide moratorium to preserve the enterprise's assets, debtors in possession, rescue financing, and an ability to bind non-consenting creditors to a plan. This effort builds on the success of Singapore's International Commercial Court, which has already enhanced Singapore's reputation as a hub for international investment and

6 Diane Chapman *et al*, *Access to Justice in the ASEAN the Key Role of UNCITRAL* (2015) at p 18 <http://uncitralrcap.org/wp-content/uploads/2015/12/Access-to-Justice-in-the-ASEAN-.pdf> (accessed 3 July 2018).

7 UNCITRAL, *Status: UNCITRAL Model Law on Cross-Border Insolvency (1997)* at <http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html> (accessed 3 July 2018).

8 Diane Chapman *et al*, *Access to Justice in the ASEAN the Key Role of UNCITRAL* (2015) fn 3, at p 18 <http://uncitralrcap.org/wp-content/uploads/2015/12/Access-to-Justice-in-the-ASEAN-.pdf> (accessed 3 July 2018).

resolution of cross-border disputes. Such efforts towards convergence can go a long way towards minimizing investors' legal risks and encouraging capital to locate in a jurisdiction. And it seems likely that investors and businesses will seek to take advantage of these new laws, which build upon tried and true strategies for debtor rehabilitation and creditor protection.

D. THE ROLE OF THE BAR AND JUDICIARY IN DEVELOPING EFFECTIVE CROSS-BORDER INSOLVENCY REGIMES

21 Model Law CBI and legislative convergence are practical steps to address the lack of harmony and cooperation in cross-border insolvencies. In fact, the increased adoption of model laws or the development of international conventions are the ideal way to achieve convergence and attract capital. These efforts should be encouraged and expanded.

22 Achieving convergence through legislation, however, takes time, and often economic considerations require a pace of change and reform that the legislative process may not be able to deliver. This is where the Bar and Judiciary can make an invaluable contribution to the development of stable, predictable, legal systems, grounded in the rule of law.

23 For one, members of the Judiciary can work with their counterparts in other countries to foster increased interaction, communication, and coordination. One prominent example of this already occurring is the new Judicial Insolvency Network ("JIN"). The JIN was created in October 2016 by a group of judges from the United States, Singapore, England and Wales, Australia, Bermuda, the British Virgin Islands, Canada, and the Cayman Islands.[9] The goal of the JIN is to reduce costs and improve efficiency by enhancing communication and coordination between courts. To that end, the JIN has created guidelines aimed at encouraging communication between courts in different jurisdictions administering related insolvency proceedings.[10] The JIN Guidelines call for courts to collaborate by sharing documents related to the proceedings, ordering notice of related proceedings, allowing parties to appear without submitting

9 Judicial Insolvency Network, *About Us* <http://www.jin-global.org/about-us.html> (accessed 3 July 2008).

10 See Judicial Insolvency Network, *Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters* (2016) <http://www.jin-global.org/content/jin/pdf/Guidelines-for-Communication-and-Cooperation-in-Cross-Border-Insolvency.pdf> (accessed 3 July 2018).

to the court's jurisdiction, recognizing governing orders or laws from other jurisdictions, and holding joint hearings where appropriate. And the Guidelines also call upon the Bar to draft, propose, and negotiate protocols for conducting parallel insolvency proceedings in an efficient manner.

24 In addition, members of the Bar and Judiciary can work to identify common principles that underpin the commercial laws of different jurisdictions, despite their differing legal systems and traditions. This, also, has already begun. For example, the Asian Business Law Institute ("ABLI") has recently undertaken phase one of a project aimed at mapping the core principles governing non-convention or treaty-based recognition of judgments in 15 Asian jurisdictions. Notably, although these jurisdictions each have their own, distinctive legal systems, the project determined that the principles underpinning the recognition of judgments are broadly similar in all but two jurisdictions.[11] Such efforts are also underway in the restructuring sphere, through a joint project of the ABLI and the International Insolvency Institute aimed at identifying core principles of in-court and out-of-court restructurings across Asian jurisdictions.[12] And UNCITRAL also is making strides in this area, having recently completed a proposed model law regarding the enforcement of judgments relating to insolvency.[13]

25 These efforts, and more like them, should be encouraged. And we, as lawyers and jurists, should all be looking for opportunities to be involved in projects like these, which seek to identify the core notions of fairness, equity, and justice with which we are all familiar.

E. THE FUTURE OF CROSS-BORDER INSOLVENCY LAWS

26 Model Law CBI, the JIN Guidelines, and the work of the ABLI are commendable, and international insolvency regimes would benefit by their

11 See ABLI Legal Convergence Series, *Recognition and Enforcement of Foreign Judgments in Asia*, at 4–5 (2017) <https://abli.asia/LinkClick.aspx?fileticket=I0rTeJ0yljw%3d&portalid=0> (accessed 3 July 2018).

12 See Asian Business Law Institute, *Asian Principles of Restructuring* <https://abli.asia/Asian-Principles-Restructuring> (accessed 12 February 2019).

13 See UNCITRAL, *Model Law on Recognition and Enforcement of Insolvency-Related Judgments* (2018) <http://www.uncitral.org/pdf/english/texts/insolven/Interim_MLIJ.pdf> (accessed 12 February 2019).

expansion. But they are not yet perfect, and there remains much work to do to foster an authentic rule of law and international cooperation.

27 For example, UNCITRAL is currently working on a way to fill the gaps in how Model Law CBI applies to enterprise groups, an increasingly common feature of the modern business world.[14] The Model Law CBI is predicated on the restructuring of a single corporate entity, which has a COMI in one jurisdiction and establishments in others, with deference being given to the proceedings in the COMI. It was conceived at a time when global trade was not as pervasive, and corporate structures were not as complicated as they are today.

28 Today, many businesses are multinational and multifaceted. They function as groups. There are many corporate entities in the group with interlocking and interwoven economic interests. Assets are held and income streams are organized for economic, tax and regulatory reasons. It is often difficult to ascertain the precise economic significance of each member of the group. And it may be equally difficult to determine each member's COMI, let alone the COMI of the whole group. Added complications arise when some members may be solvent but they would nonetheless be integral to the restructuring of the group as a whole.

29 To address this, UNCITRAL is seeking to craft a model law for the restructuring of group enterprises. While the new model law is still some way from being finalized and presented to the Commission, there are valuable concepts that can be gleaned from the draft and used for restructuring of investments and businesses in the ASEAN Economic Community. Three are worth highlighting:

30 First is the concept of "planning" or "coordinating" proceedings. These are proceedings opened in the COMI of one of the enterprise group members. The planning proceedings play the role of coordinating the restructuring efforts of the group, including the development of the group restructuring plan.

31 Second, the model law contemplates the appointment of a Group Representative by the court in which the planning proceedings have been opened. The Group Representative would be authorized to act as a

14 See UNCITRAL, *Facilitating the Cross-Border Insolvency of Enterprise Groups: Draft Legislative Provisions* (26 February 2018) <https://undocs.org/en/A/CN.9/WG.V/WP.158> (accessed 12 February 2019).

representative of the planning proceeding in proceedings opened by other group members in the jurisdictions where they have their COMI or are incorporated. In fact, the various courts may agree on the appointment of the same Group Representative in each of the parallel proceedings, so that there is a single point of reference.

32 Third, the model law uses the concept of synthetic proceedings, which was first developed in the English case of *Collins & Aickmen*.[15] In a synthetic proceeding, the court administering the planning proceeding treats claims on the same basis as they would have been treated if parallel proceedings had been opened in another jurisdiction. Synthetic proceedings would therefore centralize the determination of all key issues in the court administering the planning proceeding with a view to avoiding the opening of parallel proceedings by members of the enterprise group.

33 The concepts in the new model law are a powerful working philosophy that courts, practitioners, policymakers, creditors and debtors should consider, to ensure that restructuring efforts in the ASEAN Economic Community are efficient and effective. Centralization of restructuring efforts and resolution of disputes would be a significant innovation and would facilitate the success of the region.

F. ESSENTIAL ATTRIBUTES OF CROSS-BORDER INSOLVENCY REGIMES GROUNDED IN THE RULE OF LAW AND INTERNATIONAL COOPERATION

34 There are differing views about what the future of cross-border insolvency law should be. Some will emphasize increased universalism, matter consolidation, and a possible UN convention providing one forum for a worldwide restructuring. Others might argue for the identification of a single country, whose law is known and trusted by investors, to which a region's insolvency proceedings could be channeled. And still others will emphasize the need for separate proceedings, recognition of foreign proceedings, and comity.

35 My goal today is not to resolve this debate, but to emphasize that whatever form future efforts take, one absolute necessity is a well-

15 See *In re Collins & Aikman Eur. S.A.* [2006] EWHC (Ch) 1343 (Eng).

functioning legal regime grounded in the rule of law and international cooperation.

36 At a minimum, such a regime should provide for access to the courts, where disputes can be resolved by an impartial judiciary. Transparency of process will be critical to prevent fraud, insider dealings, and back-room deals that advantage the debtor or particular creditors. Of course, any legal system is benefited by clear rules that encourage the sort of predictability businesses and investors crave. Comity will be a necessity when dealing with proceedings that cross international lines. And we must not forget to ensure that the insolvency regime protects basic human rights and seeks to ensure that the burden of rehabilitating an insolvent company does not fall disproportionately on the most vulnerable of the company's stakeholders.

37 More specifically, insolvency regimes should seek to promote the two pillars of insolvency law: protection of the debtor's estate and a fair distribution to creditors. They should thus provide some sort of moratorium – such as the automatic stay of the US bankruptcy laws or the moratorium contained in Singapore's new restructuring law – to ensure that the debtor's estate is not dissipated by the actions of a few creditors. Regimes should discourage a race to the courthouse and forum shopping for jurisdictions with favorable rules. And rules must be adopted that respect the differing priorities of creditors, ensuring that the property interests of secured creditors are respected while also providing that similarly-situated creditors are treated similarly.

38 The law should aim to allow debtors to rehabilitate whenever possible, for example, by allowing rescue financing and pre-negotiated restructuring schemes like those contained in the laws of the US and Singapore. But it should also provide for a fair liquidation when necessary. To that end, rules that emphasize efficiency, speed, transparency, and international coordination are a must.

39 Not every country is on a speedy path to such a system. The first step will be to adhere to a commercial regime that will encourage and protect investment. Not far behind, there must be a recognition of individual and human rights. How such systems develop and how fast is the responsibility of the legal profession around the world. It is part of the commitment and obligations that they assumed when they took their oaths to become lawyers.

40 Notwithstanding much hand wringing around the world about the profession and its future, this is, in truth, the best time in the history of the world to become a lawyer and the most important time in history for lawyers to make the rule of law a reality everywhere. The profession should lead us to a world where all countries are founded on the same or similar principles of fairness and equity and it is the lawyer's ability to articulate those principles on behalf of clients that will advance the rule of law.

41 No one knows for sure what path the law of cross-border insolvency will take in the future. However, we as lawyers will play a fundamental role in shaping that path. We must recognize the needs and challenges of the existing structures and seek improvements based on sound legal principles that will be fairly applied by an impartial judiciary. Only then will the AEC be able to achieve the predictability and efficiency necessary to attract private capital.

RAPPORTEUR REPORT FOR PLENARY SESSION II

Law as an Instrument to Facilitate the Success of the ASEAN Economic Community*

A. SUMMARY OF SPEECHES

1. Justice Kannan Ramesh (Judge, Supreme Court of Singapore)

1 Economic integration is sustainable only if the law is its benevolent guardian. For the ASEAN Economic Community to realise its goal of economic integration and achieve a single market, convergence of laws and practices is a necessary, if not vital, ingredient. The real question is how we can get there. Harmonisation is a desirable and necessary objective and it must involve an integrated legislative regulatory framework and ecosystem.

(a) The role of the court: What can the courts do to facilitate convergence?

2 Hard law takes time, but judges deal with various practical issues every day. From the court's perspective, it takes two hands to clap. The Bar and the business community must push for greater coordination between the judiciary of various States. Judges cannot, in dealing with a case before them, communicate with a foreign judiciary on their own initiative. But it is true that judges need to interact with one another. The Judicial Insolvency Network ("JIN") was formed to enable judges to better understand each other's philosophies. Through discussions and sharing, it is hoped that convergence can be built. Perhaps a JIN-like model could be considered for ASEAN judges – a constant interactive platform for exchange of ideas.

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* The 13th ASEAN Law Association General Assembly and The ASEAN Law Conference, with the theme "The Power of ONE: Unlocking Opportunities in ASEAN Through Law", was held on 25 to 28 July 2018. This session was held on 27 July 2018, 9.00am to 10.30am.

(b) The role of soft law

3 The Asian Business Law Institute ("ABLI") is a visionary institution because it tries to achieve commonality of principles in Asia in commercial business laws. It undertook a mapping exercise across 15 jurisdictions with very different legal systems and traditions and yet found that the principles relating to the recognition of foreign judgments were, save for two jurisdictions, broadly the same. Such findings could be used to facilitate convergence. Additionally, if soft law principles could be brought before the court by the practitioners, the court could be invited to consider assimilating these principles into national jurisprudence. Regulators could also be brought together to encourage consistency in applying such soft law principles in their home jurisdictions. One example is the regulators' colloquium that took place in New York in April this year.

(c) Short-term solutions

4 Given the existence of the Singapore International Commercial Court ("SICC") and the Singapore International Arbitration Centre ("SIAC"), it is worth considering if they could be neutral platforms to bring parties together for cross-border restructuring or dispute resolution within ASEAN.

2. Stephen J Brogan (Managing Partner, Jones Day)

5 The rule of law is essential to make common ground given that all major countries in the world are now either facing or moving towards the same principles of fairness and equity. There is hope that the convergence of law in this aspect will occur and do good. It is encouraging that in the US, where the States had vast differences in insolvency law when I started practice, we now see an incredible amount of convergence. Convergence might not be imposed, but might develop organically.

(a) The role of the court: What can the courts do to facilitate convergence?

6 Judges have power and if they can be persuaded to use it to facilitate convergence, there can be a big impact. One model for this might be the multi-jurisdictional litigation model, under US federal rules. These have

been very effective in having to avoid litigation in every State and courthouse.

(b) The role of soft law

7 Clients are likely to support projects carried out by institutions such as ABLI because it has the potential to cause people to think through issues, instead of being adversarial.

(c) Short-term solutions

8 Solutions have to start somewhere. The SICC and the SIAC are important because, although they are established in Singapore, the benefits created would radiate throughout the whole of ASEAN.

3. Prof Dr Ignacio Tirado (Professor of Corporate, Banking and Insolvency Law, Universidad Autónoma of Madrid (Spain))

9 For harmonisation to work, the law needs to be well drafted, clear and predictable. But aside from having good law, there has to be strong institutional support. This takes not just time, but also money to build. At the same time, the law needs to be adapted to the reality of and mirror the needs of each State. There is also an important ongoing debate between harmonisation and regulatory competition.

(a) The role of the court: What can the courts do to facilitate convergence?

10 Given language and cultural barriers, it may be difficult to achieve strong collaboration between courts of different countries in the short term. We need to pave the way by harmonising laws before there can be proper communication; that way, concepts will be familiar and judges will be more open to sharing ideas and coming up with solutions. The insolvency practitioners and the Bar, in general, play important roles in helping judges to coordinate.

(b) The role of soft law

11 Businesses may find that if they comply with soft law, people will invest in the company for precisely that reason. When companies embrace the work products of institutions like ABLI, then we get the beginnings of soft law becoming part of the business climate.

(c) Short-term solutions

12 Having a full-fledged court is a good short-term solution. This was key in the European Union. The regulations are directly applicable in Member States but ultimately every Member State has its own insolvency laws. The question then is of jurisdiction. In Europe, the "centre of main interest" ("COMI") test was supposed to resolve this but instead of looking at the facts and then deciding where the COMI was, the various courts decided where COMI was and *then* looked at the facts. This was ultimately resolved through very clear rulings of the European Court of Justice. Thus, if you have common legislation *and* a common court to determine issues, then things will start to work. Otherwise, the Member States will be fighting for jurisdiction.

4. Natasha Nababan (General Counsel, ExxonMobil Indonesia)

13 Globalisation has created demand for countries to have more streamlined laws and regulations to attract investments. However, hard law, like treaties, cannot move at a fast-enough pace. In the meantime, countries need to reach out to their counterparts and engage in dialogues.

(a) The role of the court: What can the courts do to facilitate convergence?

14 The quality of the judicial system is absolutely essential when looking to invest in a country. From the investors' perspective, we look for a strong legal ecosystem of judges and practitioners, and strong and efficient dispute resolution systems.

(b) Short-term solutions

15 The SICC and SIAC could create possible forums to bring parties together. It is already a reality, at least from the Indonesian investors' point of view, that private business with bigger transaction values choose Singapore as the neutral venue because of its reputation. The question moving forward is whether the other States will compete or see it as an opportunity to complement each other. However, for contracts in the public sector, it remains an open question as to whether there is any appropriate forum and there may be a push back against having any domestic court as the forum to resolve disputes.

5. Patrick Ang (Chief Executive Officer, Rajah & Tann Asia)

(a) The role of the court: What can the courts do to facilitate convergence?

16 In the realm of cross-border insolvency, the biggest problem that the court can help alleviate is the lack of time. If courts can coordinate with each other on practical things, like timing of proof of debt, matters can move more smoothly.

(b) The role of soft law

17 The Asian Principles of Restructuring Project by the International Insolvency Institute and the ABLI is a good example to showcase the importance of the application of soft law. While the project results might show that principles across various jurisdictions do not vary much, on the ground, the application of those principles and the institutions involved can differ greatly. In this regard, there is a huge role that regulators can play in enhancing convergence. One of the biggest issues that investors face in ASEAN is understanding how the regulatory climate works, in real life. It is important that we go through such exercises to learn more about each other, rather than work apart.

Kang Jia Hui and Li Yiling Eden
Rapporteurs
27 July 2018

DISRUPTIVE TECHNOLOGIES: OPPORTUNITIES AND CHALLENGES

Sriram Raghavan
Vice President, IBM Research
Chief Technology Officer, IBM India/South Asia

A. INTRODUCTION

1 As the pace of transformation in the digital age continues to increase, three foundational technologies are poised to become the cornerstones of disruption. *Artificial Intelligence* ("AI"), *blockchain*, and the *Internet of Things* ("IoT") represent a triumvirate of deeply disruptive technologies that are dramatically changing the way business is conducted. These technologies are reshaping industries, professions, and entire economies at a tremendous pace, forcing businesses, governments, and individuals to grapple and make sense of their societal implications. In this milieu, a flexible, balanced and forward-looking regulatory and policy framework is essential to ensure responsible, ethical, safe, and fair use of these technologies without curtailing innovation and value creation.

2 In this paper, we will focus on two of these technologies – AI and blockchain. We will begin with a brief overview of each technology, summarizing their potential and current level of maturity and adoption. We will then illustrate how these technologies have an interesting *dichotomous relationship* with fundamental issues surrounding *trust*, *privacy*, and *transparency*. *While these technologies raise new questions and challenges in these important societal dimensions, they simultaneously also promise to be important ingredients for the solutions to these challenges.*

B. ARTIFICIAL INTELLIGENCE

3 AI, as a field of study within the discipline of computer science, is over 60 years old, tracing its origins to the seminal Dartmouth conference in 1956. However, over the last half a decade or more, a confluence of exponential growth in the availability of data and an exponential drop in the cost of computing power has resulted in a step change in the ability to develop and deploy practical AI systems.

1. State of AI

4 Today, we are at a point where the technology underpinnings of *narrow AI* are well understood and such systems are being deployed at scale. In this context, narrow AI refers to AI tasks that are crisp, unambiguous, and well defined, often in a single domain with data available in sufficiently large volumes to train the models that power the AI system. Applications, such as language translation, speech transcription, object detection, face recognition, and many others, are now being widely deployed across industries from agriculture to finance, retail, online commerce, healthcare, manufacturing, government, and others.

5 However, the more pervasive and disruptive impact of AI will begin to appear as we evolve from narrow AI to *broad AI*, *ie*, from narrow, task-specific capabilities to broader intelligence powered by richer knowledge, adaptive learning, and more powerful reasoning techniques (Figure 1). Such AI systems can do more with smaller volumes of data, learn across domains, learn across tasks, build richer internal models of specific bodies of knowledge, and apply richer forms of inference and reasoning. We are currently in the early stages of this evolution from narrow to broad AI but it is well underway and will result in AI being used to optimize decisions across industries (see Figure 2).

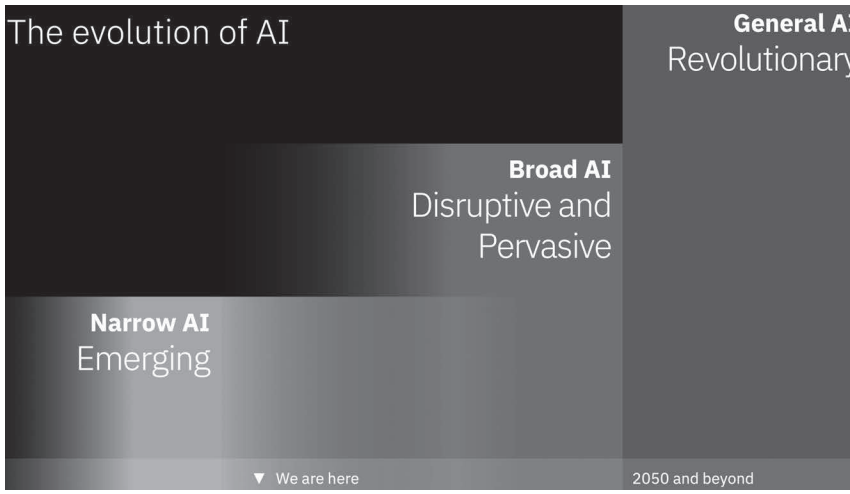

Figure 1: Evolution of AI

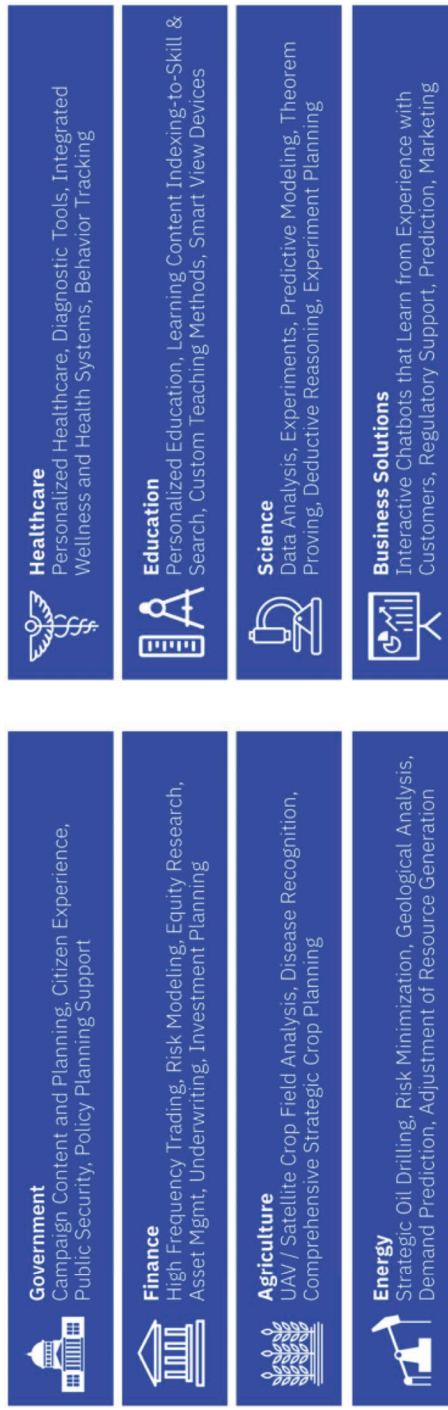

Figure 2: Optimizing decisions using AI

2. AI models and data

6 The two fundamental building blocks of an AI system are *data sets* and *models*. Models embed the intelligence that the AI system has harnessed from processing data and are the artifacts that are embedded in business applications. For example, an application such as IBM Watson for Oncology embeds within it numerous AI models that have been trained on vast volumes of medical data related to each type of cancer.

7 To appreciate the issues of trust, transparency, and governance that are beginning to emerge around AI, it is important to understand that the process by AI models are built from one or more data sets through a process called *training*. Figure 3 is an extremely simplified representation of the salient steps in this training process. The first phase of training is data preparation – taking raw data, often from multiple sources and in multiple forms, and using a processing pipeline to integrate, normalize, transform, clean, and curate the data into a processed data set that is ready to be utilized to build AI models. This phase of data preparation is often the most expensive, laborious, time-consuming, and complex and is typically accomplished by one or more data engineers. Once a prepared data set is available, a trained data scientist leverages one or more learning algorithms to build an AI model out of this data set – often experimenting with several algorithms and tuning parameters to finally result in a model that provides acceptable performance. Finally, this model is embedded into a business application where it is used to make inferences or predictions (*eg*, suggest treatment regimens or drugs for a patient).

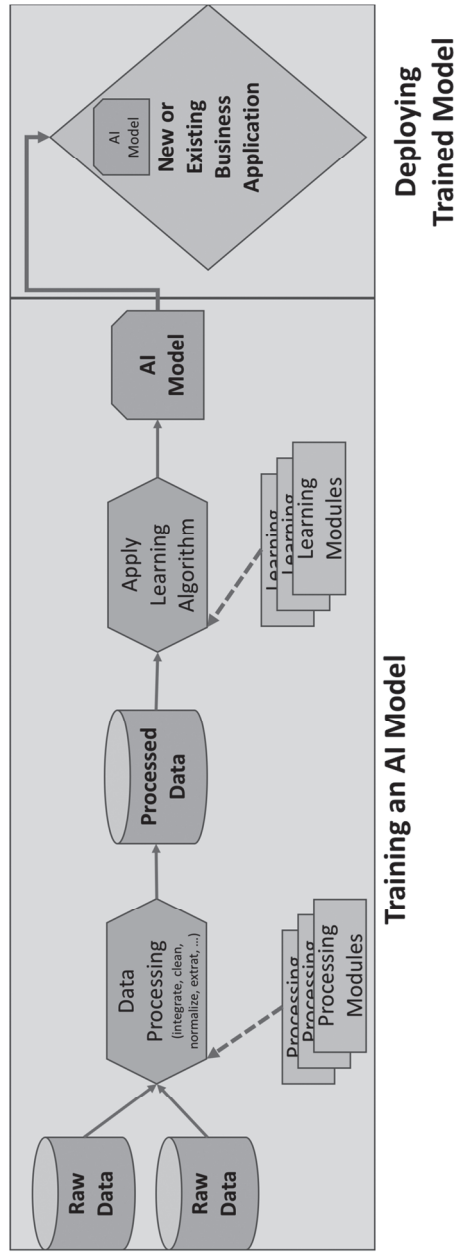

Figure 3: Central activity in AI – training and deploying models

3. Trust, transparency, and governance in AI

8 The process described in Figure 3 illustrates several key elements of how AI systems are built and helps draw out implications from the viewpoint of security, trust, and transparency.

(a) Governance of the AI supply chain

9 The models and data that make up an AI system are connected to each other through a *supply chain* analogous to physical supply chains that go from raw materials (raw data sets) to a manufactured product (AI model). Analogous to the physical world, these different data sets may belong to different entities; individual processing steps may be outsourced and performed by third parties, and individual steps of this process may take place within different national and jurisdictional boundaries. Therefore, by extension, many of the same elements that govern physical supply chains must also be asked of AI supply chains:

(a) **Traceability**. We must ensure that there is full trusted traceability across this supply chain so that it is possible to verify and confirm what data sets were used to train a specific AI model.

(b) **Transparency**. There must be clarity on who trained a model, what data was used, how and where the training was accomplished, and clear historical record of the versions of all the artifacts involved in the process.

(c) **Privacy**. As data is the fundamental raw ingredient for this supply chain, all of the issues associated with data privacy, end-user control of data, and safeguarding of confidential information also apply to the AI supply chain.

(d) **Purpose**. Finally, policies and processes must be put in place to ensure that the purpose for which an AI model is being developed is clear and unambiguous and can be verified and audited appropriately.

(b) Models as first-class objects

10 While the digital age has introduced data sets as a fundamental asset of critical importance for a business, the AI world will add models as another artifact that should receive the same treatment. Questions of

ownership, rights, trademarks, and copyrights will eventually need to be extended to cover models as well. If company A uses the platforms, people, and infrastructure provided by company B to train a model based on a combination of its own data and data from third-party company C, how does one determine the roles, responsibilities and rights of each of the entities with respect to the created model? As data sets and models become crucial elements of a company's market differentiation and competitive advantage, these questions become particularly crucial and germane.

(c) Ethics and bias

11 One of the biggest emerging questions with respect to AI systems is the question of *bias*. To understand where bias enters the AI system, it is useful to go back to Figure 3. In its very simplest form, bias can emerge in three places – raw data, processed data, or model. First, bias can enter when the underlying raw data used in this AI training pipeline is biased or skewed in terms of the population that it represents (*eg*, data only represents customers with a certain gender or racial background or nationality). Second, even if the original raw data sets are unbiased, bias can emerge downstream in the processing pipeline before a processed data set is created (as mentioned earlier, the data processing pipeline is often very complex and involves many stages). Finally, even if the processed data set used to train models is unbiased, bias can enter through the training process, when statistical summaries and approximations are used to capture the model.

12 Public examples of the unintended consequences of bias in AI systems have already emerged. For example, there have been allegations of racism in Amazon's delivery service. In a recently-published scientific paper titled "Gender Shades: Intersectional Accuracy Disparities in Commercial Gender Classification",[1] the authors evaluate multiple commercial facial recognition services and report that the capabilities are not adequately balanced for gender and skin tone. Earlier this year, as part our annual five-in-five technology predictions, IBM Research predicted that bias in AI systems will explode but only those coming up with solutions to monitor, control, and manage bias will survive.

1 The paper was delivered at the Conference on Fairness, Accountability, and Transparency (February 2018).

13 The issue of recognizing, capturing, modeling, and mitigating bias is now a major theme of AI research and development activities. In the MIT-IBM Watson AI Lab, researchers are drawing upon advances in computational cognitive modeling and contractual approaches to ethics to describe the principles that humans use in decision-making. IBM research scientists have recently released the world's largest annotated data set of over one million images for studying bias in AI systems that perform facial analysis.

14 The topics discussed in this section require a broad multidisciplinary effort that combines core technical development from AI technology vendors with the right governance and legal frameworks. An example of such an initiative is the Partnership on AI, a premier industry-wide effort to study and formulate the best practices around the development and deployment of AI technologies. The partnership was initially established in late 2016 across seven major AI technology companies – Apple, Amazon, DeepMind, Facebook, Google, IBM, and Microsoft – but has subsequently grown to over 50 partners. Many of the topics discussed in this section were the driving motivations for establishing this partnership. In addition, IBM has released a set of Principles for Trust and Transparency that guide its handling of customer data and insights and the responsible development and deployment of technologies such as the IBM Watson AI system.

C. BLOCKCHAIN

15 Blockchain technology represents the next generation of secure multiparty trusted transaction systems built on top of a shared ledger. Blockchain enables permissioned parties to come together in real time to conduct secure authenticated transactions and securely exchange data while preserving confidentiality and privacy – all without a central trusted party.

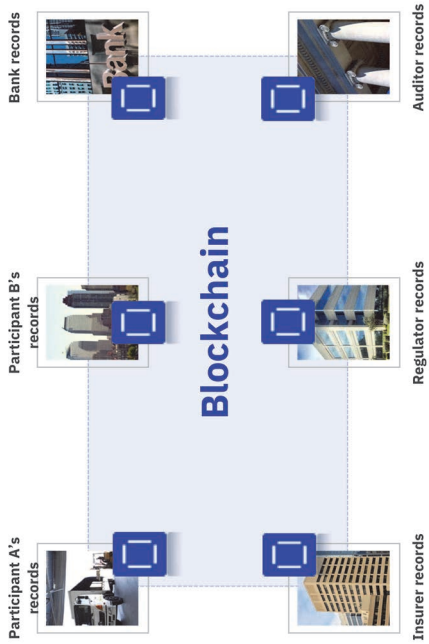

Figure 5: Business networks backed by blockchain

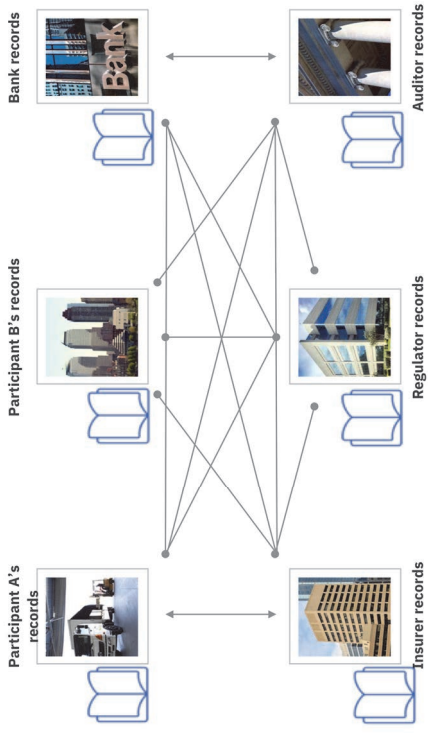

Figure 4: Inefficient business networks

16 As a result, blockchain transforms classical, inefficient, expensive business networks primarily built up out of individual point-to-point connections (Figure 4) into a network backed by a shared, permissioned, replicated ledger holding a *single immutable version of the truth* (Figure 5). This transformation results in three fundamental benefits:

(a) immutable version of the truth that reduces conflict, fraud, disputes, and the cost of reconciling inconsistent information across individual participants;

(b) *shared visibility of information* that drives efficiency, reduces costs, and reduces risks; and

(c) *reduction in the time to process multiparty transactions*, by removing unnecessary layers of checks, redundant operations, and duplication of work as information moves from one participant to another.

1. State of blockchain

17 While the original inspiration for blockchain technology came from anonymous cryptocurrency networks, such as the bitcoin network, enterprise blockchain networks are built quite differently and operate under a different trust model. Enterprise blockchain networks are based on a *permissioned system* in which named, authenticated participants come together to form a network (or join an existing permissioned network). For example, in a blockchain network for supply chain finance, the participants in the network would include the suppliers, the buyers, the banks providing finance, and potentially the logistics providers involved in moving goods from the supplier to the buyer. Similarly, a blockchain network for international trade would include shippers, customs agencies, port and terminal operators, warehouse and third-party logistics providers, the exporter and importer, insurance companies, certification agencies, *etc*. The difference in the trust model also allows permissioned blockchain networks to operate orders of magnitude faster (1,000s of transactions per second) as opposed to fully anonymous networks that typically operate at tens of transactions per second or lower.

18 The ability to conduct secure, authenticated transactions across a business network while recording and maintaining a single version of the truth and providing controlled visibility and sharing of data is a

fundamental technological advancement with broad cross-industry applications. The most immediate impact and appetite for near-term adoption and deployment is being seen in banking, financial services, and supply chain and logistics. However, numerous pilots and early-stage network formation is underway in many other industries – most notably healthcare, manufacturing, telecom, retail, government – and is expected to grow significantly over the next several years.

2. Governance in blockchain networks

19 As a technology that structurally and operationally cuts across many entities, it is no surprise that governance of blockchain networks is an important and complex problem. Governance cuts across many dimensions, technological and otherwise, of establishing and operating a blockchain network. It begins with the legal agreements capturing the relationships, roles, and obligations of the different participants in the network but expands to include policies for new member admission, policies around security and confidentiality of data, policies around the business rules and endorsements that control the transactions recorded on the blockchain, along with the complexities of handling regulatory compliance, risk management, and audit requirements across multiple parties.

20 Currently, these problems are being addressed individually in each blockchain network. However, as adoption increases, we anticipate that there will be a level of maturity and standardization that will emerge in both the legal frameworks and the associated software governance tools used to manage and operate blockchain networks.

D. THE DICHOTOMOUS RELATIONSHIP

21 The previous two sections of this paper described new issues and challenges in trust and governance posed by the emergence of AI and blockchain. Interestingly, these same technologies also provide some of the key ingredients to address these issues.

22 For example, we saw that one of the fundamental capabilities of blockchain networks was to introduce trust and visibility into complex multiparty transactions business networks. This same capability can be harnessed to infuse trust into the "AI supply chain" that we introduced in

section 2. Blockchain technology can enable improved traceability of sensitive data, as the shared immutable ledger technology brings a compelling mix of transparency and security. The decentralization of transaction processing and distribution of trust that is inherent in blockchain, the ability to store and handle encrypted data, and the ability to track and immutably record all operations can be exploited to build trusted AI platforms that provide provenance and lineage of AI models and the entire training process. As techniques for bias checking and mitigation are invented and made part of AI platforms, blockchain can be used to record and ensure that these checks are performed and certified before AI models are deployed into production use.

23 Another example: while we talked about the issue of bias in AI models, AI also promises to serve as a tool to study, measure, evaluate, and address the bias inherent in society and human decision-making. For example, in a recent scientific paper at the 2018 Conference on Fairness, Accountability, and Transparency, scientists demonstrated how AI capabilities in deep natural language processing and advanced image analytics can be used to quantify and highlight gender bias in movies. Similarly, IBM's Project Debater is an early example of the power of AI to automatically extract and synthesize unbiased arguments for and against complex policy questions and potentially shine a light against society's own biases.

24 Finally, related to trust and governance is the important issue of data privacy, especially important as companies today collect and maintain troves of information about the personal data of their users. Recent unauthorized disclosures of sensitive, personal information have re-opened fundamental questions about data privacy. These disclosures also highlight the importance of marrying policy measures with the deployment of new technologies that are designed from the ground up to safeguard privacy. Recent technical advances in areas like pervasive encryption, homomorphic encryption, secure multiparty computation, and zero knowledge protocols, while motivated by the market opportunity around blockchain, also provide the building blocks for developing secure privacy preserving systems.

E. CONCLUSION

25 We are at an inflection point in the digital age when disruptive technologies, like AI and blockchain, are poised to dramatically transform how individuals, society, corporations and nations function. As we embrace the immense possibilities for these technologies to transform our lives and address the most pressing challenges of our time, it is critical to establish the right frameworks, principles, and policies that ensure that these technologies are used responsibly and equitably. Clearly, this requires a strong multidisciplinary approach and open collaboration between leaders in technology, law, policy, and government across the academic, scientific, and technical communities.

DISRUPTIVE TECHNOLOGIES ON BUSINESS LANDSCAPES IN ASEAN: OPPORTUNITIES AND CHALLENGES*

Supawat Srirungruang
Partner, R&T Asia (Thailand) Limited

1. Disruptive technologies: Challenges for banks

- Payment service business
- Peer-to-peer ("P2P") lending
- Cryptocurrency

2. Payment Service Providers

- Alipay
- Rabbit LINE Pay
- AsiaPay
- TrueMoney
- Apple Pay
- Samsung Pay *etc*

3. P2P lending *versus* traditional banking

- Online services, lower overhead costs
- Lower loan interest rates
- Higher interest rates for lenders (compared to savings interest rate offered by banks)
- Normally, lenders bear the risk of default
- P2P lending service providers bear (no) risks from oversupply of deposits

4. Cryptocurrency

- Cryptocurrency

* This is an adaptation of the presentation slides used at The ASEAN Law Conference.

- transfer virtual money (cryptocurrency) without a need for intermediary (bank)
- relying on blockchain technology to verify transactions
- usually faster than traditional money transfer
- prices of cryptocurrencies are still highly volatile

– Estimated time to verify a cryptocurrency transaction

- bitcoin – 60 minutes
- ether – six minutes
- ripple – near-instant

5. Banks' business restrictions

– e-Commerce
– Social media
– Retailers
– Telecommunications

6. In order to help banks survive, the regulator may:

– Impose restrictions on non-bank in conducting banks' businesses; or
– Relax the restrictions imposed on banks

7. Tom Yam Kung crisis: Factors

– Inefficiency in policy implementation
– Current account deficit
– External debt
– Over-investment and real estate bubble
– Performance of financial institutions
– Attack on Thai baht

ARTIFICIAL INTELLIGENCE GOVERNANCE IN SINGAPORE*

Yeong Zee Kin
Assistant Chief Executive, Info-Communications Media Development Authority
Deputy Commissioner, Personal Data Protection Commission

1. Digital economy framework for action

- Goal: Singapore as a leading digital economy which continually reinvents itself
- Strategic priorities:
  - accelerate: digitalising industries
    - accelerate digitalisation of existing sectors
  - compete: integrating ecosystems
    - grow Singapore's competitiveness by fostering new ecosystems enabled by digital
  - transform: industrialising digital
    - developing the next-generation digital industry as an engine of growth
- Enablers:
  - talent
  - research and innovation
  - policy, regulation and standards
  - physical and digital infrastructure
- Use and share personal data innovatively and responsibly → competitive advantage for businesses
- Infusing artificial intelligence ("AI") into business operations → accelerate digital transformation

* This is an adaptation of the presentation slides used at The ASEAN Law Conference.

– In 2016, companies invested from US$26bn to US$39bn in AI[1]
    - technology giants: from US$20bn to US$30bn
    - start-ups: from US$6bn to US$9bn
– Need to promote responsible deployment of AI to engender consumer trust and willingness to use AI solutions

2. Opportunity for Singapore to balance between technology innovation and consumer concerns through enabling regulations

– Consumer empowerment
– Public trust and confidence
– Business friendliness
– Technology innovation

3. Advisory Council on Ethical Use of AI and Data

– Why an Advisory Council?
    - provide guidance on complex ethical issues arising from new business models and innovation in AI space
    - barometer of business needs and consumer sentiments to shape government's plan for sustainable AI ecosystem
– Who are the Council Members?
    - AI technology providers
    - businesses that use AI
    - representatives of societal and consumer interests
– How to achieve the Council's goals?
    - engagement and dialogue sessions with industry and consumers
– What are the Council's work products?
    - model AI governance framework
    - voluntary industry codes of practice

1 McKinsey Global Institute, *Artificial Intelligence: The Next Digital Frontier*.

4. Discussion paper on responsible AI to trigger public dialogue

- Why a discussion paper?
  - propose an accountability-based framework for responsible development and adoption of AI
  - promote structured discussions on ethical, governance and consumer protection issues
  - promote understanding and trust in AI technologies
- Strategic considerations:
  - promote:
    - development and adoption of AI
    - innovation, competition and consumer choice
    - consistency in decision-making
- Principles of responsible AI:
  - decisions made by AI should be *explainable, transparent and fair*
  - AI systems, robots and decisions should be *human-centric*
- AI governance framework:
  - objectives
  - organisational governance measures
  - consumer relationship management
  - decision-making and risk assessment

5. Proposed reference AI governance framework

- Objectives:
  - explaining how AI systems work and verifying that they work consistently
  - building in good data accountability practices
  - creating open and transparent communication between stakeholders

- Organisational governance measures:
  - governance
    - putting in place internal corporate governance and oversight processes
    - taking measures to identify and mitigate risks or harm
    - reviewing how and where AI is deployed within the company periodically
  - operations management and systems design
    - having good practices in managing data
    - ensuring AI performs consistently
    - understanding what data was used to make algorithmic decisions
    - training and maintenance of AI models
- Consumer relationship management:
  - transparency
    - policy for disclosure
    - policy for explanation
  - communication
    - establishing a feedback channel
    - reviewing decisions made by AI
  - interaction
    - reviewing human-machine interactions for user-friendliness
    - providing an option to opt out
- Decision-making and risk assessment:
  - determining the appropriate decision-making approach to maximise benefits and minimise risk of harm
  - "human-in-the-loop" involves a human who relies on intelligent systems but ultimately makes the final decision
  - "human-over-the-loop" involves a human who has made a choice but relies on intelligent systems to suggest options to perform an action

- "human-out-of-the-loop" involves automated decisions by intelligent systems based only on a pre-determined set of scenarios

6. Research programme on governance of AI and data use

– Why a research programme?

- build up a body of knowledge of legal, policy and governance issues concerning AI and data use
- develop a pool of experts knowledgeable in these issues
- complement existing efforts to strengthen scientific research (AI Singapore) and professional training in AI (TechSkills Accelerator)
- develop Singapore as a thought leader in AI legal and governance issues

– Who hosts this research programme?

- Singapore Management University School of Law
- in collaboration with local and international partners

– What are the deliverables?

- research and publications
- local and international workshops, seminars, symposiums, conferences

7. Interlinked AI governance initiatives to support Singapore's AI development and innovation

– Research programme on governance of AI and data use:

- executive committee: National Research Foundation, AI Singapore, Info-communications Media Development Authority, Singapore Management University
- management team: Singapore Management University

– Advisory Council on the Ethical Use of AI and Data: provides industry and consumer perspectives to the research programme:

- composition
    - industry-led
    - private sector thought leaders
    - consumer advocates
- roles: advise and support the government to:
    - identify regulatory, legal, policy, ethical and governance issues in commercial deployment of data-driven technologies
    - provide insights and recommendations on issues that may require policy consideration/regulatory/ legislative intervention
    - develop ethics standards and reference governance frameworks and publish advisory guidelines, practical guidance, and/or codes of practice for the voluntary adoption by the industry
    - provide insight and guidance to the research programme

– Discussion paper: AI and personal data – fostering responsible development and deployment of AI: provides regulators' perspectives to the research programme

- regulators' round-table discussion on AI governance
    - composition
        - Sector regulators and public agencies
    - roles
        - community of practice for public agencies
        - establish common AI governance principles and framework across sectors
        - coordinated, principled and outcome-focused sectoral regulations where necessary

8. Data protection issues in DLT records

– DLT records are typically used transactional records for transfers of value, *eg*, cryptocurrencies, title registry, data accountability and provenance tracking (*ie*, regular technology)

- DLTs are well-suited audit trails and transactional records
- permission-less DLTs can be accessed or written by anyone
    - but entries in DLTs are encrypted but accessed through an application layer
- permissioned DLTs are closed to club members

– Protection obligation – s 24 of Personal Data Protection Act ("PDPA"); principle of integrity and confidentiality – Art 5(1)(*f*) of General Data Protection Regulation ("GDPR"); security of processing – Art 32 of GDPR

- reasonable security arrangements to prevent unauthorised access, collection, use, disclosure, copying, modification, disposal or similar risks
- DLT effective in preventing modification or data loss
- but poses disclosure risks

– Retention limitation – s 25 of PDPA; principle of storage limitation – Art 5(1)(*e*) of GDPR

- cessation to retain personal data or removal of the means by which it can be associated with individuals when purpose for collection fulfilled and no longer necessary for legal or business purpose
- blockchain entries can't be archived or deleted – but what about disposing of the encryption keys?
- same issues faced in jurisdictions with right to erasure (Art 17 of GDPR)

– Correction – s 22 of PDPA; rectification – Art 16 of GDPR

- must correction of personal data entail erasure of old records?
- if no correction is made, organisation must "annotate the personal data … with the correction that was requested but not made"
- can this be extended to annotation of outdated records and inserting a pointer to the updated record?

- Anonymisation
  - data is no longer personal if recipient is unable to identify the individual
    - from data itself or any other data recipient has access to
    - compare anonymisation guidelines (chapter 3, selected topics guidelines)
  - assessment not just at DLT record layer but also the application layer (*eg*, cryptocurrency wallet)
- Transfer limitation – s 26 of PDPA; Art 44 of GDPR
  - transfers out of Singapore only to organisations that provide a comparable standard
  - requirements for transfers: reg 9 of Personal Data Protection Regulations
    - consent
    - contract performance
    - data in transit
    - publicly available
  - consent requirements
    - summary of extent of transfer and countries
  - DLT records face the same challenges as the use of cloud computing
- Potential use of DLT for cross-border know your costumer ("KYC")
  - "Consortium of banks, together with IMDA of Singapore, completes proof-of-concept for ASEAN's first industry KYC Blockchain" OpenGov (28 October 2017)[2]
  - KYC records are personal information
  - Can KYC records come within the credit reports exception?

2 <https://www.opengovasia.com/articles/8093-consortium-of-banks-together-with-imda-completes-proof-of-concept-for-aseans-first-industry-kyc-blockchain> (accessed 25 July 2018).

- Would KYC records come within future "legitimate interest" exception?

RAPPORTEUR REPORT FOR PLENARY SESSION III

Disruptive Technologies on Business Landscapes in ASEAN: Opportunities and Challenges*

A. SUMMARY OF SPEECHES

1. Sriram Raghavan (Vice President, IBM Research; Chief Technology Officer, IBM India/South Asia)

1 Three foundational technologies that are poised to become cornerstones of disruption are: (a) artificial intelligence ("AI"); (b) blockchain; and (c) the Internet of Things ("IoT"). This plenary focused on AI and blockchain, against the backdrop that the IoT has generated a huge amount of data that has today become a highly-valued commodity. These technologies are reshaping industries, professions and economies at a tremendous pace. A flexible, balanced and forward-looking regulatory and policy framework is essential to ensure responsible, ethical, safe and fair use of these technologies without curtailing innovation and value creation.

2 AI models are built through a process of training, which entails data preparation, the building of an AI model from a data set, and finally the rollout of the model in a business application. Ethical and regulatory challenges include: (a) the governance of the AI supply chain to ensure traceability of all steps taken to train a model, transparency in the development of the model, and data privacy; (b) the mitigation of bias in all steps of training an AI; and (c) rights and ownership over AI models.

3 Blockchain technology represents the next generation of secure multi-party trusted transaction systems built on top of a shared ledger. It enables permissioned parties to come together in real time to conduct secure authenticated transactions and securely exchange data while preserving confidentiality and privacy, without a central trusted party. As a technology that structurally and operationally cuts across many entities and industries,

* The 13th ASEAN Law Association General Assembly and The ASEAN Law Conference, with the theme "The Power of ONE: Unlocking Opportunities in ASEAN Through Law", was held on 25 to 28 July 2018. This session was held on 27 July 2018, 11.00am to 1.00pm.

the governance of blockchain networks is an important and complex problem. Governance refers to not only the private relationships and obligations of participants in a blockchain network but also the broader policies on the admission of new members to a blockchain network, security and confidentiality of data, control of transactions recorded in the ledger, and so on. As an example of how the technologies that are creating new challenges in trust and governance also provide key elements of the solution, we may explore adopting blockchain to ensure traceability and transparency in how data is used in the AI supply chain.

4 With these technologies dramatically transforming our societies, countries, businesses and personal lives, it is crucial that we establish the right frameworks, principles and policies to ensure they are used responsibly and equitably. This task requires a multi-disciplinary approach with collaboration among technologists, lawyers, policymakers, government and academia. It will be increasingly difficult to draw silos between different businesses, professions and functions.

2. Yeong Zee Kin (Assistant Chief Executive, Info-communications and Media Development Authority of Singapore; Deputy Commissioner, Personal Data Protection Commission)

5 The role of government is to provide a regulatory framework to support technological innovation and the widespread adoption of new technology while addressing consumers' concerns. The focus here was on Singapore's experience in regulating AI.

6 The speaker shared about the following initiatives:

(a) Create a platform for key stakeholders – tech providers, businesses that use AI, and representatives of societal and consumer interests – to discuss and engage the public so as to develop a governance framework for AI and codes of practice for industries using AI (*eg*, the Advisory Council on the Ethical Use of AI and Data in Singapore).

(b) Issue discussion paper(s) on responsible AI, the aim being to trigger public dialogue on ethical, governance and consumer protection issues.

(c) Encourage companies to develop frameworks for accountability and responsible use of AI through structured discussion. Such frameworks should identify who is responsible for the AI supply chain and ethical compliance; how to manage transparency, communication and interaction with consumers; and the company's approach to decision-making and risk assessment in its adoption of AI.

(d) Create a research programme whereby industry, academia and the Government can engage in dialogue about the legal, regulatory and governance issues surrounding the AI ecosystem.

3. Supawat Srirungruang (Partner, R&T Asia (Thailand) Limited)

7 Technology has enabled financial transactions to be carried out through intermediaries other than banks and their agents. For example, Alipay, Rabbit LINE Pay, AsiaPay, TrueMoney, Apple Pay and Samsung Pay are all platforms for digital payments and fund transfers whose services are increasingly employed by banks to reach consumers. Regulators have to consider whether to relax banking regulations to allow banks to penetrate new businesses or to expand the coverage of financial regulations to include these other financial intermediaries.

8 Furthermore, as technology facilitates cross-border transactions, governments may be concerned to impose greater restrictions on the adoption of technologies which allow easy access to loans (internally and externally), which can in turn create a highly-leveraged economy.

4. Lam Chee Kin (Managing Director and Head, Group Legal, DBS Bank Ltd)

9 Technology is increasingly transforming or eliminating processes that are pain points for customers. AI has transformed an array of processes in a bank's business. Narrow AI has been deployed to transform customer acquisition, transactional behaviour of customers, customer engagement and risk management. For example, AI has been used to flag suspicious behaviour patterns that should attract more attention for bank officers tasked with screening for money laundering and terrorism financing. AI has also radically expedited the process of approving a payment and setting up accounts across borders. The deployment of AI has reaped enormous

efficiencies, the benefits of which may be plumbed back into further data science research and ultimately to consumers.

10 Blockchain has not been deployed at scale, and may be viewed as an issue for the next generation. But we must begin now to create the appropriate legal frameworks for its future use. In this regard, market players and regulators must understand that the proposed uses of blockchain must drive the development of this technology and our analysis of the legal frameworks required. They must also grapple with the risks posed by money laundering.

5. Attorney JJ Disini (Managing Partner, Disini & Disini Law Office)

11 Technology poses immense challenges for regulation. There is a need for clarity on why we strive to regulate particular aspects of technology, so as to guide our focus in regulation. There is also a need for flexibility in the way that we conceptualise problems posed by technology. For instance, the emergence of driverless cars could change the way that we think about property ownership, resource sharing and space allocation.

12 Though technology creates problems, technology itself also often offers solutions to the same problems. But as technological problems morph into social problems, we will increasingly need to engage with the social sciences to determine the appropriate response.

B. COMMENTS/QUESTIONS FROM PARTICIPANTS AND RESPONSES FROM PANELLISTS

S/No	Questions and responses
1	**Harriet Territt (Partner, Jones Day)**: What is the single biggest obstacle to widespread adoption of these technologies? **Sriram Raghavan**: The biggest obstacle is the high level of skill required for proper implementation of these technologies. Technological development has outpaced education. **Yeong Zee Kin**: Adopters have to persist in their journey of adopting technology (accumulating data, customising their use case, procuring the right technology); it is not immediate and one should not be put off by a wrong turn.

	Lam Chee Kin: The will to adopt technology to transform our institutions and entities is the biggest obstacle.
2	**Harriet Territt**: What is the biggest shift in business that we may expect from the next generation's adoption of blockchain? **Lam Chee Kin**: Our use of blockchain today is powered by data and computing power. In respect of data, it is critical that our legal frameworks surrounding data use (sharing, protection, retention, deletion) evolve. In respect of computing power, it is critical that our approach to managing the risks of cloud computing evolves. As the capability of in-memory processing increases and quantum computing is introduced, there will have to be further evolution in the way we manage the risks associated with data use. **Sriram Raghavan**: As the computational power of personal devices expands, our patterns of data use will change. Now with edge computing, data storage and processing may be decentralised; in fact, decentralisation may be viewed as more desirable because of privacy concerns. As such, our frameworks of ownership, rights and governance must evolve. **Yeong Zee Kin**: It is crucial that this trend of decentralisation (if it materialises) should develop because of the technology rather than because of the regulatory framework. The regulator's goal is to facilitate and not distort technological development. **Lam Chee Kin**: The first mover is technology; the second mover is business; the third mover is public policy; and the fourth mover is legislation. Legal frameworks only become applicable after the fourth mover. The challenge is how to transform the fourth mover into a first mover, and insert thought leadership into the development of legal frameworks and legislation. **Harriet Territt**: In my view, the only regulation that works is principles based.
3	**Harriet Territt**: If you were advising a client who is considering the adoption of AI and blockchain for their business, what are the top risks they need to consider? **Supawat Srirungruang**: In Thailand, we must pay attention to the readiness of regulators to allow the deployment of these new technologies.
4	**Harriet Territt**: Are lawyers focusing too much on the challenges and not enough on the opportunities presented by technology, leading to a tendency to over-regulate? **Attorney JJ Disini**: Yes, technologists may have to circumvent or bypass government regulations in order for a project to thrive. Technology will

	continue to develop because of the economic incentives. But governance is necessary in order to ensure that technologists are alive to ethical considerations in technological development and use. **Sriram Raghavan**: *Timing* of regulation should be considered. Over-regulation inhibits technological development and experimentation. But if technology is allowed to develop, at some point, it will hit a scale when regulation is necessary. The distinction is between technological *development* and technological *application* at scale. The challenge is to identify which point technology transitions from development to application.
5	**Harriet Territt**: How important is it to have cross-border conversation in ASEAN among regulators, technologists and academia when developing appropriate regulatory frameworks? **Yeong Zee Kin**: ASEAN has developed data protection principles and has begun developing a framework for digital management. **Lam Chee Kin**: It is of critical importance to cross-border trade that we harmonise laws across jurisdictions, not only thematically (*eg*, data privacy) but as a holistic system. From a business/bank's perspective, the suite of laws and regulations involved within jurisdiction is formidable, much less across jurisdictions. Academia can make valuable contribution to this dialogue. **Supawat Srirungruang**: The challenge is how to achieve cross-border conversation when deliberation on a coherent framework within the country is itself a challenge.
6	**Harriet Territt**: If you had to pick the technology that would have the single biggest impact on the world in the next 20 years, what would it be? **Sriram Raghavan/Attorney JJ Disini**: Quantum computing. **Lam Chee Kin/Supawat Srirungruang**: AI. **Yeong Zee Kin**: Data.

Ho Jiayun and Muhammad Taufiq bin Suraidi
Rapporteurs
27 July 2018

RAPPORTEUR REPORT FOR PLENARY SESSION IV

Power of *One*: ASEAN Economic Community Financial Integration*

A. SUMMARY OF SPEECHES

1. Tan Boon Gin (Chief Executive Officer, Singapore Exchange Regulation Pte Ltd)

1 The speaker opined that the benefits of deeper financial integration are evident; it was the difficulties with integration that merited further discussion. Two difficulties came to fore; first, the significant differences in the levels of development of the financial systems across ASEAN, and second, the need to get the necessary buy-in from all stakeholders, including the private sector. Three success factors were proposed. First, the need to persevere through with the process of achieving end-to-end integration, even if the economic benefits are not immediately apparent. Second, while it is likely that integration will grow the economic pie to be shared, equal emphasis must be placed on equalisation of economic benefits. This could be done via capacity building in less developed financial systems, aligning interests through joint ventures or other revenue sharing arrangements and taxing the routing of funds from less developed jurisdictions to more developed jurisdictions. Third, the need to engage the private sector, especially in arriving at a compelling value proposition – there must be a robust business case for financial integration.

2 The speaker then observed that while there are quite a number of ASEAN initiatives to advance financial integration, they lacked an effective coordination system. While ASEAN is nowhere near to the level of centralisation achieved in the European Union (and neither does ASEAN desire that level of centralisation), ASEAN might find that there are benefits to having a body to coordinate its initiatives more effectively. One obvious candidate was the ASEAN Secretariat. If the Secretariat is resourced

* The 13th ASEAN Law Association General Assembly and The ASEAN Law Conference, with the theme "The Power of ONE: Unlocking Opportunities in ASEAN Through Law", was held on 25 to 28 July 2018. This session was held on 27 July 2018, 2.30pm to 4.00pm.

adequately and given the necessary support, that would be a big step forward.

2. Attorney Francisco Ed Lim (Senior Partner, Angara Abello Concepcion Regala & Cruz Law Offices)

3 The speaker observed that the common thread underlying the pursuit of greater integration in capital markets, insurance and banking was the matter of harmonisation. Where true harmonisation would be overly ambitious due to constraints of time and political will, a regime of mutual recognition could take its place. In this regard, he mooted the example of the Trans-Tasman Mutual Recognition Scheme entered into between Australia and New Zealand.

4 In terms of the challenges faced, the speaker opined that it is often in the follow-through and execution of the nitty-gritty that ASEAN initiatives fall short. Based on his experience, promoting ASEAN financial integration has generally been low in most governments' lists of priorities. Things might be different if the benefits of financial integration are made clear. The speaker recalled an experience he had as President of the Philippine Stock Exchange, advocating for the Philippines' membership in the ASEAN Trading Link. He had argued that the Philippines' participation in the ASEAN Trading Link would be a driving force for the Philippine Stock Exchange to "level up" in terms of its processes and regulation.

3. Kyaw Zin Htet

5 The speaker acknowledged that Myanmar's financial system is relatively undeveloped; its capital markets are still not open to foreigners (though that is soon to change), liquidity is very low and the Yangon Stock Exchange is still in its infancy. However, the flipside to this was that Myanmar is very porous – it represents a golden opportunity for ASEAN to get involved with assisting in its development.

6 The speaker observed that, thus far, it has been non-ASEAN entities taking the lead in developing Myanmar's financial system. For example, the Yangon Stock Exchange was built up with assistance from Japanese entities like the Daiwa Institute of Research Group and the Japan International Cooperation Agency. For ASEAN to play a bigger role in financial

integration, it must be prepared to take on a more concerted and deliberate effort, or risk losing the initiative to non-ASEAN entities.

4. Nattarat Boonyatap (Partner, Corporate Commercial, R&T Asia (Thailand) Limited)

7 The speaker noted that it was very easy to view ASEAN financial integration as a zero-sum game, but that this should not be the case. The speaker emphasised the need to support fellow ASEAN Members with less mature capital markets to develop the same. It was in the interest of ASEAN as a whole to develop its capital markets to the point that even non-ASEAN investors would find it overwhelmingly attractive to invest in ASEAN.

5. Ng Wai King (Managing Partner, WongPartnership LLP)

8 The speaker stressed the importance of harmonisation and recognition for successful capital markets integration. Although Singapore, Malaysia, and Thailand have, to some extent, achieved such integration through the ASEAN Trading Link initiative, much was left to be desired still. In this regard, a viable next step would be to address the issue of mutual recognition of professionals and offerings. This would tie in with Truong Nhat Quang's (see next speaker) two main points on how the ASEAN Trading Link can be improved. Crucially, mutual recognition would be attractive to investors, as it significantly reduced time and expense.

9 The speaker noted that the contemporary challenge for the industry comes from other forms of fundraising. These new and unconventional forms of fundraising, such as initial coin offerings, fall outside the conventional securities regulation regime. The problem for the financial industry is that if it did not move fast towards integration, then there were other stakeholders out there to usurp the role that conventional fundraising was meant to play.

6. Truong Nhat Quang (Managing Partner, YKVN)

10 The speaker noted that it was an appealing proposition for companies to be able to raise funds in different jurisdictions, but the reality was that

the present ASEAN Trading Link was not appealing enough to be of interest to Vietnamese investors. This was largely because the ASEAN Trading Link had not yet resolved post-trade issues. The long-term solution is to look beyond that. If ASEAN develops a long-term vision for the investor, then there would be long-term integration for investors to look forward to.

11 For financial integration to happen by 2025, as envisioned by the AEC Blueprint, apart from the three success factors Boon Gin raised, the speaker also identified three other "must-haves". First, buy-in from the various governments and stock exchanges, as well as the political will to change. Second, given the reality that there were different levels of market development in different ASEAN countries, those who were ahead should take the lead first. Singapore, Malaysia, and Thailand already have the ASEAN Trading Link from which they could establish mutual recognition arrangements amongst them as the other countries buy in and then eventually work towards regional harmonisation. Third, buy-in had to be not just from the perspective of the lawyers, but also from all key players in the market, including investment banks and other professionals like auditing firms, *etc*.

B. COMMENTS/QUESTIONS FROM PARTICIPANTS AND RESPONSES FROM PANELLISTS

S/No	Questions and responses
1	**Unidentified delegate from the Philippines**: The delegate raised the question of whether the ASEAN way of doing things – which he acknowledged has, to a large measure, succeeded – nonetheless needs to be changed if ASEAN is to become a more "powerful" and "stronger" organisation. Is the ASEAN Way still the way to ensure financial integration? There are some critics who say that ASEAN should not even dream of financial integration because ASEAN was not born for that purpose. The delegate invited comments from the panellists on the points raised. **Ng Wai King**: The ASEAN Way – consensus building – has served the organisation very well. Indeed, when one looks at the AEC Blueprint 2015, the ASEAN Members have agreed to do many things in pursuit of greater financial integration. The challenge is not in the decision-making, but in the lack of individual political will to see through the execution. For example, a part of the key action plan for financial integration is the

	substantial liberalisation of the insurance markets. The Members of ASEAN have said they want substantial liberalisation, but the key is committing to doing something in pursuit of that goal. **Nattarat Boonyatap**: Especially in banking and insurance, countries often retain exceptions to ASEAN commitments as safeguards. In ASEAN, there is still a strong feeling that each country retains autonomy and sovereignty. **Attorney Francisco Ed Lim**: We should continue with the ASEAN Way – we do not impose our will on others. The consensus approach has worked well. Each government should "level up" especially in terms of trying to harmonise standards and regulations. The speaker suggested that a "comply or explain" approach might be a suitable middle ground alongside a mutual recognition approach. Such an approach would acknowledge the limitations of some ASEAN Members; harmonisation should be to a minimum standard. This can be explored as part of speeding up integration and hitting the targets set for 2025.

Dennis Saw and Reuben Ong
Rapporteurs
27 July 2018

COMPETITION LAW IN THE ASEAN ECONOMIC COMMUNITY

Lim Chong Kin
Director, Drew & Napier LLC

1 ASEAN has seen tremendous growth over the years. In 2014, it emerged as the third-largest economy in Asia, and the seventh largest in the world. Its progress was further facilitated by the establishment of the ASEAN Economic Community, or AEC for short, in 2015 to realise the region's goal of becoming a single market and production base.

2 There is much value in ASEAN becoming an integrated economic region. From a macro-economic perspective, the presence of a unified production base would enable the region to attract foreign direct investments ("FDIs"). In 2016 alone, FDIs in the region totalled $96.7bn, with intra-ASEAN investments totalling $24bn. From the perspective of businesses, an integrated economy will provide a level playing field for businesses and ensure that they have easy access to the market.

3 A unified economy cannot be attained without having effective competition policies and laws implemented on both the national and ASEAN level. Perhaps, the importance of effective and consistent competition regulations may be better illustrated by the impact that businesses might suffer in their absence.

4 In countries without effective competition laws, access to markets might be affected due to, for instance, the anti-competitive practices of dominant domestic enterprises aimed at raising barriers to entry or driving smaller competitors out of the market.

5 On an ASEAN level, the cost of compliance increases with companies having to comply with varied and inconsistent competition laws across ASEAN Member States ("AMS"). ASEAN's appeal as an attractive FDI destination may thus be affected.

6 Accordingly, AMS should keep up with their efforts in implementing, refining and streamlining competition polices and regulations. This will not only create a level playing field for businesses in ASEAN, but also create and preserve business incentives to invest in the region. This is a virtuous cycle, which will help to pave the way for integration into global networks, which will help create more jobs and income in the ASEAN region.

7 Looking back, several initiatives have been put in place to promote the effective implementation of competition laws and policies. In August 2007, the ASEAN Experts Group on Competition (also known as the AEGC) was established, to serve as a forum for discussing and coordinating competition policies, with the goal of promoting a healthy competitive environment in the region.

8 The ASEAN Regional Guidelines on Competition Policy was also launched, which sets out different policy and institutional options that expedites the development of national competition policy within each Member State. The Guidelines encourage every AMS to provide clarity, transparency and certainty to businesses on how prohibitions and exemptions in competition law will be enforced.

9 For the business community, the Competition Compliance Toolkit for Businesses in ASEAN was launched in 2017, to provide guidelines on implementing an internal Competition Compliance Programme in the ASEAN context. This was effected in tandem with the revision of the Handbook on Competition Policy and Law in ASEAN for Business 2017, which provides an overview of the substantive and procedural competition law in AMS.

10 To date, nine out of ten AMS have national competition laws. AMS with implemented national competition laws have also sought great initiative in amending their competition laws to be in line with international best practices. At the ASEAN level, the focus has generally shifted from the enactment of competition law to the *effective* enforcement and harmonisation of it.

11 Moving forward, the AEC Blueprint 2025 provides broad directions for the AEC from 2016 to 2025, with a vision for remaining AMS that do not have competition laws to put in place competition laws, and effecting the implementation of national competition laws in all AMS based on international best practices and agreed-upon ASEAN guidelines.

12 Flowing from these strategic measures is the wider vision set out in the ASEAN Competition Action Plan 2016–2025, which seeks to create a progressive competition regime with strengthened capacities to be built in the region. What remains to be seen is operationalising the term "effectiveness" and developing a methodology to adequately assess the system.

13 So far, there is much to be said about the achievements by the national competition authorities and the policymakers involved in creating a principled approach to competition law implementation in the ASEAN region, as well as the milestones reached in the greater vision of establishing a dynamic ASEAN market and production base. However, challenges are still faced by businesses whose continued growth is integral to the development of a unified region.

14 Based on my experience as a competition law practitioner, I have broadly categorised the practical challenges faced by businesses into two categories, namely: (a) the lack of consistent competition law enforcement throughout the region; and (b) differences in the practical implementation of competition laws in AMS, for example, in respect of the availability of leniency programmes, notification systems and settlement procedures.

15 Starting with inconsistent competition law enforcement in the region, owing to a myriad of factors, such as capacity issues or the lack of political resolve or support, competition laws have not been consistently enforced across the region.

16 From a business perspective, divergences among competition regimes can be problematic. First, where businesses carry on operations in more than one country, their conduct is potentially subject to regulation by more than one competition regime. Lack of uniformity becomes problematic when various competition law regimes reach different conclusions on the legality of the same conduct.

17 The lack of consistent competition law enforcement and corresponding legal and compliance uncertainty increases barriers to entry to the region as a whole by decreasing investor confidence in the very legal structures that were meant to ensure a conducive environment for businesses to grow and compete in.

18 Whilst the implementation of competition laws in the AMS represents a first step towards a competitive, innovative and dynamic ASEAN, ultimately, political commitment to promoting competition and ensuring the independence of competition authorities are crucial to the effective enforcement of competition legislation.

19 The proposed formation of the ASEAN enforcers' network is a noteworthy development in the right direction. Announced during the Global Competition Review Live 2018 by the Chief Executive of the

Competition and Consumer Commission of Singapore, Mr Toh Han Li, the network is focused on fighting cross-border cartels and improving coordination on merger reviews for countries that have merger regimes. The network will set the stage for exchange of information on cases and mergers, and will allow ASEAN to move to the next phase of building capacity and enforcement.

20 In my view, further practical measures can also be taken by each competition authority to assist businesses, namely: (a) publishing enforcement decisions and translating them into English; (b) issuing harmonised guidelines to ensure a consistent approach to the enforcement of competition laws in the region and to help businesses understand how the law will be enforced; (c) implementing consultation processes to gather regular feedback from businesses across the region; and (d) providing clear regulatory timelines.

21 By and large, AMS should constantly update and strengthen their legislative framework, drive capacity-building initiatives and align their competition law enforcement approach with international standards.

22 Next, we move on to address the second challenge faced by businesses operating in the region, which concerns differences in the practical implementation of competition laws in AMS, for example, in respect of the availability of leniency programmes, notification systems and settlement procedures.

23 Divergence in leniency, particularly the fact that some jurisdictions have no leniency programmes, acquires a practical significance when cartels involving multiple AMS are involved. This is because whistle-blowers of cartels having a multinational dimension would face different levels of exposure to liability in different jurisdictions. The current situation brings about practical consequences for multinational cartel participants. First, multinational cartel participants would be less willing to blow the whistle in jurisdictions that do not offer them lenient treatment. Second, and more significantly, multinational cartel participants may be ambivalent about coming forward at all, even in jurisdictions that do have leniency programmes. This is because they may inadvertently increase their exposure to liability in jurisdictions without leniency programmes.

24 Moving forward, harmonisation for leniency programmes should, ideally, be available in all ASEAN jurisdictions, where immunity be offered on similar terms. This would allow businesses some degree of certainty, and

this may even tip the scale in favour of whistle-blowing cartel participants stepping forward for leniency.

25 Similarly, inconsistencies arise in the settlement procedures present amongst the AMS. For the sake of procedural efficiency, competition regimes may allow undertakings to accept liability for the conduct for which they are being investigated in exchange for a reduction in the penalty to which the undertaking would otherwise have been subjected. This discount on the penalty imposed is a reward for undertakings to settle, rather than to protract the investigation which may be costly and time-consuming, both for the undertakings concerned and for the competition authority. To date, Singapore, Myanmar, the Philippines and Thailand have had in place formal settlement procedures.

26 Accordingly, if a business chooses to settle in some jurisdictions, it may face challenges in defending itself in other jurisdictions as settlements may involve an admission of guilt or infringement. However, if the business chooses not to settle in some jurisdictions, then it risks suffering from being involved in protracted investigations and proceedings, as well as the full penalty in the event it is ultimately found liable for infringement.

27 Moving forward, the availability of settlement procedures in all competition law frameworks in AMS would greatly assist businesses and AMS in the effective enforcement of competition law.

28 Lastly, we turn to consider the variations in the notification systems for (a) anti-competitive agreements; and (b) merger notifications. Notification for the former system is absent in several AMS, while divergence in the latter system lies in its mandatory and voluntary notification divide. For instance, Brunei and Singapore have voluntary notification frameworks, whilst the Philippines, Thailand and Vietnam have mandatory pre-merger notification frameworks. Then we have mixed regimes like Indonesia, which adopt a hybrid system comprising both voluntary and mandatory networks.

29 The challenge posed to ASEAN businesses arises from the absence of formal notification systems in some AMS. Without the possibility of a formal notification and clear direction from the authority, businesses may be less willing to enter into agreements or engage in conduct that, while *prima facie* infringing the competition prohibitions, are nonetheless worthy of exemption.

30 While the idea of a common merger filing platform has been raised, regard must also be had to the differences in business environments and operations in each AMS, which would require different information for the assessment of a merger.

31 Therefore, a common filing platform may be more useful as a one-stop shop in respect of an information depository at the commencement of a merger notification where the merger may impact on two or more AMS to avoid duplication of filing efforts, although it is envisaged that, more often than not, merger reviews may take on different a complexion in each AMS affected.

32 Separately, and more important to the efficient administering of a merger review programme, is the suggestion for the relevant authorities to come up with reasonable and harmonised merger review timelines and adopt a consistent and transparent economic testing in merger reviews.

33 In closing, whilst we recognise that this is a difficult area to reform as competition law is often national in application and national policies may diverge depending on the stages of economic development of each AMS economy, growth drivers of each AMS, and the maturity of competition regimes, central to the solutions proposed is the belief that harmonisation should be achieved by way of consensus building and soft law arrangements or, as we better know it, "The ASEAN Way".

34 A harmonised approach to implementing competition law principles in the ASEAN region can be achieved by establishing working groups to identify key analytical areas for harmonisation, with bilateral and multilateral approaches to be considered first. A central set of guidelines could be developed to harmonise enforcement of competition laws in AMS. Regular AEGC sessions should also be conducted with business involvement, to provide a common platform for consultation and dialogue between the agencies and the businesses.

35 By working together in the true spirit of ASEAN, we can continue to prevail as a dynamic, innovative and competitive region.

THE HARMONISATION OF ASEAN COMPETITION LAWS*

Dr Kodrat Wibowo
Commissioner, Komisi Pengawas Persaingan Usaha

1. Outline

- Introduction
- Targets of Competition Policy and Law ("CPL")
- Can targets be met with a pile of challenges?
- Indonesia's current progress
- What ASEAN needs to do
- Is the harmonisation of CPL the ultimate answer for the efficacy of CPL in ASEAN?
- Conclusions

2. Introduction

- Intra-ASEAN export volumes increase at roughly 1.5% each year, in nominal terms. Foreign direct investment ("FDI") flows in 2016 increased by 14.4% year-on-year[1]
- With 25.2% of total inflows to the region, intra-ASEAN was the second largest source of FDI inflows to the region after the European Union with 32.9%[2]
- Cross-border competition, including merger and acquisition cases, has also increased
- Competition policy and Law is one of the important pillars in ASEAN Economic Community ("AEC") Blueprint 2025

* This is an adaptation of the presentation slides used at The ASEAN Law Conference.

1 <https://press.pwc.com/News-releases/intra-asean-trade-could-exceed-us-375-billion-by-2025/s/597b2c9a-9710-4568-9971-69bfd8e8910c>.

2 <https://press.pwc.com/News-releases/intra-asean-trade-could-exceed-us-375-billion-by-2025/s/597b2c9a-9710-4568-9971-69bfd8e8910c>.

3. Targets of CPL

– Facing incomplete and relatively big gap among its developments, ASEAN puts ambitious targets for its competition policy and law:

  - peer review for ASEAN Member States on competition law; establishing a regional cooperation agreement on CPL; procedures for joint investigations and decisions on cross-border cases; regional strategy on convergence; and an ASEAN set of principles on competition agreement; and
  - while developing such targets, narrowing gap of their developments

4. Challenges

– The major challenge to competition policy and law in ASEAN is currently the battle of transition
– Different legal systems and procedures across ASEAN cause difficulties in finding a suitable procedure for handling a cross-border case
– There is imbalanced competition and business culture across ASEAN, both from policymaker and business perspectives
– There is reduced potential support from development partners in ASEAN

5. Indonesia's current progress

– Indonesia is anticipating significant changes in its government and competition policy and law. 2019 will be a national election year for presidential and national parliament election. Huge democracy euphoria has been coming to Indonesia. This makes it necessary for Indonesia to be prepared with some changes
– On competition policy and law, the final draft of the new law is being finalised by both the parliament and government, targeted to be passed by the end of this year; internally, competition authority of Indonesia, KPPU, is starting this year with its new commissioners and new set of priorities in the sectors of food, health, education, housing, digital economy, automotive,

logistic, transportation, information and communications technology, finance and banking sector

6. What ASEAN needs to do

- ASEAN needs to rethink about its ambitions. ASEAN may undertake two efforts:
  - to shift the timeline of achieving output targets; or
  - to simplify outputs, in particular by eliminating less important targets or incorporating closely-related targets
- ASEAN needs to accelerate the establishment and implementation of law enforcer network
- ASEAN needs to increase the role of its member countries with more developed CPL in assisting other ASEAN countries

7. Is the harmonisation of CPL the ultimate answer for the efficacy of CPL in ASEAN?

- Not in the short term. Harmonisation must come from a need, not from coercion to achieve the target set
- Instead, ASEAN should increase interaction and communication among them

8. Conclusions

- Increasing importance of CPL. ASEAN has set a very ambitious target in the field of competition, so its potential achievement needs to be questioned
- Different legal systems and resources are main challenges in achieving the targets. Therefore, rather than thinking about harmonising the CPL in the region, ASEAN should strengthen and improve interaction in the aspects of prevention and enforcement of cross-border law and increase the contribution of ASEAN countries in assisting other ASEAN countries

RAPPORTEUR REPORT FOR PARALLEL SESSION 3

Competition Law in the ASEAN Economic Community*

A. SUMMARY OF SPEECHES

1. Lim Chong Kin (Director, Drew & Napier LLC)

1 Having effective competition regulations and policies are important to ensure a level playing field for businesses, which will therefore attract more businesses into the ASEAN region. Nine of ten ASEAN Member States now have competition laws in place. The shift is therefore to move from enactment to effective enforcement and harmonisation.

2 ASEAN enforcers' network: The network will be focused on fighting cross-border cartels and improving coordination on merger reviews for countries that have merger regimes. The network will set the stage for exchange of information on cases and mergers, and will allow ASEAN to move to the next phase of building capacity and enforcement.

3 Other practical measures are: (a) publishing enforcement decisions and translating them into English; (b) issuing harmonised guidelines to ensure a consistent approach to the enforcement of competition laws in the region and to help businesses understand how the law will be enforced; (c) implementing consultation processes to gather regular feedback from businesses across the region; and (d) providing clear regulatory timelines.

4 As of now, the leniency programmes available in Member States differ. This may lead to multinational cartel participants being less willing to blow the whistle, even in jurisdictions that do have leniency programmes, as they may inadvertently increase their exposure to liability in jurisdictions without leniency programmes. Moving forward, harmonisation for leniency programmes should, ideally, be available in all ASEAN jurisdictions, where immunity may be offered on similar terms. This would allow businesses some degree of certainty, and may even tip the

* The 13th ASEAN Law Association General Assembly and The ASEAN Law Conference, with the theme "The Power of ONE: Unlocking Opportunities in ASEAN Through Law", was held on 25 to 28 July 2018. This session was held on 27 July 2018, 4.30pm to 6.00pm.

scale in favour of whistle-blowing cartel participants stepping forward for leniency.

2. Dr Kodrat Wibowo (Commissioner, Komisi Pengawas Persaingan Usaha ("KPPU"))

5 I will discuss the importance of harmonising competition laws in ASEAN.

6 Competition policy and law may be *new* in certain nations. It was introduced only in 1999 for Indonesia. Only Cambodia has no competition laws. Will it be ready this year? Our region has an ambitious target on competition policy: (a) peer review for ASEAN Member States on competition law; (b) a regional cooperation agreement on competition law and policy; (c) procedures for joint investigations and decisions on cross-border cases; (d) a regional strategy on convergence; and (e) an ASEAN set of principles on competition agreement.

7 We face these challenges. First, we are in a battle of transition. For example, Cambodia has just initiated competition policy. There are also various Member States which are making amendments to their competition laws. Second, there are different legal systems and procedures across ASEAN. This causes difficulties in finding a suitable uniform procedure for handling cross-border issues. For example, Indonesia codifies its laws, whereas Singapore and Malaysia use the common law and keep their written laws simple. And on the issue of exchange of information for investigation purposes, what is "evidence" in Indonesia might not be for other jurisdictions' competition authorities. Third, there is an imbalanced competition culture across ASEAN, both from policymaker and business perspectives. Fourth, we have had reduced support from development partners in ASEAN.

8 Regarding Indonesia's progress, Indonesia is anticipating significant changes in their government and competition policy law. There is a democracy euphoria. Indonesia has to be prepared for some changes. On competition policy and law, the final draft of a new law is being finalised by both parliament and the Government, and is targeted to be passed by the end of this year. Internally, the KPPU is starting this year with new commissioners and a new set of priorities.

9 ASEAN needs to do the following. First, it needs to rethink its ambitions. This might involve shifting the timeline of achieving output targets and simplifying outputs, in particular by eliminating less important targets or incorporating closely-related targets. Second, ASEAN needs to accelerate the establishment and implementation of the enforcement network. In this regard, academics may not be effective competition commissioners because they lack practical experience. Third, ASEAN needs to increase the role of ASEAN countries in assisting other ASEAN countries. Indonesia and Malaysia have resources. Singapore and Indonesia are the first two to contribute to the formation of ASEAN law and they can help too.

10 Is harmonisation of competition policy and law the ultimate answer? Not in the short term. Harmonisation must come from a need, not from coercion to achieve the set target. Instead, ASEAN should increase interaction between competition commissions, regulators and other stakeholders. More studies need to be conducted so that policymakers can be equipped with information to make good laws.

B. COMMENTS/QUESTIONS FROM PARTICIPANTS AND RESPONSES FROM PANELLISTS

S/No	Questions and responses
1	**Lim Chong Kin**: As regional senior counsel to Microsoft which operates in a region as diverse as ASEAN which has nine different competition laws, what are some of the challenges that multinational corporations ("MNCs") face operating in ASEAN? **Joy Fuyuno (Asia Regional Senior Counsel, Digital Transformation and Privacy, Microsoft Corporation)**: The main difficulty is in having to balance compliance with each country's laws, on one hand, and having to adopt uniform business practices, which is necessary for MNCs, on the other. Another difficulty is in the different standards that each Member State adopts: there are leniency programmes in some but not all jurisdictions, whether there are criminal sanctions for breach of competition laws, whether legal privilege exists, *etc*. Another challenge is in differences in merger notification requirements and procedures: where to notify and when, different measures of market power and dominance, *etc*.

2	**Lim Chong Kin**: Could you briefly describe the ASEAN enforcement network and tell us whether any cases have come through the network thus far? **Toh Han Li (Chief Executive and Commissioner, Competition & Consumer Commission of Singapore** ("**CCCS**")): It is a regional cooperation framework which allows for ASEAN Member States to cooperate on a broad range of issues relating to competition law: resource sharing, investigations, merger analysis, *etc*. The recent Grab-Uber merger which primarily affects the ASEAN region is one case in which we have cooperated on through the network, and illustrates the need for cooperation between Member States. We have had good discussions with the Philippines and Vietnam authorities. We also understand that the Malaysia Competition Commission ("MyCC") is reviewing their laws to include merger regulations and perhaps this case can provide the springboard.
3	**Lim Chong Kin**: Would the MyCC be a strong supporter of the enforcement network? **Dr Nasarudin Abdul Rahman (Member, Malaysia Competition Commission**): It is very important for us to cooperate. To have 100% harmonisation is impossible because our legal systems are different. Even though we don't have binding regional guidelines, we have extraterritorial provisions, which enable us to regulate anything outside Malaysia which may affect us. The enforcement network will be beneficial to us. We also have a leniency programme, which we use against hardcore cartels. The applicant has to provide information that significantly assists our operations. We have received three leniency applications and rejected one. We rejected it for various reasons, *eg*, late filing and the fact that the applicant was the instigator.
4	**Lim Chong Kin**: I understand that the Philippine Competition Commission ("PCC") and the CCCS have been cooperating on some matters. Are you satisfied with the current level of interaction? **Attorney Johannes Bernabe (Commissioner, Philippine Competition Commission**): We have found it very helpful to pick the brains of the CCCS on merger review matters because they have had this in place for a longer time. However, most of our interaction is done on an informal level through conference calls. Otherwise, it may be difficult if we have to go through formal channels and get the foreign affairs ministry involved. The level of information sharing currently is dependent on how different Member States treat confidentiality. If Member States could provide waivers of confidentiality, that would go a long way towards promoting cross-jurisdictional cooperation.

5	**Lim Chong Kin**: Will Malaysia amend their laws to include provisions for merger review? **Dr Nasarudin Abdul Rahman**: There will be an opportunity for us to convince the Government to include merger provisions in our act. We need political will to implement merger review. However, we also have no staff to deal with the complexity. Even if the Government approves, and we only have two to three lawyers, and a few junior economists on staff.
6	**Lim Chong Kin**: With the new government, will we see more or less competition enforcement? **Dr Nasarudin Abdul Rahman**: We are waiting for the new CO and chairman to come in. Maybe there will be a change of direction. The new government is committed to resolving the issue of increase in cost of living. They are going to review the existence of monopolies and oligopolies in the city, and maybe will act towards dismantling them.
7	**Lim Chong Kin**: Is the KPPU increasingly concerned with enforcing cross-border competition law? **Dr Kodrat Wibowo**: Enforcement is still being undermined by the law authorities, *eg*, police. On cross-border enforcement, the difficulty is in investigation and collection of evidence. If we have a case involving MNCs, especially one from a neighbouring country, it is very important to have competition enforcement. New amendment in our laws may include extra clause on joint enforcement.
8	**Lim Chong Kin**: What is your opinion on the view that those ASEAN Member States which are ready to harmonise on certain aspects can go ahead first, and others can join in later, *eg*, for leniency filings? Singapore has had a fairly successful leniency programme. Would you encourage other Member States to implement this? Do you think it is possible to have a regional leniency programme in the ASEAN context? **Toh Han Li**: In the first five years after the introduction of the leniency programme, there were fewer than ten applications. However, in the last ten years, many cases have been solved through leniency programmes. The most notable case solved through the leniency programme is the capacitors cartel case in January this year, where a $20m fine was levied. In order for cooperation between States to occur, it is important to obtain waivers of confidentiality so as to allow the case to be discussed with foreign competition authorities. In the capacitors case, we cooperated with the US, Taiwan and the European Union.

	Indonesia is trying to pass new laws to recognise a leniency programme. Vietnam has passed a law last month introducing leniency. Philippines and Malaysia already have leniency programmes. **Dr Kodrat Wibowo**: From an enforcement perspective, you want the laws providing for leniency to be harmonised in order to effectively fight cross-border cartels. If I filed for leniency in one country, another country might learn about it if that country does not have the same leniency programme. And I might therefore be disincentivised from filing.
9	**Lim Chong Kin**: Has the PCC received any leniency applications since the lapse of the two-year transitory period? **Attorney Johannes Bernabe**: There have been two informal applications just to find out what are the limits of the leniency programme. We have no finalised rules as yet. But we want to make sure that the leniency rules ultimately adopted are tailored to the unique conditions in the Philippines, to ensure that it will really incentivise companies to come forward.
10	**Lim Chong Kin**: Moving on to merger notifications, what do you think are the benefits from having a harmonised approach to merger notifications across ASEAN and what aspects do you think can be harmonised? **Joy Fuyuno**: It would definitely make the process less painful, although we acknowledge that a centralised review system would be difficult and inappropriate due to the diverse market conditions. There could be harmonisation for information requested (uniform notification forms), the threshold for notification, timelines, market definitions, and the analytical framework that is applied. **Toh Han Li**: We see that the principles for assessment of mergers around the world are largely the same. This is due in part to the International Competition Network having come up with a set of recommended practices. In a recent case involving the merger of water treatment companies, the US and Singapore arrived at the same outcome, which illustrates the importance of applying the same principles. There might be divergence in the thresholds for notification: Singapore has a voluntary notification procedure, while Philippines has a mandatory notice requirement. Notification forms can and should be made uniform. There may be divergence in procedures but it is important to have harmonisation in the principles and frameworks applied to assessment.

11	**Lim Chong Kin**: Now that the transitory period is over, what are your enforcement priorities? **Attorney Johannes Bernabe**: First, merger review: we want to continue to mitigate the pushback against merger review. Businesses still see it as a hindrance. Second, we wish to extend enforcement to the logistics, transport and manufacturing sectors. Third, we want to improve and increase the capabilities of the PCC. We also want to get the judiciary acquainted with competition law given that many adverse decisions of the PCC are now the subject of judicial review.
12	**Lim Chong Kin**: You started competition enforcement in the food and health sectors. Why, and are there other industrial sectors you think you should be focusing on? **Dr Kodrat Wibowo**: We focused on the food and health sectors because there was an amazing increase in the price of livestock. Another sector we are starting on is automobiles. Last year we had a case involving Yamaha, Suzuki where they had tried to do price-fixing.
13	**Lim Chong Kin**: How has awareness of competition law grown over time in Malaysia? As a judge, do you see a need for ASEAN-wide training of adjudicators? **Assoc Prof Dr Wan Liza Md Amin (Member, Malaysia Competition Appeal Tribunal)**: Acceptance of competition policy and law has been slow. This is because of the market scenario. For Malaysia, stakeholders were contented with the monopolistically and oligopolistically structured economy. In 2010, we enacted the Enforcement of Competition Act. Stakeholders became more interested. Students have become more attuned. We are witnessing more careful marketplace behaviour now. We cannot have state-of-the-art law but weak institutional design. The problem raised about enhancing investigation powers – these problems are of the nature raised by competition authorities for advanced economies. We, ASEAN, are young. A competition capacity programme would be good. We cannot segregate law and economics in competition law. It is highly important for judges to have that skill and to be able to understand economic evidence. Commissioners must also have the skill and guts to prosecute big companies.

14	**Lim Chong Kin**: What is the reason for the CCCS taking on a new function of consumer protection? Is there a change in enforcement priorities? **Toh Han Li**: Competition law looks at the supply side while consumer protection looks at the demand side. In order to help markets work well, it is necessary to approach it from both angles.

Andre Soh and Torsten Cheong
Rapporteurs
27 July 2018

ENHANCING THE RULE OF LAW IN INVESTOR-STATE DISPUTE SETTLEMENT

A Proposed Protocol for Communication with Non-Disputing States on Issues of Treaty Interpretation

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A. INTRODUCTION

1 The present international investment regime is made up of a wide range of bilateral, regional, plurilateral and multilateral agreements. Binding agreements exist mainly at the bilateral, regional and plurilateral levels, while agreements at the multilateral level are mostly of a non-binding nature.[1] The subject matter of existing agreements covers a broad spectrum of issues, including admission and treatment of foreign investment, promotion of foreign investment, investment insurance, aspects of corporate conduct, taxation, competition and jurisdictional matters, and dispute settlement procedures.[2]

2 The number of international investment agreements continues to grow. In 2017, 18 new international investment agreements (nine bilateral investment treaties ("BITs") and nine treaties with investment provisions ("TIPs")) were concluded, bringing the total to 3,322 treaties (2,946 BITs and 376 TIPs) at year end, of which 2,638 were in force at year end.[3] Between January and May 2018, six international investment agreements were signed (Australia–Peru Free Trade Agreement, Comprehensive and Progressive Agreement for a Trans-Pacific Partnership Agreement, Republic of Korea and the Republics of Central America Free Trade Agreement,

1 Richard Blackhurst & Adrian Otten, World Trade Organization Report, *Trade and Foreign Direct Investment* (9 October 1996) <https://www.wto.org/english/news_e/pres96_e/pr057_e.htm> (accessed July 2018).

2 Richard Blackhurst & Adrian Otten, World Trade Organization Report, *Trade and Foreign Direct Investment* (9 October 1996) <https://www.wto.org/english/news_e/pres96_e/pr057_e.htm> (accessed July 2018).

3 United Nations Conference on Trade and Development ("UNCTAD") International Investment Agreement ("IIA") Issues Note: Recent Developments in the International Investment Regime (30 May 2018) at p 2.

Brazil–Suriname BIT, Brazil–Ethiopia BIT, and United Arab Emirates–Paraguay BIT).[4] As of May 2018, there are in total 3,328 international investment agreements which have been signed, independent of whether the agreements have entered into force (international investment agreements for which termination has entered into effect are not included).

3 The growing number of international investment agreements is a testament to investment agreements as powerful tools to attract foreign investments. Attracting foreign investment is an engine to propel continued economic growth of a State. Foreign investment benefits not only the investor but also the State receiving the investment. The positive effects of foreign investment on a receiving State are wide-ranging and include the provision of financing, management experience, technological advances, and the establishment of commercial ties with other States that may be leveraged to increase future exports and needed imports, all of which would, in turn, help local businesses flourish and tap on foreign expertise.

4 To attract foreign investment, a State must provide the assurances that investors need before they decide to invest. The main concerns for investors are investment protection and a fair return on their investment. Investors invest with the aim of making a profit and/or acquiring property and they expect to keep such profits and property. Investors will typically evaluate the risks involved in any foreign investment, as such risks would affect the profit margins. Such risks include political and legal risks. In a State where there is political instability, investors would take into account the risk that their rights under the investment may not be preserved or they may be subject to the arbitrary demands of a government. Investors are more reluctant to invest in such States given the increased levels of uncertainty in securing profit margins. Further, in a State where bribery and corruption are rampant in the legal system, an investor would take into account the risk that it has no meaningful recourse in the courts should its investment be seized or damaged. If such concerns are not assuaged, investors often decide not to invest in that State. That, in turn, results in the State in question missing out on the benefits that those investments would have brought.

4 UNCTAD IIA Issues Note: Recent Developments in the International Investment Regime (30 May 2018) at p 2. See also UNCTAD's IIA Navigator <http://investmentpolicyhub.unctad.org/IIA/MostRecentTreaties#iiaInnerMenu>.

5 One way to assuage potential investors' concerns is by the use of international investment agreements. These agreements can serve to encourage foreign investment by guaranteeing certain standards of investment protection to foreign investors. Typical clauses that serve to protect investments contained in such agreements include: (a) clauses providing that a State cannot expropriate an investment without compensation; (b) clauses on fair and equitable treatment of foreign investors (which would cover unprincipled or arbitrary conduct of a State); and (c) clauses on the protection of any investment agreements entered into between a State and foreign investors (which transform the breach of a contract between a State and a foreign investor into a breach of the treaty).

6 International investment agreements thus undergird the rule of law in the international investment regime by putting in place a set of rules that serve to attract foreign investment by giving investors the confidence that the risk of arbitrary actions of a State is confined. For the host State, the obligations that bind the State under international investment agreements lay the foundation for good governance, which is a key ingredient of economic growth. Creating an investment-friendly regime through international investment agreements thus benefits both the host State and the foreign investor.

7 However, the provision of investment protection standards in international investment agreements would be of little comfort if there were no effective way for those standards to be enforced. Investors must be able to enforce such standards against a State; otherwise, these provisions would amount to empty promises. It is for this reason that arbitration clauses are routinely included in international investment agreements, providing an avenue to investors to enforce investment protection standards against a State. These clauses often provide for International Centre for Settlement of Investment Disputes ("ICSID") or Permanent Court of Arbitration ("PCA") arbitrations under the ICSID Arbitration Rules or under the United Nations Commission on International Trade Law ("UNCITRAL") Arbitration Rules.

8 Such arbitration clauses allow investors from the home State, which is a party to an international investment agreement, to commence arbitration proceedings against the other party to that agreement, *ie*, the host State in which the investment was made. An international tribunal will then be constituted to decide whether the respondent State has breached its

international law obligations to abide by the terms of the investment agreement. For example, the international tribunal may well be asked to determine whether certain actions by a State amount to expropriation without due compensation. If so, the tribunal may order the respondent State to compensate the claimant investor. That award would be enforceable as extensively worldwide as commercial arbitration awards are under the New York Convention.

9 Many successful claims have been brought by investors against States and this has given credibility to investment treaty arbitration as well as to investment agreements themselves. With the rule of law applying to investment agreements in this way, the efficacy of investment agreements in incentivising foreign investment is facilitated.

10 It was not always this way. Before the advent and popularisation of investment treaty arbitration, investment disputes were resolved by arbitration only where consents to arbitration could be obtained from the respondent State after the dispute had arisen. This was usually as a result of pressure from the claimant investor's home State, occasional government-to-government negotiations of settlements requiring great diplomatic effort, and unending disagreement between developed and less developed countries over the content of applicable international law.[5] Johnson and Gimblett argue that history reveals that the fundamental value of the current BIT regime is twofold. First, the existence of more than 2,700 BITs may not have resolved the debate over what customary international law requires of a State when it expropriates alien-owned property, but it has rendered that debate largely academic.[6] Secondly, the fundamental value is found in the arbitration provisions that allow investors to resolve disputes with host States directly, without the involvement of the investor's home State.[7]

5 O Thomas Johnson Jr & Jonathan Gimblett, "From Gunboats to BITs: The Evolution of Modern International Investment Law" in *Yearbook on International Investment Law & Policy 2010–2011* at p 690.

6 O Thomas Johnson Jr & Jonathan Gimblett, "From Gunboats to BITs: The Evolution of Modern International Investment Law" in *Yearbook on International Investment Law & Policy 2010–2011* at p 690.

7 O Thomas Johnson Jr & Jonathan Gimblett, "From Gunboats to BITs: The Evolution of Modern International Investment Law" in *Yearbook on International Investment Law & Policy 2010–2011* at p 691.

11 The second fundamental value identified by Johnson and Gimblett is the practical manifestation of the rule of law in the international investment regime. Provisions in international investment agreements that allow for investor-State dispute settlement by independent adjudication advance the procedural aspect of the rule of law in the international investment regime. F A Hayek describes the rule of law in this context as meaning:[8]

> … that the government is bound by rules fixed and announced beforehand – rules that make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one's individual affairs on the basis of this knowledge. Thus, within the known rules of the game the individual is free to pursue his personal ends and desires, certain that the powers of government will not be used deliberately to frustrate his efforts.

12 This captures the fundamental ingredients of investor-State dispute settlement that advance the rule of law in the international investment regime: legal procedural certainty and a level playing field among disputing parties (investor and State). Investor-State dispute settlement procedures enhance the rule of law in the international investment regime by providing a depoliticised forum where the rules are applied in an independent and impartial manner and where all parties must abide by the same rules.

13 However, the ability to resolve disputes without involving the investor's home State has another effect. Arbitral tribunals are often called upon to interpret treaties without the benefit of submissions from the investor's home State. This occurs simply because the investor's home State is a Non-Disputing State and therefore is not party to the arbitral proceedings. Thus, unless it intervenes or is invited to participate, it would not ordinarily have any ability to contribute to the tribunal's consideration of the proper interpretation of the treaty in question.

14 Being the other party to the treaty, the Non-Disputing State is actually in a position to make significant contribution to the interpretation of the treaty. Moreover, the Non-Disputing State certainly has interests in ensuring that the tribunal correctly interprets the BIT. In addition to wanting its national who has invested in the other State to be dealt with appropriately, decisions of tribunals are thereafter relied on by other tribunals even though there is no strict system of binding precedent.

8 F A Hayek, *The Road to Serfdom* (Routledge Press, 1944).

15 In certain cases, the treaty interpretation of arbitral tribunals has led to Non-Disputing States expressing their disagreement with the tribunal's interpretation after the tribunal's award came to light. For example, the Swiss government expressed disagreement with the arbitral tribunal's conclusion in *SGS v Pakistan* on the meaning of Article 11 of the Swiss and Pakistan bilateral investment treaty stating that "the Swiss authorities are alarmed about the very narrow interpretation given to the meaning of Article 11 by the Tribunal, which … runs counter to the intention of Switzerland when concluding the Treaty".[9]

16 In other cases, tribunals have expressed the view that input from a Non-Disputing State would be valuable to their treaty interpretation analysis. It is possible that, in some cases, investors may have that view as well.

17 There is growing recognition that there is value to tribunals having a Non-Disputing State's submissions on treaty interpretation.[10] Article 5(1) of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration expressly recognises that arbitral tribunals may invite the Non-Disputing State to submit on issues of interpretation. However, the mechanics of how such an invitation should be issued is unclear and the reality is that it is only in a small fraction of cases that such submissions are actually solicited or made.

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9 See K Yannaca-Small, "Interpretation of the Umbrella Clause in Investment Agreements" in *Organisation for Economic Co-operation and Development ("OECD") Working Papers on International Investment 2006/03* (OECD Publishing, 2006) at pp 15–16 <http://dx.doi.org/10.1787/415453814578>.

See also the People's Republic of China's disagreement with the Singapore Court of Appeal's decision in *Sanum v Lao* on the coverage of the People's Republic of China and Lao bilateral investment treaty, stating that:

> The geographical scope of application of the China–Laos investment agreement is a question of fact concerning acts of state, which is up to the contracting parties to decide. China has confirmed twice in diplomatic notes that the China–Laos investment agreement does not apply to Macao SAR. The ruling made by the Singaporean court on this question of fact is incorrect.

Hua Chunying, Spokesperson, Ministry of Foreign Affairs of the People's Republic of China, at a regular press conference (21 October 2016) <http://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/2511_665403/t1407743.shtml> (accessed July 2018).

10 See ICSID Arbitration Rule 37; UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration, Art 5; statement of the Free Trade Commission on Non-Disputing Party participation (7 October 2003) <https://www.state.gov/documents/

18 United Nations Conference on Trade and Development also recognises the potential value of having the Non-Disputing State's input by encouraging that treaties provide for their authoritative joint party interpretation.[11] The goal is to clarify the content of a treaty provision and narrow the scope of interpretative discretion of tribunals. It allows treaty parties to voice their positions on a specific clause without undertaking a comparatively higher-cost and more time-consuming amendment or renegotiation of the treaty.[12] This, of course, requires the States in question to be in agreement on the interpretation.

19 In line with this, the ASEAN Comprehensive Investment Agreement of 2009 ("ACIA") (which coexists with the BITs in force between ASEAN Member States) provides that the arbitral tribunal may request a joint interpretation on any provision of the ACIA that is at issue in the dispute.[13]

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organization/38791.pdf> (accessed July 2018); *Achmea BV v The Slovak Republic*, UNCITRAL, PCA Case No 2008-13 (formerly *Eureko BV v The Slovak Republic*); *SGS Société Générale de Surveillance SA v The Republic of Paraguay*, ICSID Case No ARB/07/29; M Kinnear, "Transparency and Third Party Participation in Investor-State Dispute Settlement", presentation at a symposium co-organised by ICSID, OECD and UNCTAD, "Making the Most of International Investment Agreements: A Common Agenda" (12 December 2005) <http://www.oecd.org/dataoecd/6/25/36979626.pdf> (accessed July 2018); Katia Yannaca-Small, OECD, *Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures*, Working Paper No 2005/1 (April 2005) <http://www.oecd.org/dataoecd/25/3/34786913.pdf> (accessed July 2018); B Legum, "Lessons Learned from the NAFTA: The New Generation of US Investment Treaty Arbitration Provisions" (2004) 19 ICSID Rev-FILJ 349 <https://academic.oup.com/icsidreview/article/19/2/344/744275/Lessons-Learned-from-the-NAFTA-The-New-Generation> (accessed July 2018); A Mourre, "Are *Amici Curiae* the Proper Response to the Public's Concerns on Transparency in Investment Arbitration?" (2006) 5 Law & Prac of Int'l Cts & Tribunals 257; A Bjorklund, "The Participation of *Amici Curiae* in NAFTA Chapter Eleven Cases" <http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/participate-e.pdf> (accessed July 2018); Eloïse Obadia, "Extension of Proceedings Beyond the Original Parties: Non-Disputing Party Participation in Investment Arbitration" (2007) 22 ICSID Rev-FILJ 349 <https://academic.oup.com/icsidreview/article-pdf/22/2/349/1760855/22-2-349.pdf> (accessed July 2018).

11 "Phase 2 of IIA Reform: Modernizing the Existing Stock of Old-Generation Treaties" UNCTAD IIA Issue Note No 2, 2017 (6 June 2017) at pp 9–10; *World Investment Report 2017* at pp 130–133.

12 *World Investment Report 2017* at pp 132–133.

13 Article 40(2) of the ASEAN Comprehensive Investment Agreement (26 February 2009) <http://www.asean.org/storage/images/2013/economic/aia/ACIA_Final_Text_26%20Feb%202009.pdf> (accessed July 2018) reads as follows:

However, the steps that the arbitral tribunal should take to communicate such a request are not addressed in the ACIA. Specifically, who the arbitral tribunal should contact to make that "request" and the form of the request are not dealt with in the ACIA. Additionally, there is no provision in the ACIA for a request to be made by a national court reviewing an arbitral award issued by an investor-State tribunal nor by an investor claimant.

20 Issues have also arisen in the past when Non-Disputing States have provided input only for the investor claimant to assert that the input did not come from the proper authority in the Non-Disputing State.[14] This can lead to significant waste of time and resources as one party seeks to establish that the input comes from the appropriate and authoritative source within the Non-Disputing State, whilst the other party seeks to cast doubt on that.

21 In such a context, it is proposed that it would be beneficial to have a protocol for handling requests for Non-Disputing States to provide input on the interpretation of a treaty to which it is a party. Such a protocol does not seek to impose any new obligations on ASEAN Member States. Rather, the proposed protocol is facilitative and allows ASEAN Member States to properly receive requests and to respond as they wish. ASEAN Member States will be able to decline any such requests if they prefer but where they believe it would be in their interests to inform the decision-making process, the proposed protocol seeks to create an avenue for them to effectively and authoritatively provide their input to investor-State arbitral tribunals and national courts reviewing the decisions of such tribunals.

22 It is hoped that by establishing such a protocol, engagement with Non-Disputing States will be encouraged, and the quality of arbitral treaty interpretation thereby improved. This can only benefit the rule of law. Even where States choose not to participate, that at least will be a conscious choice which will reflect that State's assessment of particular cases and its own policy decisions on the level of its participation in such processes.

> The tribunal shall, on its own account or at the request of a disputing party, request a joint interpretation of any provision of this Agreement that is in issue in a dispute. The Member States shall submit in writing any joint decision declaring their interpretation to the tribunal within 60 days of the delivery of the request.

14 See *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 at [34].

B. THE PROPOSED PROTOCOL

23 The proposed protocol is described in the following paragraphs and a draft of the protocol is at Annex A.

1. Request by arbitral tribunal, national court or disputing party

24 Article 2 of the proposed protocol recognises that a request may be made to a Non-Disputing State for it to make submissions about the interpretation of provisions of the treaty which has given rise to an investment arbitration.

25 That request may be made by the arbitral tribunal, the claimant investor, the respondent State or even a national court hearing an appeal against an arbitral tribunal's decision on jurisdiction or an application to set aside or enforce such an arbitral tribunal's award.

26 The proposed protocol provides clarity on how the party making the request can convey that request to the Non-Disputing State. The directory appended to the protocol sets out clearly the office or representative that such requests should be sent to for each ASEAN Member State and the contact details where the request should be sent. Each State is also able to designate the language the request must be in and the manner in which the request must be conveyed (*eg*, by fax or e-mail). In this way, the requesting party can be confident that the request has been sent to the appropriate office or representative of the Non-Disputing State and that it will receive due attention.

27 The proposed protocol also gives some guidance about what the request should contain though it is not intended that the guidance provided in Article 2.4 should be exhaustive, as is clear from Article 2.5.

2. Response by the Non-Disputing State

28 Article 3.1 of the proposed protocol provides for a 30-day period for an initial response to the request to be provided. This deadline seeks to ensure that the arbitral or court proceedings are not unnecessarily delayed by the Non-Disputing State. In this regard, Article 3.3 of the proposed protocol makes it clear that the arbitral tribunal or national court retains the discretion whether or not to wait for a Non-Disputing State's substantive response.

29 Article 3.2 of the proposed protocol sets out a menu of responses for the Non-Disputing State. It can choose to say that it will not be providing a substantive response. No reasons for such a decision are required. Alternatively, it may say that it will be providing a substantive response on a specified date. Yet another alternative is for the Non-Disputing State to say that it is still undecided as to whether it will be providing a substantive response and needs a specified period of time to decide whether a substantive response will be forthcoming. The goal of this menu of responses is not to limit the Non-Disputing State unnecessarily but, recognising that governmental processes do take time, to enable it to consider the matter whilst keeping the requesting party informed.

30 Article 3.4 of the proposed protocol, which requires that the initial response and/or any subsequent written communication from the Non-Disputing State be copied to all parties to the dispute and the arbitral tribunal or national court (as the case may be), seeks to ensure that there is transparency in the entire process of seeking input from the Non-Disputing State.

3. Written request by Non-Disputing State

31 At times, a Non-Disputing State might come to know of an arbitration or a reviewing court proceeding even though no request has been made of it. That State may wish to offer its views on the interpretation of the treaty to the arbitral tribunal or national court and Article 4 of the proposed protocol seeks to create an avenue for this.

32 The proposed protocol requires the Non-Disputing State to specify the issues on which it wishes to make written submissions and the amount of time needed to make those written submissions. This enables the arbitral tribunal or national court to appropriately determine whether the Non-Disputing State's written submissions would be relevant and necessary to the resolution of the dispute put before it. It is stressed that the input must concern the interpretation of the treaty in question and/or whether there is any common agreement between the parties to the treaty on an interpretation of the treaty and any evidence thereof. This limitation serves to exclude other unnecessary interventions in the arbitral or court proceedings by the Non-Disputing State.

33 The proposed protocol envisages that the Non-Disputing State's written request is to be sent to the designated office or representative of the State which is party to the arbitral or court proceedings (as specified in the directory at Appendix A), who shall then convey the request to the arbitral tribunal or national court in a manner consistent with the applicable procedural rules.

34 It is recognised that there are other ways for the request of a Non-Disputing State to be made, directly or indirectly, to a tribunal or court. It may well be that additional avenues can be included in the protocol.

35 The proposed protocol does not specify a deadline for an arbitral tribunal or national court to respond to a written request from the Non-Disputing State as an arbitral tribunal would not be bound to comply with the protocol. However, any tribunal or court would already have its own incentives to be prompt.

4. Directory

36 The directory at Appendix A of the proposed protocol allows each ASEAN Member State to specify the designated office or representative who has the authority to deal with the matters covered by the protocol. Further, each ASEAN Member State is to specify the manner (*eg*, fax or e-mail) and language in which it wishes to receive the request.

37 The directory seeks to ensure that there is certainty and clarity in the process of receiving input from the Non-Disputing State. All parties would know exactly who to contact and how to do so in respect of the interpretation of any investment treaty entered into between ASEAN Member States. The directory would also serve to eliminate any dispute that the input did not come from the proper authority in the Non-Disputing State.

C. CONCLUDING REMARKS

38 The proposed protocol aims to pave a clear and certain path of communication with Non-Disputing States such that their input can, in appropriate cases, be sought or offered for the more accurate interpretation of treaties entered into by two or more ASEAN Member States. Of course, that input does not have to be followed slavishly by any court or tribunal.

Judges and arbitrators must still perform their analysis in the usual manner. However, it is hoped that the additional input will help inform the analysis and ultimately contribute towards more accurate treaty interpretation.

39 This can only reinforce the rule of law in investment treaty disputes. Treaties will be more accurately interpreted. Non-Disputing States will not feel disenfranchised as they have a possible avenue to be heard. A set process for how such involvement by Non-Disputing States can be sought or offered will inject some measure of due process and predictability. All this can be done without too much violence to the arbitral process nor to State sovereignty.

Annex A

DRAFT PROPOSED PROTOCOL FOR COMMUNICATION BETWEEN ASEAN STATES AND INVESTOR-STATE ARBITRAL TRIBUNALS AND SUPERVISORY/ENFORCING NATIONAL COURTS ON THE INTERPRETATION OF TREATIES BETWEEN ASEAN STATES

1. Introduction

1.1. ASEAN Member States have entered into bilateral and multilateral investment treaties among themselves which contain provisions providing for investor-State dispute resolution. Generally, in accordance with the terms of such dispute resolution provisions, a dispute arising under such treaties may be submitted to an arbitral tribunal.

1.2. Issues of interpretation of the relevant treaty often arise in such arbitral proceedings. However, not all States party to the treaty would be party to the arbitration and thus would not necessarily be in a position to provide submissions to the arbitral tribunal on the proper interpretation and intent of the treaty. Such issues of interpretation may also arise when a national court within ASEAN is asked to review the arbitral tribunal's decision on jurisdiction or enforce or set aside the arbitral tribunal's award.

1.3. This protocol sets out procedures for such submissions to be sought from and/or provided by a State which is not a party to a particular arbitration ("**Non-Disputing State**") in respect of the interpretation of provisions of a treaty to which the Non-Disputing State is a signatory. It also identifies the appropriate authority from each ASEAN Member State which will deal with such matters.

1.4. The purpose of this Protocol is purely facilitative. ASEAN Member States remain at liberty to decide whether it is necessary or desirable for them to provide such submissions to any arbitral tribunal or national court.

2. Request by arbitral tribunal, national court or disputing party

2.1. An arbitral tribunal hearing a dispute pursuant to an investor-State dispute resolution provision in any investment treaty between any of the ASEAN Member States may choose to make a request to a Non-Disputing

State for that Non-Disputing State to provide written submissions to the tribunal on: (a) the proper interpretation of the treaty in question; and/or (b) whether there is any common agreement between parties to the treaty on an interpretation of the treaty and any evidence thereof.

2.2. A national court hearing an appeal against an arbitral tribunal's decision on jurisdiction or an application to set aside or enforce an arbitral award made pursuant to an investor-State dispute resolution provision in any investment treaty between any ASEAN Member States, may choose to make a request to a Non-Disputing State for that Non-Disputing State to provide written submissions to the national court on: (a) the proper interpretation of the treaty in question; and/or (b) whether there is any common agreement between parties to the treaty on an interpretation of the treaty and any evidence thereof.

2.3. Any party to an arbitration pursuant to an investor-State dispute resolution provision in any investment treaty between any of the ASEAN Member States may make a request to a Non-Disputing State for that Non-Disputing State to make written submissions on: (a) the proper interpretation of the treaty in question; and/or (b) whether there is any common agreement between parties to the treaty on an interpretation of the treaty and any evidence thereof, such submissions to be made to the arbitral tribunal hearing the dispute or to the national court hearing an appeal from a decision on jurisdiction or an application to set aside or enforce an arbitral award issued by such an arbitral tribunal.

2.4. Such a request by an arbitral tribunal, national court or disputing party shall be in writing and should:

2.4.1. identify the provisions of the treaty that require interpretation and specify the question of interpretation that needs to be decided by the arbitral tribunal or national court; and/or

2.4.2. identify any alleged common agreement between the parties to the treaty on the interpretation of the treaty and specify the question that the requesting party invites submissions on in respect of that alleged common agreement.

2.5. The request should also include any other information relating to the dispute that may be relevant to the question of interpretation of the treaty.

2.6. Any such request shall be sent to the Non-Disputing State in the manner specified by that State as set out in the directory at Appendix A.

Any such request to the Non-Disputing State shall be sent to the designated office or representative specified by that State as set out in the directory at Appendix A. Any such request shall be in the language specified by the Non-Disputing State as set out in the directory at Appendix A.

2.7. Any such request shall specify the manner in and address to which the response should be sent by the Non-Disputing State.

3. Response by the Non-Disputing State

3.1. The Non-Disputing State shall provide an initial response in writing within thirty (30) days of the receipt of the request. This initial response and all subsequent responses shall be sent in the manner and to the address specified in the request.

3.2. The initial response shall be one of the following:

3.2.1. The Non-Disputing State acknowledges receipt of the request and states that it will provide a response to some or all of the queries in the request within a specified period of time.

3.2.2. The Non-Disputing State acknowledges receipt of the request and states that it will not be providing any substantive response to the request.

3.2.3. The Non-Disputing State acknowledges receipt of the request and specifies any clarifications it requires before it can inform the requesting party whether or not it will be willing to provide a substantive response to the request. In that event, the Non-Disputing State shall specify how much time after the clarifications are received it would require before informing the requesting party either that it will not be providing any substantive response or to provide a substantive response to part or all of the request.

3.2.4. The Non-Disputing State acknowledges receipt of the request and states that it is unable to respond within thirty (30) days of receipt of the request and will respond within a specified period of time.

3.3. This protocol does not seek to require any arbitral tribunal or national court to wait for a Non-Disputing State's substantive response.

3.4. The initial response and/or any subsequent written communication from the Non-Disputing State shall be sent or copied to all parties to the dispute, as well as the arbitral tribunal or national court, as the case may be.

4. Written request by Non-Disputing State

4.1. A Non-Disputing State may, on its own initiative, wish to provide submissions on the proper interpretation of an investment treaty between any ASEAN Member State and/or whether there is any common agreement between parties to such a treaty on an interpretation of the treaty and any evidence thereof, to an arbitral tribunal hearing a dispute pursuant to an investor-State dispute resolution provision in any investment treaty between any of the ASEAN Member States or a national court hearing an appeal against a decision on jurisdiction or an application to set aside or enforce an arbitral award made pursuant to an investor-State dispute resolution provision in any investment treaty between any ASEAN Member States. In that event, the Non-Disputing State shall make a request to the arbitral tribunal or the national court, as the case may be, in the following manner.

4.1.1. The request should be in writing.

4.1.2. The request should be made by the office or representative identified by the Non-Disputing State in the directory at Appendix A.

4.1.3. The request should specify the issues on which the Non-Disputing State wishes to make written submissions and the amount of time that that State requires to make those written submissions.

4.2. The request should be sent to the office or representative of a State which is party to the arbitral or court proceedings as specified in the directory at Appendix A, who shall, within thirty (30) days of receipt of the request, convey the request to the arbitral tribunal or national court in a manner consistent with the applicable procedural rules. If the Non-Disputing State is aware of the contact details of the other parties to the arbitration or court proceedings, and/or the contact details of the arbitral tribunal or national court, the Non-Disputing State may concurrently provide a copy of the request to one or more of them.

4.3. Nothing in this Protocol is intended to prevent a State from utilising any other existing avenue to intervene in arbitral or court proceedings or communicate with an arbitral tribunal or a national court.

5. Maintenance of the directory

5.1. The directory at Appendix A specifies the office or representative of each ASEAN Member State which shall have authority to deal with the matters covered by this Protocol.

5.2. ASEAN Member States may amend the details in the directory by sending the new details to all other designated offices or representatives listed in the directory.

DRAFT APPENDIX A TO THE PROTOCOL: DIRECTORY

S/No	ASEAN Member State	Contact details of designated office or representative	Form of request/ initial response	Language
1	Brunei Darussalam		To be made in writing by way of [insert choice of methods, *eg*, fax or e-mail]	
2	Cambodia			
3	Indonesia			
4	Laos			
5	Malaysia			
6	Myanmar			
7	Philippines			
8	Singapore			
9	Thailand			
10	Vietnam			

PROPOSED PROTOCOL FOR COMMUNICATION WITH NON-DISPUTING STATES ON ISSUES OF TREATY INTERPRETATION*

Dr Romesh Weeramantry
Foreign Legal Consultant, Clifford Chance

1. Comments

- A welcome development in investment treaty dispute procedure
- Potentially reduces the asymmetry in investor-State dispute treaty interpretation
- Drafting points:
  - wording of protocol should align with Art 31(3)(*a*) of the Vienna Convention on the Law of Treaties
  - what if the protocol conflicts with provisions of the relevant treaty? This needs to be addressed
  - request by a party to an arbitration for a Non-Disputing State to make submission on interpretation of treaty should be copied to tribunal and to other parties (see para 2.4, and compare with para 3.4)
- Survey of relevant cases

2. Cases in which tribunals have commented on role of Non-Disputing States

Case	Supported	Rejected	Post-award	No influence	Forum
Pope & Talbot v Canada (2000)		✓			United Nations Commission of International Trade Law ("UNCITRAL")/ North American Free Trade Agreement ("NAFTA")

* This is an adaptation of the presentation slides used at The ASEAN Law Conference.

Metalclad v Mexico (2000)				✓	International Centre for Settlement of Investment Disputes ("ICSID")/NAFTA
Marvin v Mexico (2000)		✓			ICSID/NAFTA
Loewen v USA (2001)		✓			ICSID/NAFTA
Pope v Canada (2001)		✓			UNCITRAL/NAFTA
Methanex v USA (2002)				✓	UNCITRAL/NAFTA
Mondev v USA (2002)		✓			ICSID/NAFTA
United Parcel Services v Canada (2002)	✓				UNCITRAL/NAFTA
ADF v USA (2003)	✓	✓			ICSID/NAFTA
Gami v Mexico (2004)					UNCITRAL/NAFTA
Bayview v Mexico (2007)	✓				ICSID/NAFTA
Archer v Mexico (2007)	✓				ICSID/NAFTA
Glamis v USA (2009)	✓				UNCITRAL/NAFTA
Commerce Group v El Salvador (2011)	✓				ICSID/Central America Free Trade Agreement ("CAFTA")
SGS v Pakistan (2013)			✓		ICSID/Switzerland–Pakistan Bilateral Investment Treaty ("BIT")

Sanum v Lao (2016)			✓		UNCITRAL/People's Republic of China–Laos BIT

The table shows a more favourable view towards non-disputing parties in more recent years.

3. ICSID Arbitration Rules r 37(2) and ICSID Additional Facility Rules Art 41(3)

- Before submission: non-disputing party can file submission concerning the dispute to the tribunal after the tribunal's consultation with the disputed parties
- Tribunal's considerations:
  - whether the submission would assist the determination of factual or legal issue
  - whether submission would address a matter within the scope of the dispute
  - whether the non-disputing party has a significant interest in the proceeding
- Non-disputing party's submission:
  - non-disputing party's submission should not disrupt the proceedings or unduly burden or unfairly prejudice either party
  - opportunity given to disputed parties to provide observation on the non-disputing party's submission

4. UNCITRAL Arbitration Rules: Art 5

- Each party may be represented or assisted by persons chosen by it
- Communication of choice to all parties and tribunal, specifying whether the appointment is being made for: (a) representation; or (b) assistance
- If the person is to act as a representative, the arbitral tribunal may, at any time, require proof of authority granted to the representative

5. NAFTA: Art 1128

– On written notice to the disputing parties, a party may make submissions to a tribunal on a question of interpretation of this agreement

6. ASEAN Comprehensive Investment Agreement: Arts 40(2) and 40(3)

– Member State's joint decision of interpretation: joint interpretation of any provision of the agreement shall be submitted within 60 days of the request by the tribunal
– Status of the joint decision:
    - a joint decision of the Member States, declaring their interpretation of a provision of this agreement shall be binding on a tribunal
    - any decision or award issued by a tribunal must be consistent with the decision

RAPPORTEUR REPORT FOR PARALLEL SESSION 4

Rule of Law – Role in Attracting Trade and Investments in ASEAN – Free Trade Agreements and Bilateral Investment Agreements in ASEAN Countries*

A. SUMMARY OF SPEECHES

1. Cavinder Bull SC (Chief Executive Officer, Drew & Napier LLC)

1 *Challenge posed*: Questions of interpretation of the treaty in question often arise in an investor-State dispute. However, the Non-Disputing State ("NDS"), who is a party to the treaty in question, is not typically involved in the tribunal's/national court's consideration of the proper interpretation of the treaty in question. This issue had arisen in investor-State disputes such as *SGS v Pakistan* and *Sanum v Lao*.

2 *Solution*: Interstate protocol[1] (the "Protocol") to facilitate requests for NDSes to provide submissions or input on treaty interpretation, specifically: (a) on the proper interpretation of the treaty in question; and/or (b) whether there is any common agreement between parties to the treaty on an interpretation of the treaty and any evidence thereof.

3 *Language of the Protocol*:

(a) Article 2 provides that the arbitral tribunal, the claimant investor, the respondent State or even a national court hearing an appeal against an arbitral tribunal's decision on jurisdiction or an application to set aside or enforce the award *may request for an NDS to make submissions about the interpretation of provisions of the treaty that has given rise to an investment arbitration*. Art 2.4 prescribes the form and content of the request: the request should identify the treaty

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* The 13th ASEAN Law Association General Assembly and The ASEAN Law Conference, with the theme "The Power of ONE: Unlocking Opportunities in ASEAN Through Law", was held on 25 to 28 July 2018. This session was held on 27 July 2018, 4.30pm to 6.00pm.

1 Referred to by Cavinder Bull SC as "A Proposed Protocol for Communication with Non-Disputing States on Issues of Treaty Interpretation" (henceforth referred to as the "Protocol").

provisions that require interpretation, specify the question of interpretation that needs to be decided, identify any alleged common agreement between the parties to the treaty on the interpretation, and specify the question that the requesting party invites submissions on.

(b) Article 4 provides that an NDS may request to intervene and offer its views on the interpretation of the treaty in question to the arbitral tribunal or national court even though no request has been made of it.

4 The Protocol is envisioned to operate by way of providing ASEAN Member States with a directory that stipulates points of contact in the respective NDSes for which requests for consultations on treaty interpretation can be directed to. This directory would ensure clarity and certainty on the proper authority to deal with a request for submissions by an NDS.

5 The Protocol is *not meant to have mandatory effect*. An NDS can choose not to respond to requests made under Art 2 of the Protocol. This is expressly set out in Art 3.2.2 of the Protocol.

2. Dr Hop X Dang (Arbitrator and Academic, Hop Dang's Chambers)

6 Dr Dang believes that the Protocol embodies the collective spirit of ASEAN and that the "Power of One" should be harnessed in respect of investor-State disputes. Dr Dang recognises the public interest in creating a process to obtain the input of the NDS so that the tribunal can arrive at the best and most judicious outcome.

7 Dr Dang, however, believes that the Protocol should be more ambitious and should not merely be an optional set of guidelines. He thinks that the Protocol should be more directive and have more bite. For example, States that have been issued a request under Art 2 of the Protocol should be under an obligation to respond.

3. Dr Romesh Weeramantry (Foreign Legal Consultant, Clifford Chance)

8 Dr Weeramantry believes that the Protocol is a commendable and interesting proposal. He believes that the Protocol, if successfully implemented, can be an example for the rest of the world.

9 Dr Weeramantry notes that investor-State arbitration is asymmetric in nature. It involves, on the one hand, the investor, who had no role in the drafting of the treaty (and therefore has no access to the *travaux préparatoires*), and on the other hand, the host State, which had participated in drafting the treaty. The Protocol can remedy this imbalance by streamlining the process for the investor's home State to give information.

10 Dr Weeramantry raises certain points to mull over when finalising the Protocol:

(a) consistency with Art 31(3)(a) of the Vienna Convention on the Law of Treaties;[2]

(b) potential conflict between the Protocol and provisions of relevant investment treaties (*eg*, Art 40(2)[3] of the ASEAN Comprehensive Investment Agreement of 2009); and

(c) transparency.

11 Dr Weeramantry assuages any concern that the NDS's submissions, being submissions from a non-party, would dictate the outcomes of interpretation disputes. He notes that such a mechanism had been introduced in Art 1128 of the North American Free Trade Agreement ("NAFTA"), and in respect of ensuing NAFTA disputes, tribunals have not necessarily accepted the submissions made by NDS. He presented statistics based on a brief survey of 15 disputes: in six of these disputes, the NDS's submissions have been rejected; in six disputes, the NDS's submissions have

2 Article 31(3)(*a*) of the convention provides that when a treaty is interpreted, "[t]here shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions".

3 Article 40(2) reads as follow: "The tribunal shall, on its own account or at the request of a disputing party, request a joint interpretation of any provision of this Agreement that is in issue in a dispute. The Member States shall submit in writing any joint decision declaring their interpretation to the tribunal within 60 days of the delivery of the request".

been accepted; and in the remaining disputes, the NDS's submissions were found to be irrelevant and therefore played no influence.

4. Minn Naing Oo (Managing Partner, Allen & Gledhill (Myanmar) Co Ltd)

12 Mr Minn welcomed Mr Bull SC's proposal. Speaking from his experience as a drafter and negotiator of bilateral investment treaties ("BITs"), he recounted his concern as to how treaties entered into would be subsequently interpreted by tribunals.

13 He expressed his broad approval with the Protocol, but also raised a few concerns:

(a) **Possibility of bias.** When a huge investment arbitration claim is brought, the State might be tempted to offer an interpretation that bends over backwards to support the investor. This might politicise the arbitration process, which defeats the very purpose of the investor-State dispute settlement process in its current iteration.

(b) **Impracticality of inviting numerous State parties to submit on the interpretation of multilateral treaties**. This problem would be especially acute when ASEAN enters into a treaty as a single regional bloc.

(c) **Potential conflict with similar mechanisms in existing BITs and free trade agreements ("FTAs")**. (Echoing Dr Weeramantry's concern; see [10(b)] above.)

14 Mr Minn made reference to Rule 29 of the Singapore International Arbitration Centre Investment Arbitration Rules 2017 where there is a similar mechanism for an NDS to make submissions before a tribunal.[4]

15 Finally, Mr Minn agreed with Mr Bull SC that the proposal should be kept non-binding.

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4 Rule 29.1 of the Singapore International Arbitration Centre Investment Arbitration Rules 2017 provides that "[b]y written notice to the Registrar and the Parties, a Non-disputing Contracting Party may make written submissions to the Tribunal, but only on a question of treaty interpretation that is directly relevant to the dispute. The Tribunal may also, after considering the views of the Parties and having regard to the circumstances of the case, invite written submissions from a Non-disputing Contracting Party under this Rule 29.1".

5. Vilawan Mangklatanakul (Deputy Director General, Department of Treaties and Legal Affairs, Ministry of Foreign Affairs, Thailand)

16 Mrs Mangklatanakul disagreed with Mr Bull SC. She took the view that the Protocol may give rise to: (a) political tensions that may arise on conflicting submissions on the interpretation of a treaty provision; and (b) delay in investment arbitration proceedings that are presently already very lengthy.

17 Mrs Mangklatanakul suggested, in lieu of Mr Bull SC's proposal, the following:

(a) establishing joint committees in respect of existing BITs and FTAs to jointly interpret treaty provisions in dispute; and

(b) resolving any interpretation problems on a government-to-government level, by leveraging on existing avenues provided for the clarifying of the interpretation of treaties.

B. COMMENTS/QUESTIONS FROM PARTICIPANTS AND RESPONSES FROM PANELLISTS

S/No	Questions and responses
1	**Jeffrey Chan SC (Former Principal Senior Consultant, Attorney-General's Chambers of Singapore)**: Comments that this proposal may be seeking to reinvent the wheel, given that the Arts 4 and 5 of the UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration 2014 ("Transparency Rules") already allow non-parties to make submissions to the tribunal, and the tribunal to invite submissions on issues of treaty interpretation from non-parties, respectively. Queries whether the question for ASEAN to ponder should be whether ASEAN Member States should ratify the Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration 2014 (entered into force in 2017) ("Mauritius Convention") instead, such that the Transparency Rules will necessarily apply to investment treaty disputes. **Cavinder Bull SC**: The Protocol is not about whether third parties can or cannot participate in the arbitration. Rather, it is merely intended to create a directory so that there will no longer be any dispute over the authority of the source of the information provided.

	Dr Romesh Weeramantry: The Mauritius Convention has not gained traction because many States hold reservations about transparency in investment arbitration. The Protocol does not animate such concerns. **Minn Naing Oo**: Affirms the idea of setting up a directory.

Samuel Koh and Tan Jun Hong
Rapporteurs
27 July 2018

LEGAL OBSTACLES TO TRADE AND INVESTMENT IN ASEAN

Prof Locknie Hsu
Professor of Law, Singapore Management University

A. INTRODUCTION

1 The Association of Southeast Asian Nations ("ASEAN") was founded in 1967 by Indonesia, Malaysia, the Philippines, Singapore, and Thailand to promote regional peace and stability. The bloc has since expanded to include Brunei Darussalam, Cambodia, Lao PDR, Myanmar and Vietnam. Integration – particularly economic integration – efforts have been ongoing since its creation. While December 2015 marked a significant milestone with the formal launch of the ASEAN Economic Community ("AEC"), economic integration activities had been underway for a number of years. Such activities include those captured in the first economic "blueprint" of 2007.[1]

2 All ten ASEAN countries are members of the World Trade Organization ("WTO") and signatories to the New York Convention on recognition and enforcement of foreign arbitration awards.

3 The AEC Blueprint 2007 set out four main goals:

(a) creating a single market and production base with a free flow of goods, services and skilled labour and a freer flow of capital;

(b) developing a competitive region with clear competition policies;

(c) promoting equitable economic development; and

(d) developing a region integrated into global networks.

4 Building on this, the AEC Blueprint 2025, launched in 2015, sets out the following further aims:

(a) a highly integrated and cohesive economy;

(b) a competitive, innovative, and dynamic ASEAN;

1 See ASEAN <http://asean.org/wp-content/uploads/archive/5187-10.pdf> (accessed 22 February 2019).

(c) enhanced connectivity and sectoral cooperation; a resilient, inclusive, people-oriented, and people-centred ASEAN; and

(d) a global ASEAN.[2]

5 The AEC Blueprint aims to address trade barriers which can increase business costs and impeded trade, including non-tariff measures ("NTMs").

6 Developments in global trade, technology and business models have made it necessary to examine the state of legal obstacles in ASEAN and to assess gaps and where possible improvements may be made in its business law environment. This paper draws on some of the research conducted in a Singapore Management University research project, which culminated in a Final Report launched on 22 March 2018.[3] While that Report covered legal obstacles in a number of areas, this paper will highlight mainly those in the trade, investment and dispute settlement areas.[4]

7 As ASEAN faces uncertainty arising from global trade tensions, shifting trade alliances, challenges to the multilateral trade rules regime and the WTO[5] and the need for economic development, a number of priority questions could be identified to help steer the Member countries to provide legitimate businesses operating within the region with a degree of certainty and trade facilitation.

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2 See ASEAN <astnet.asean.org/docs/AEC-Blueprint-2025-FINAL.pdf> (accessed 6 June 2018).

3 The Final Report (referred to hereafter as the "SMU research report"), which comprises the work of the present author and two colleagues, is available at <https://www.canasean.com/reports/> (accessed 6 June 2018). The research was supported by a grant of the Singapore Ministry of Education (Academic Research Fund Tier 1 grant, no 15-C234-SMU-001) and supported in kind by the Canada–ASEAN Business Council. The research report was launched in Singapore on 22 March 2018. The research included feedback from an online survey of businesses, academic and business literature and round-table discussions with businesses, regulators and lawyers in a number of ASEAN cities.

4 The present paper highlights some of the project's key findings and recommendations on trade, investment and dispute settlement obstacles, which this author was primarily responsible for, as well as some further research carried out for this particular paper. (Other areas covered in the SMU research report include corporate and land use barriers in ASEAN, which are highlighted at the end of this paper.)

5 See, *eg*, the recent remarks of Christine Lagarde, "Creating a Better Global Trade System" (29 May 2018) <https://blogs.imf.org/2018/05/29/creating-a-better-global-trade-system/> (accessed on 22 February 2019).

8 This paper discusses areas where laws in ASEAN may be lacking or unclear, or where a common ASEAN stance on laws and regulations – to better harness "the Power of One" – would be desirable.

B. TRADE AND INVESTMENT LEGAL OBSTACLES

1. The "Power of One" – Tariffs and NTMs

9 ASEAN has made significant strides in eliminating a number of trade barriers over the years. These include the near-complete elimination of intra-ASEAN tariffs, adoption of a number of streamlining activities for customs procedures and documents, establishment of customs processing portals known as "single windows", adoption of a harmonised tariff classification system for greater uniformity in categorising of imports and exports and setting up of databases on non-tariff measures (NTMs, or trade obstacles which take a form other than a tariff).

10 While tariffs on intra-ASEAN have been dramatically reduced, they have not been totally eliminated. At the same time, with this reduction in tariffs, more attention is now being paid to the prevalence of NTMs, as can be seen from various relatively new and informative databases.[6]

11 Micro-, small- and medium-sized enterprises ("MSMEs") in ASEAN, in particular, have limited resources relative to larger corporations and tariff and non-tariff obstacles can present particularly large impediments to them.[7]

(a) The "Power of One" in trade facilitation

12 All ASEAN Members (except Indonesia) have also signed the WTO's Trade Facilitation Agreement ("TFA") which contains certain commitments to further improve national laws, procedures and processes to

6 See, *eg*, ASEAN Secretariat <http://asean.org/asean-economic-community/asean-free-trade-area-afta-council/other-documents/> and the ASEAN verified NTMs lists <http://www.aseansme.org/zfta_ntms> (accessed 22 February 2019).

7 See, *eg*, "SMEs still facing 'very big' hurdles in export markets, says WTO director-general" *The Business Times* (8 November 2017). See also generally, Asia-Pacific Economic Cooperation Policy Support Unit, "Promoting Ecommerce to Globalize MSMEs" (2017).

facilitate trade. Countries which are signatories to the TFA commit to, *inter alia*, expedited customs and related procedures according to their stage of development.

13 Prior to the TFA, ASEAN had already taken a number of trade facilitation actions. For example, ASEAN Member States agreed in 2005 to work towards the establishment of an "ASEAN Single Window" ("ASW") to increase trade facilitation.[8] To this end, most ASEAN countries have established National Single Windows ("NSWs") designed to connect to the ASW.

14 The ASEAN Trade in Goods Agreement ("ATIGA") also sets out a number of other trade facilitation commitments for each Member State.[9]

15 One area which ASEAN countries can better utilise and which is envisaged under the TFA is that of Authorised Economic Operators ("AEOs"). AEOs, which are determined to have certain fiscal and security track records, may receive expedited customs treatment for their goods; businesses in ASEAN which are given AEO status can, for example, therefore enjoy faster release of their goods by customs authorities. In this regard, ASEAN countries can facilitate trade by entering Mutual Recognition Agreements ("MRAs") of each other's AEOs.

16 The importance of trade facilitation actions and strong regulatory coherence were confirmed during the 17th ASEAN Economic Community Council meeting in November 2018.[10]

(b) Complex rules of origin in Free Trade Agreements

17 The following view expressed by Canadian business leaders summarises the complicated Free Trade Agreement ("FTA") rules of origin succinctly:

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8 See the Agreement to Establish and Implement the ASEAN Single Window (Kuala Lumpur, Malaysia) (9 December 2005).

9 See also the AEC 2025 Trade Facilitation Strategic Action Plan, at: <https://asean.org/wp-content/uploads/2012/05/AEC-2025-Trade-Facilitation-SAP-FINAL-rev.pdf> (accessed on 22 February 2019) (accessed on 22 February 2019).

10 See speech by Mr Chan Chun Sing, Singapore's Minister for Trade and Industry, (12 November 2018) at para 7 <https://www.mti.gov.sg/en/Newsroom/Speeches/2018/11/Speech-by-Minister-Chan-Chun-Sing-at-the-17th-AEC-Council-Meeting> (accessed 22 February 2019).

> In the context of free trade deals, rules of origin determine whether or not a producer will have to pay duties and at what level. With over 300 trade agreements in force today, different rules of origin in each agreement increase complexity and exporters face increasing difficulties in proving origin.
>
> Complex rules create regulatory fragmentation, exclusion and discrimination. There can also be stiff penalties for errors in identifying origin. As a result, some exporters are foregoing the benefits negotiated in free trade agreements.
>
> Different ways of assessing rules of origin are also costly. It is estimated that rules of origin compliance costs run as high as five percent of the value of the finished goods. Simplifying and properly managing preferential rules of origin is thus an opportunity to lower the cost of goods paid by consumers.[11]

18 ASEAN has a number of FTAs, both as a bloc and in individual Member State treaties. These FTAs contain their own rules of origin. While the rules are obviously important in determining what imports may or may not benefit from preferential tariff and other treatment under a FTA, they can be complicated, especially where a product or a component traverses more than one border before it arrives at the final importing country as a finished product, raising questions of which FTA it may qualify for benefits under.[12] Businesses need awareness and an understanding of such rules to benefit optimally from the agreements of which they are a part. However, not all businesses in ASEAN – especially SMEs – have the wherewithal and resources to develop such an awareness and understanding.[13]

(c) The "Power of One" in paperless trade opportunities

19 Two aspects of trade facilitation need attention. Apart from the actions envisaged by the TFA, a second aspect relates to *digital* trade facilitation. This is the facilitation of trade through promoting the use of digitalised and paperless cross-border trade in ASEAN. Inadequate digital trade facilitation will hinder the realisation of the AEC's benefits as businesses increasingly embrace digitalised commercial tools and business platforms. Examples of such tools are digitalised trade documents and legal documents which exist in code (such as "smart contracts"). In the area of

11 Canadian Council of Chief Executives paper (June 2014).

12 For example, automotive parts for use in assembly into vehicles are imported and exported in ASEAN regularly.

13 See, *eg*, "SMEs still facing 'very big' hurdles in export markets, says WTO director-general" *The Business Times* (8 November 2017) <http://www.sgsme.sg/news/government/smes-still-facing-very-big-hurdles-export-markets-says-wto-director-general> (accessed 15 June 2018).

trade documents, paper documents continue to be the norm – indeed the requirement – in many contexts. National laws and procedures and trade treaties continue to reinforce the requirement of paper trade documents such as bills of lading and certificates of origin.[14]

20 A 2017 report provides two important findings regarding ASEAN's implementation of trade facilitation measures, the second of which relates to digital trade facilitation:[15]

> First, achieving basic compliance with WTO FTA by implementing only binding measures result in only modest trade cost reductions. Full implementation of binding measures [of the TFA] results in a decrease of trade costs of 5–6%, while full implementation of all measures results in a 10–11% reduction. Second, the paperless implementation of TFA measures together with enabling the seamless electronic exchange of trade data and documents across borders result in *much larger trade cost reductions, averaging nearly 19–20% for ASEAN as a whole*. [emphasis added]

21 As an example, although ASEAN countries were to have implemented "live" exchange of *electronic* phytosanitary certificates, *only 20%* of the countries have reportedly implemented this partially, or on a pilot basis.[16]

22 Two particular international instruments merit study by ASEAN, in order to determine whether and how their principles and provisions could advance digital trade facilitation in the region. These are the Model Law on Electronic Transferable Records ("MLETR")[17] and the Framework Agreement on the Facilitation of Cross-border Paperless Trade in Asia and the Pacific.

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14 See SMU research report at pp 43–44.

15 United Nations Economic and Social Commission for Asia and the Pacific ("UNESCAP"), *Trade Facilitation and Paperless Trade Implementation in ASEAN – Results from the UN Global Survey 2017* at p 23.

16 See UNESCAP, *Trade Facilitation and Paperless Trade Implementation in ASEAN – Results from the UN Global Survey 2017* at pp 10 and 17.

17 <http://www.uncitral.org/pdf/english/texts/electcom/MLETR_ebook.pdf> (accessed 1 November 2017). Singapore is studying the possible adoption of this model law; see public consultation paper issued in March 2017 <https://www.imda.gov.sg/-/media/imda/files/inner/pcdg/consultations/consultation-paper/public-consultation-paper---uncitral-model-law-on-etrs_10-march-2017.pdf?la=en> and <https://www.imda.gov.sg/regulations-licensing-and-consultations/consultations/consultation%20papers/2017/public-consultation-on-the-draft-uncitral-model-law-on-electronic-transferable-records> (accessed 11 June 2018).

23 The MLETR is a model law promoting the use of digital transferable documents. Countries which adopt the MLETR undertake to recognise the use of digital documents of title, paving the way for use of international trade instruments such as electronic bills of lading (e-bills of lading). Currently, most jurisdictions require paper versions of bills of lading, both in their laws and their trade treaties.[18]

24 The framework agreement ("FA") was launched in 2017, to promote principles on cross-border paperless trade in the wider Asia-Pacific region. At the time of writing, the only ASEAN country which has signed the FA is Cambodia.[19]

25 Both the MLETR and the FA are instruments worthy of study by ASEAN countries, to determine whether and how their provisions and principles can promote digital trade facilitation in the region.

(d) The "Power of One" in e-commerce laws and regulations

26 While a number of ASEAN countries have enacted laws to facilitate electronic commerce, most have done so at a relatively basic level, to allow the recognition of electronic communications and digital signatures in the context of contracts.[20] Few – let alone ASEAN as a whole – have addressed deeper e-commerce needs with laws and regulations which deal with e-commerce aspects such as e-payments, cross-border product complaints and region-wide privacy protection for e-commerce customers.

27 Indeed, under the AEC Blueprint 2025,[21] ASEAN has been developing an ASEAN Agreement on e-Commerce, which includes implementing the following strategic measures:

18 See, for example, the ASEAN–India and ASEAN–Hong Kong Free Trade Agreements which expressly require the submission paper documents (original and copies) for purposes of obtaining certificates of origin.

19 Other signatories to date are Armenia, Azerbaijan, Bangladesh, China and Islamic Republic of Iran; see <http://www.unescap.org/resources/framework-agreement-facilitation-cross-border-paperless-trade-asia-and-pacific> (accessed 7 June 2018).

20 See, for example, the typology of laws identified in the World Economic Forum White Paper, *Making Deals in Cyberspace: What Is the Problem?* at pp 7–8 and <http://www3.weforum.org/docs/WEF_White_Paper_Making_Deals_in_Cyberspace.pdf> (accessed 6 June 2018).

21 Part C.3.

(a) harmonisation of consumer rights and protection laws;

(b) harmonisation of legal framework for online dispute resolution, taking into account international standards;

(c) development of inter-operable, mutually recognised, secure, reliable, and user-friendly e-identification and authorisation (electronic signature) schemes; and

(d) development of a coherent and comprehensive framework for personal data protection.

28 At the 33rd ASEAN Summit held in Singapore in November 2018, ASEAN leaders signed the Agreement on Electronic Commerce, with Myanmar being one of the first Member States to ratify the agreement.[22] The agreement addresses a number of issues affecting e-commerce, including online consumer protection, regulatory issues, electronic payments, the ability of businesses to move their data across borders and paperless trade.[23]

29 Apart from the matters listed above, systems which can further boost confidence in ASEAN e-commerce, such as availability of a speedy, effective and cost-effective dispute resolution system or services (possibly an online system) for product complaints and refunds, particularly to deal with low-value, high volume sales, would be desirable. The ASEAN Economic Blueprint 2007 had envisaged at least a set of guiding principles in the "actions" for e-commerce:

> To lay the policy and legal infrastructure for electronic commerce and enable on-line trade in goods (e-commerce) within ASEAN through the

22 See <https://www.channelnewsasia.com/news/business/asean-economic-ministers-ink-first-e-commerce-agreement-10920610> and <http://www.xinhuanet.com/english/2018-11/16/c_137611143.htm> (both accessed 19 November 2018). See also Singapore Ministry of Trade and Industry fact sheet, at: <https://www.mti.gov.sg/-/media/MTI/Newsroom/Press-Releases/2018/11/17th-AECC/Annex-A-Factsheet-on-ASEAN-Agreement-on-e-Commerce.pdf> (accessed on 22 February 2019). Singapore was the Chair of ASEAN in 2018. See also generally, ASEAN's work programme on e-commerce for 2017–2025 <http://asean.org/asean-economic-community/sectoral-bodies-under-the-purview-of-aem/e-commerce/> (accessed 15 June 2018).

23 See <https://www.straitstimes.com/singapore/e-commerce-pact-aims-to-lower-costs-protect-consumers> and <https://www.businesstimes.com.sg/hub/asean-singapore-2018/helping-asean-ride-the-e-commerce-wave> (both accessed 19 November 2018). At the time of writing, the text of the agreement was not yet publicly available.

implementation of the e-ASEAN Framework Agreement and based on common reference frameworks.

i. Adopt best practices in implementing telecommunications competition policies and fostering the preparation of domestic legislation on e-commerce;

ii. Harmonise the legal infrastructure for electronic contracting and dispute resolution;

iii. Develop and implement better practice guidelines for electronic contracting, guiding principles for online dispute resolution services, and mutual recognition framework for digital signatures in ASEAN;

iv. Facilitate mutual recognition of digital signatures in ASEAN;

v. Study and encourage the adoption of the best practices and guidelines of regulations and/or standards based on a common framework; and

vi. Establish a networking forum between the businesses in ASEAN and its Dialogue Partners.

30 It would be useful to ensure that such an agreement also addressed specific obstacles in e-commerce faced by ASEAN MSMEs.[24]

(e) The "Power of One" in ASEAN business regulations for the "Industry 4.0" era

31 The Fourth Industrial Revolution – or "Industry 4.0"[25] – era, characterised by an increasing use of diverse technologies with unprecedented levels of data flows, is reshaping the global trade landscape rapidly and disruptively. The speed at which such technology is being harnessed and embraced by businesses is leaving lawmakers far behind, not only in ASEAN but even in many developed countries. What are some suggested priority areas which ASEAN could, however, focus on, to better tap on the trade and investment opportunities in this new era?

32 A priority area where a common set of rules or principles would create greater certainty and facilitate trade activities is the legal treatment of data privacy, data flows and data storage in ASEAN countries. As an example, presently, certain ASEAN countries, such as Indonesia and Vietnam, require local data storage while others do not. Businesses which wish to

24 See, *eg*, APEC Policy Support Unit, *Promoting E-commerce to Globalize MSMEs* (2017).

25 See, *eg*, Klaus Schwab, *The Fourth Industrial Revolution* (World Economic Forum, 2016).

comply with such requirements would have to set up local servers and storage facilities, which in turn can lead to increased costs. Such requirements present challenges to modern cloud computing business models which optimise data storage in the "cloud", rather than in a national facility.

33 The ease of data flows is also critical to certain business activities, such as developing the Internet of Things ("IoT") devices, and daily business operations, such as human resources data, and product and services data, which may need to cross borders speedily and regularly. Yet, ASEAN's national laws presently differ on the treatment of such devices and of data storage.[26]

34 Data protection laws, such as the European Union's General Data Protection Regulation, can pose serious challenges to ASEAN businesses – particularly MSMEs – joining global supply chains.[27] To ensure that such laws do not become barriers for ASEAN businesses, their awareness and ability to comply with these rules must be addressed by ASEAN governments.

35 The growing use of distributed ledger and blockchain technology in international trade, finance and supply chains (and associated components such as cryptocurrencies, and "smart" or self-executing contracts) due to its efficiency, general "immutability" and cost benefits is another area in which a unified ASEAN regulatory voice on key aspects can be helpful.

36 As another example, as businesses increasingly seek to commercialise the use of artificial intelligence, autonomous vehicles and drones (unmanned aircraft systems), questions will arise within ASEAN (and elsewhere) as to the legal permissibility and responsibility which such use might entail.[28] This is therefore an area in which ASEAN needs to examine urgently the legal and ethical positions, to provide clarity for businesses.

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26 For example, some ASEAN countries have laws and regulations requiring the domestic location of data servers and facilities, while some do not; such laws can have significant implications on business costs and on the development cloud computing services. Others have laws which contain trade restrictions on Internet of Things products.

27 See SMU research report at pp 78–79.

28 On the commercial exploration of using drones to deliver increasing loads of goods and cargo, see, *eg*, <http://www.scmp.com/tech/china-tech/article/2148692/chinese-companies-are-testing-civilian-drones-can-carry-tonne-cargo> (accessed 6 June 2018) and <https://www.wired.com/story/boeing-delivery-drone/> (accessed 6 June 2018).

37 The laws in ASEAN on various aspects of "Industry 4.0" technology use and of data is presently fragmented and uncertain. It is therefore suggested that ASEAN needs to urgently address this area by, *inter alia*, establishing a cross-discipline, multi-stakeholder ASEAN committee or group to keep abreast of technological, commercial and legal trends surrounding such uses of technology.

(f) Investment obstacles

38 The ASEAN Comprehensive Investment Agreement ("ACIA") liberalisation agenda is presently limited to the following sectors:

(a) manufacturing;

(b) agriculture;

(c) fishery;

(d) forestry;

(e) mining and quarrying;

(f) services incidental to manufacturing, agriculture, fishery, forestry, mining and quarrying; and

(g) any other sectors, as may be agreed upon by all Member States.[29]

39 The ACIA liberalisation provisions exclude measures under services under the ASEAN Framework Agreement on Services ("AFAS"), whose liberalisation negotiations are handled separately.

40 ASEAN countries are working towards a new agreement for services liberalisation, the Agreement on Trade in Services ("ATISA").[30] Under AFAS, the following priority sectors have been identified:[31] air transport, business services, construction, financial services, maritime transport, telecommunications and tourism.

29 ACIA Art 3.3. On ASEAN investment liberalisation, see generally, Ponciano S Intal Jr, *AEC Blueprint Implementation Performance and Challenges: Investment Liberalization* (ERIA-DP-2015-32, April 2015).

30 See text of the ACIA <http://investasean.asean.org/files/upload/Doc%2005%20-%20ACIA.pdf> (accessed 22 February 2019).

31 Bangkok Declaration (signed at the Fifth ASEAN Summit in 1995).

41 Under the AEC Blueprint 2007, particular services were identified as priority sectors for accelerated liberalisation.[32] Member States were to remove substantially all restrictions on trade in services for air transport, e-ASEAN, healthcare and tourism by 2010 and for logistics services, by 2013. The Blueprint set the following target dates for Mode 3 (commercial presence) liberalisation, allowing for foreign (ASEAN) equity participation of:

> (a) not less than 51% by 2008, and 70% by 2010 for the four priority services sectors;
>
> (b) not less than 49% by 2008, 51% by 2010, and 70% by 2013 for logistics services; and
>
> (c) not less than 49% by 2008, 51% by 2010, and 70% by 2015 for other services sectors.

42 Taking logistics services – a priority area – as an example, a number of investment restrictions exist which may impede the most efficient development of the sector in ASEAN. To facilitate ASEAN business connectivity with global supply chains, some businesses have said that it is necessary to tackle:[33]

> … the development of seamless logistics in the ASEAN area through the lowering of supply chain costs in each Member State and the improvement of the speed and reliability of supply chains. Today, in fact, ASEAN area logistics efficiency remains below expectations and major investments and efforts are required in infrastructure development, ICT adoption and the reduction of non-tariff barriers.

43 Other investment restrictions which impede e-commerce exist in ASEAN. Examples include limits on foreign ownership of equity in areas such as logistics, financial service entities or e-payment service providers, e-commerce platform providers and infrastructure services.[34] Other restrictions exist in the form of local-content requirements applicable to

32 See *ASEAN Integration in Services* (2015) at pp 18–19.

33 See The European House – Ambrossetti and Italia ASEAN, Position Paper, *Enhancing Connectivity in ASEAN Area: What Opportunities of Cooperation for Italian and ASEAN Players* at High Level Dialogue on ASEAN Italy Economic Relations in Jakarta (15–16 May 2017) <https://www.ambrosetti.eu/wp-content/uploads/ASEAN-2017-Paper-CONNECTIVITY_eng_sito.pdf> (accessed22 February 2019).

34 See SMU research report at pp 69–71.

electronic devices commonly used in e-commerce, such as cellular phones, notebooks and tablets.[35]

44 Notably, the AEC Blueprint 2025 requires ASEAN countries to "explore alternative approaches for further liberalisation of services".[36]

45 To achieve this, it is suggested that ASEAN should establish a new priority cluster of services which would better support modern commerce, and particularly, allow ASEAN to better reap the potential benefits of e-commerce.[37] The suggested cluster could comprise key service areas, such as logistics, e-payment, finance, and infrastructure. Such a new cluster would bring a greater focus and coherence in the AEC's e-commerce environment.

2. Dispute settlement issues for ASEAN

(a) The "Power of One" in enforcing commercial rights and obligations

46 While the liberalisation of trade and investment rules and improving commercial laws can strengthen the AEC as a single market and production base, the ease of and certainty in resolving commercial disputes is another critical element in the legal environment. High costs, delays and uncertainty in laws in resolving disputes can impede and/or deter commercial activity.[38] Various aspects may be considered in this context, including the ease of enforcing contracts and commercial judgments and arbitration awards across borders in ASEAN. The availability of effective

35 See for example, in the case of Indonesia, see the regulation in Permenperin No 65/2016, and related articles in "Government Prepares Local Content Requirement for 4G Smartphone" *The Jakarta Post* (29 February 2016) <http://www.thejakartapost.com/news/2016/02/29/govt-prepares-local-content-requirement-4g-smartphone.html> (accessed on 22 February 2019); *Global Legal Monitor* <http://www.loc.gov/law/foreign-news/article/indonesia-local-content-rules-for-electronic-products/> and "Indonesia's 'pro-Apple' local content irks smartphone rivals" *Nikkei Asian Review* (28 May 2017) (accessed 11 June 2018). See also the discussion in the World Trade Organization ("WTO"), in WTO document, G/TRIMS/M/43, 16 March 2018, on such requirements. The information on the Indonesian regulation is derived from an unofficial translation of it, funded by the SMU research project.

36 Paragraph A2.13.

37 See SMU research report at pp 62 and 80.

38 See SMU research report at section 5.

and efficient dispute resolution national and regional options can contribute to a more positive business environment. [39]

47 The following are some examples of areas where clarity of laws is important for businesses:

(b) Enforcement of contracts

48 ASEAN's diverse legal traditions and non-homogenous contract laws can present challenges to businesses. Clarity in national contract laws and principles of contract enforceability is highly desirable, to allow businesses to plan their commercial activities and risk management well. Any mandatory requirements (such as language or other requirements) for contracts to be enforceable should be clearly published for business certainty.

(c) Admissibility of electronic evidence in ASEAN courts

49 As ASEAN countries move toward greater implementation of the ASEAN Single Window's unified customs portal for processing trade documents electronically, the legal significance of electronic documents as evidence will grow. Apart from the customs documents context, more broadly, ASEAN national laws on the admissibility of electronic evidence in judicial proceedings are not homogenous.[40]

(d) Recognition and enforcement of judgments and enforcement of foreign arbitration awards in ASEAN

50 One challenge which exists in enforcement of judgments in ASEAN is that there is no regional enforcement of judgments mechanism.

39 Other Asian jurisdictions are also studying dispute settlement avenues and obstacles. For example, the SMU research report was cited with regard to its findings on whether businesses in ASEAN included arbitration clauses in their contracts, by Rimsky Yuen, then Secretary for Justice, Hong Kong SAR, in the keynote speech (14 October 2017) at p 4 <https://www.doj.gov.hk/eng/public/pdf/2017/sj20171014e2.pdf> (accessed 11 June 2018).

40 See, for example, Bryan Tan, Michael Lew & Benjamin Ang, *E-Discovery in Asia* (LexisNexis, 2017).

Enforceability of a judgment from one ASEAN country in another is dependent on national laws and treaties (where they exist).[41]

51 While all ASEAN Member States are signatories to the New York Convention,[42] there have been some instances where arbitration awards from another ASEAN country have not been recognised or enforced in a national court of an ASEAN Member.[43]

52 Promotion of knowledge of available avenues (such as the Singapore International Commercial Court and various dispute settlement centres within ASEAN) can allow businesses to be more familiar with available avenues, their associated advantages, and which might best suit their dispute needs.

3. Corporate and land use obstacles

53 Apart from trade and investment barriers/obstacles, other observed obstacles include those in corporate laws and procedures and in land use regulation.[44]

54 Corporate obstacles within ASEAN include the complexity of procedures in some jurisdictions, equity restrictions (also addressed in this paper under investment restrictions) and the disparity in corporate laws across the region. Simplification of procedures by use of online processes and electronic forms, and consideration of a fast-track incorporation process of a citizen or entity of another ASEAN country could further

41 See *Recognition and Enforcement of Foreign Judgments in Asia* (ABLI Legal Convergence Series) (Adeline Chong ed) (Asian Business Law Institute, 2017) <http://abli.asia/PUBLICATIONS/Foreign-Judgments-Project>.

42 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) ("the New York Convention"). Note also that the ASEAN Law Association presented its draft protocol and proposed "Guidelines on Best Practices on Reciprocal Enforcement of Arbitral Awards in ASEAN" at the Sixth Session of the ASEAN Senior Law Officials Meeting Working Group held in Bali on 19 October 2015; see <https://www.aseanlawassociation.org/govcouncilmtg-vn16.html> and <https://aseanlawassociation.org/ALA%20Newsletter_April2016-March2017.pdf> (accessed 15 June 2018).

43 Some of these instances have related to the public policy exception under Art V(2)(*b*) of the New York Convention. See SMU research report at section 5.

44 See SMU research report, sections 2 (primary researcher: Pearlie Koh) and 4 (primary researcher: Yip Man). Please see the research report for a fuller discussion of the findings and other recommendations.

facilitate matters. Other steps include consideration of common registration requirements in ASEAN and establishment of a searchable online registry of ASEAN businesses and MSMEs.

55 Land rights systems differ significantly in substance and level of development in ASEAN countries. There is a need for improved land titling and governance systems in the region as a whole. Possible steps for consideration include the introduction of databases on electronic land ownership and encumbrances and an ASEAN portal to allow users to do searches, acceleration of an electronic land titling system. Other possible steps include establishment of an efficient dispute settlement and grievance system to resolve long-running land disputes, and establishment of an ASEAN working group to study best practices in compulsory acquisition laws and processes.

C. CONCLUSION

56 What, then, is required to make of the "Power of One" meaningful in addressing business obstacles effectively? This paper suggests the following as possible areas of focus to further improve the ASEAN business law environment:

(a) address NTMs, particularly in priority sectors identified for the AEC and especially with regard to their impact on MSMEs in ASEAN;

(b) trade facilitation – promotion of implementation of the TFA, including greater utilisation of AEOs and MRAs for AEOs;[45]

(c) paperless trade – promoting digital trade facilitation and, in this context, consider the usefulness of the FA and MLETR for improving ASEAN trade rules;

45 For example, Singapore and Australia have signed a MRA on AEOs; see Singapore Customs <https://www.customs.gov.sg/-/media/cus/files/media-releases/2018/for-website-310518-singapore-and-australia-sign-arrangement-to-facilit.pdf> (accessed 7 June 2018). More recently, Singapore and Thailand also signed an AEO MRA; see <http://www.wcoomd.org/en/media/newsroom/2018/july/singapore-and-thailand-sign-an-aeo-mutual-recognition-arrangement.aspx> and <https://www.gov.sg/~/sgpcmedia/media_releases/customs/press_release/P-20180629-2/attachment/29062018%20Singapore%20Customs%20Media%20Release.pdf> (accessed 22 February 2019).

(d) negotiating liberalisation and facilitation for a new priority cluster of services and goods comprising financial, logistics, e-commerce and infrastructure services which is to better support e-commerce;

(e) establishing mechanisms which can boost consumer confidence in e-commerce, such as effective and affordable dispute resolution mechanism for e-commerce disputes;

(f) establishment of an ASEAN multi-stakeholder and cross-disciplinary committee to address "Industry 4.0" business issues and the use of technology and consulting with a view to developing "one voice" in rule-making in areas such as data transfers and protection, cybersecurity, commercial use of drones and other emerging technology;

(g) provide greater clarity in rules on admissibility of electronic evidence in ASEAN courts, on mandatory language and other requirements for contracts to be enforceable in national courts;

(h) consideration of adoption of international instruments promoting commercial law harmonisation; and

(i) consideration of instruments and processes to promote more efficient cross-border enforcement of commercial judgments and arbitration awards, and promotion of knowledge of available dispute resolution avenues, within ASEAN.

57 Other obstacles in areas such as corporate registration and land use, as outlined above, should also be addressed.

CROSS-BORDER OBSTACLES IN ASEAN AND SOLUTIONS*

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1. ASEAN Community

- Unlike three decades ago, today's Southeast Asia is no longer a land of wars and conflicts. For 50 years, the ten countries of the ASEAN have been working together to provide much-needed stability to the region. It is now home to the world's fastest-growing countries in terms of both population and economic growth
- The ASEAN Community is comprised of three pillars:
  - ASEAN Political-Security Community;
  - ASEAN Economic Community ("AEC"); and
  - ASEAN Socio-Cultural Community

2. ASEAN Economic Community

- In 2016, ASEAN was ranked the sixth largest economy in the world with a combined gross domestic product of US$2.6trn, and a population of 650 million
- Not only are individual ASEAN countries attractive investment destinations, but with the potential of an integrated region, ASEAN has recently entered into free trade agreements with a number of its major regional trading partners: China, Japan, India, Korea, and a joint agreement with Australia and New Zealand
- AEC since 31 December 2015:
  - there is a common market, where factors of production, labor and capital are free to move between Members
  - there are no restrictions on immigration, emigration, or cross-border flows of capital between Member countries

* This is an adaptation of the presentation slides used at The ASEAN Law Conference.

3. Cross-border obstacles in ASEAN

- Despite all the positive outcomes from the region's integration, it is important to understand that Southeast Asia is greatly diverse in political situations, environmental conditions, rules, laws, and economic structures
- Each of the countries presents very distinct opportunities and challenges. Such disparities are causing limitations in the region's sustainable growth and stability unless the governments know how to narrow the gaps and strengthen economic integration among the Member States
- This study seeks to discuss the obstacles that the ASEAN is facing and, hopefully, help those working with the ASEAN to find concrete solutions for this increasingly complex and interconnected region

4. Challenges in logistics integration

- One of the key challenges for the ASEAN is the increasing cost of transportation that can be attributed to the differences in the Member countries' stage of development
- A study done by the Institute of Southeast Asian Studies shows that while Singapore and Malaysia enjoy a well-developed logistic services industry, the other countries are still in their infancy in providing supporting services for the flow of goods within the region
- Logistics is not merely about handling and transporting goods, but it includes a wide range of activities, such as warehousing, storage, and communication, that requires an effective measurement in institutional quality
- It also requires great coordination between government departments. Unfortunately, there are significant differences in each ASEAN country's approach to corruption, regulations, and ways of doing business

5. Inconsistency in infrastructure

- In order to facilitate trade and lower costs of business, it is vital to expand infrastructure that can consistently support not

only road networks, but also seaports and railway systems within the region

- Despite the huge potential to become a transit hub for the ASEAN, countries like Vietnam have an under-developing infrastructure system as compared to Singapore. Although the road networks have been improved for the last few years, the ports and railways are inefficiently operated
- For example, numerous ports are located within Ho Chi Minh City's borders causing traffic congestions and damaging the surfaces of newly-built roads when container trucks roll through the city. This cost importers and exporters time and money. Also, Vietnam's rail links are currently not used for container transportation purposes
- Imagine that instead of trucks, trains become the main transporters for containers; this will produce extremely sufficient results in facilitating logistics within the Southeast Asian region

6. Unskilled workers and the productivity challenge

- In spite of the huge population (654 million), 11% have no education and 60% only have primary education or lower. The shortage of skilled labor is the biggest challenge for the countries in the ASEAN
- Again, differences in their state of development, economic structure, and strategic growth explain the skills gap in industries
- While Singapore has a skilled, educated, English-speaking workforce, Indonesia and Philippines are under pressure to deal with high youth unemployment rate – 18.3% in Indonesia and 14.4% in Philippines. Both countries face challenges in equipping their workers with basic knowledge and skills in science, technology, and engineering
- Because ASEAN countries are diverse in economic growth – some are high-income countries while others are still poorly developed – cross-border illegal migration is becoming a problematic issue when huge populations are moving to big cities for better job opportunities

7. Lack of effective regional cooperation

- Although there is a more effective integration among the ASEAN in addressing human trafficking and illegal wildlife trade, the region still lacks cooperation in resolving climate change, water-energy-food security, and disaster management
    - one example is that, for years, coastal erosions caused by dams have had a major impact on the lives of many people living in the downstream cities and provinces along the Mekong River, one of the most biologically diverse area in the world and the main live support for five Southeast Asian countries (not including China)
    - until now, the countries involved have come up with limited practical implementation to solve this important environmental issue
- Moreover, due to the similarity in natural conditions, labor-intensive environments, price competitiveness, and technological capacities, Southeast Asian countries have been competing with each other for markets in the developed countries
    - take tourism, for example. The ten countries are more dependent on tourism to drive their economies than other regions in the world. Therefore, they are more likely to become competitors than cooperators in attracting tourists around the world
    - it is hard to find any attractive tourism package that could encourage intra-region travels

8. Challenges in banking integration

- One of the key challenges that the Member States are facing is the inconsistency in banking regulations across the region. According to Global Risks Insights, in terms of deposit insurance, while Singapore limits its deposit protection at $36,000, Indonesia's Deposit Insurance Corporation allows up to $148,000
- More importantly, financial safety mechanisms have not been implemented effectively by the ASEAN. The recent stories of banking mismanagement in countries like Vietnam, including

the lack of data security in financial services, have reduced trust among the Member States in launching successful banking integration

– Only by consolidating the banking system in each country to safeguard Southeast Asia against systematic risks will the Member States be able to gain trust in establishing sufficient common financial safety measurements

9. Gaps in catching up with the Fourth Industrial Revolution

– The Fourth Industrial Revolution requires a set of highly-developed technologies, including 3D printing, robotics, and artificial intelligence
– This significant change in technological development will bring both benefits and challenges to the ASEAN countries
– However, because many ASEAN countries are growing based on the supply of low-cost and low-skilled labor, artificial intelligence and robotic machines will create fear over job losses in the future
– Moreover, unless the governments carefully invest in proper cybersecurity measures, policy, and law, ASEAN will be vulnerable to cyber-attacks as more devices, sensors, and machines are connected to the Internet

10. Lack of commercial arbitration in ASEAN

– Several of the ten ASEAN countries are ranked poorly in civil justice and enforcement of contracts. This is decreasing the confidence of foreign investors when they want to open businesses in the Member States
– There is still a lack of arbitrational institutions that can transparently and fairly resolve commercial disputes in ASEAN
– Each Member State is now at a different stage of enabling local arbitration rules
    - both Singapore and Malaysia have highly reputable arbitration institutions

- Vietnam has had a functioning commercial arbitration body, the Vietnam International Arbitration Centre ("VIAC"), for more than two decades
- Cambodia has recently launched its commercial arbitration body, the National Commercial Arbitration Centre ("NCAC"), and adopted its arbitration rules in July of 2014
- Myanmar is still progressing in developing policies and revising laws for foreign trade, banking and finance, construction, manufacture, and more

11. Solutions

– With good transportation among Member countries, people can move almost freely across borders to learn about the richness of the region's diverse history, cultures and religions. This requires better infrastructure and a stronger security system, so that tourists can enjoy travelling to as many countries as they want when visiting ASEAN, while the governments can maintain the security within their territories

– The citizens of ASEAN countries are not equipped with sufficient knowledge of other Member States. For many years, the interactions among Member States have only been limited to the governing level. Therefore, lessons on ASEAN should be taught in schools. Problems within the region must be available to the public. Organising of cultural events, economic workshops and conferences need to be more prevalent and accessible to the people

– The attention given to small- and medium-sized enterprises ("SMEs") and entrepreneurs is not enough, although this group accounts for a large portion of our economies. By giving SMEs enough information about ASEAN markets and by allowing their products to be present at the ASEAN marketplace, we can give them a chance to get acquainted to ASEAN customers and increase the quality of their products through fair competition

– I also suggest a better exchange of skilled workers among ASEAN countries. An open policy on working visas is necessary so that skilled workers from more advanced economies may go and train unskilled workers in the less advanced economies.

Freer movement of labor can increase competition and boost productivity. It also helps stabilize labor cost and makes the whole region competitive to the outside world

- To succeed in the era of the Fourth Industrial Revolution, ASEAN Member States need to harmonize laws and regulations by transforming their local platforms, such as banking payment systems, online marketplaces, and logistic operations into a common regional system
- In the future, as the demand for pension funds and insurances grow in aging populations, the ten Member States really need a better monitoring arbitrary office which can facilitate and oversee all types of connected services – including infrastructure, construction, insurance and hospital services, and banking systems among ASEAN Members, so that citizens of ASEAN can have a better and healthier living condition in the prosperity years ahead

12. Conclusions and recommendations

- Cross-border obstacles in ASEAN are very specific issues that negatively affect trade and investment in the common market. When these obstacles persist, they not only limit integration but also cause many disputes. Disputes of broader scope and complexity and the number of cases are rising. Therefore, through agreements, treaties, protocols, and Charter of ASEAN, the Member States of ASEAN are satisfied with the agreements signed by Members on the mechanism for settling disputes among Member States
- The establishments of the ASEAN Banking Integration Framework ("ABIF") in 2014, AEC in 2015, and other ASEAN platforms have put a milestone on a more integrated ASEAN in all aspects of economic development
- The countries' leaders also have developed the Asian Bond Markets Initiative, and have been able to connect the stock markets in countries. As a result, the difference in interest rate within the region has been narrowed
- ASEAN should establish an ASEAN Economic Arbitration Center, together with the commercial arbitration centres of the Member States, to create a reputable ASEAN arbitration system

to settle disputes among Members, and between Members and partners outside ASEAN. There must be mechanisms for the enforcement of ASEAN's arbitral awards more perfectly and more powerfully

RAPPORTEUR REPORT FOR PLENARY SESSION V

Cross-Border Obstacles in ASEAN and Solutions*

A. SUMMARY OF SPEECHES

1. Justice Syamsul Ma'arif (Judge, Supreme Court of Indonesia)

1 Justice Ma'arif gave a broad overview and introduced the speakers and panellists. ASEAN as an economic bloc has been slow but it is growing gradually. With a population of more than 640 million, ASEAN is the seventh largest economy in the world. ASEAN has been productive and to date, it has adopted more than 200 agreements. Nevertheless, it is agreed that the implementation of ASEAN agreements is an issue. Justice Ma'arif stated that the quality of these agreements is another problem.

2. Prof Locknie Hsu (Professor of Law, Singapore Management University)

2 Prof Hsu presented the highlights of a Singapore Management University research report, "Improving Connectivity between ASEAN's Legal Systems to Address Commercial Issues". Building on one of the aims in the ASEAN Economic Community ("AEC") Blueprint 2025, she emphasised the need to focus on enhanced legal connectivity in ASEAN. She proceeded to discuss the legal obstacles impeding trade facilitation in ASEAN. Prof Hsu identified non-tariff measures ("NTMs") as a major trade obstacle. She proposed integrating ASEAN's present information sources on NTMs, namely the ASEAN Trade Repository and the matrix of actual cases, to provide an up-to-date, searchable database.

3 Prof Hsu recognised the need for digital trade facilitation. First, she recommended developing laws supporting this, and proposed studying the UNCITRAL Model Law on Electronic Transferable Records and the Framework Agreement on the Facilitation of Cross-border Paperless Trade

* The 13th ASEAN Law Association General Assembly and The ASEAN Law Conference, with the theme "The Power of ONE: Unlocking Opportunities in ASEAN Through Law", was held on 25 to 28 July 2018. This session was held on 28 July 2018, 9.00am to 10.30am.

in Asia and the Pacific. One area worthy of consideration would be regulations providing for electronic bills of lading. Second, with the Fourth Industrial Revolution – or "industry 4.0" – era, Prof Hsu proposed establishing an AEC industry 4.0 committee to keep abreast of technological, commercial and legal trends, and to increase legal certainty in view of the diverse national laws. Third, Prof Hsu pointed out that the priority areas identified in liberalisation agendas in goods, services and investment agreements of the AEC are not in sync with one another. Thus, to better reap the potential benefits of e-commerce, she recommended establishing a new priority cluster of services comprising key service areas such as logistics, e-payment, finance and infrastructure.

4 Prof Hsu further emphasised the need to harmonise the legal and administrative rules involved in doing business in ASEAN. These include simplifying procedures and harmonising registration requirements and online registries to overcome corporate obstacles. Another example is the proposal for a uniform land titling system, to provide for clarity and certainty in land rights for businesses. Prof Hsu also highlighted the difficulty with enforcing foreign judgments and arbitration awards in ASEAN courts. She suggested increasing ASEAN judicial dialogue at all levels to discuss such cross-border commercial issues. Additionally, she recommended that key judgments should be made available in English for foreign investors where possible.

3. Dr Nguyen Thi Son (Vice Secretary General, Vietnam Lawyer Association)

5 Dr Nguyen noted that Southeast Asia is greatly diverse in political situations, environmental conditions, laws and economic structures, and that these disparities are limiting the region's sustainable growth and stability. Member countries should seek to narrow these differences and strengthen economic integration between them. The challenges include: (a) challenges in logistics integration; (b) the inconsistency in infrastructure; (c) shortages of skilled labour; (d) the lack of effective regional cooperation in areas such as environmental matters and tourism; (e) challenges in banking integration; (f) gaps in catching up with the Fourth Industrial Revolution; and (g) the lack of commercial arbitration in ASEAN.

6 To build on ASEAN's work in economic integration over the past few years, Dr Nguyen recommended that Member countries work on the following to address the listed challenges:

(a) better transportation among Member countries to facilitate free movement of people and boost tourism;

(b) greater cultural, social and economic understanding between Member countries;

(c) greater attention and support to small- and medium-sized enterprises;

(d) better exchange of skilled workers to improve the quality of workers on the whole for ASEAN to be competitive internationally;

(e) harmonisation of laws and regulations in areas including banking payment systems to succeed in this era of the Fourth Industrial Revolution;

(f) better monitoring office to facilitate and oversee connected services to provide for better and healthier living conditions; and

(g) the establishment of an ASEAN Economic Arbitration Center to create a reputable ASEAN arbitration system to settle disputes, and mechanisms for enforcement of ASEAN's arbitral awards.

4. Ahmad Basuni Haji Abbas (Partner, Abrahams, Davidson & Co)

7 From his experience with investors, Mr Basuni provided a practitioner's perspective on cross-border obstacles in ASEAN and raised some areas of concern. In discussing dispute resolution, he agreed with Dr Nguyen that ASEAN should have a common arbitration centre with set rules and procedure, especially to provide for an effective remedy where such a remedy may be unavailable in the national courts. In the same vein, he emphasised the need for contracts and arbitral awards to be enforced.

8 Mr Basuni mentioned the importance of balancing between the interests of national governments and of investors when it comes to regulating and licensing industries like banking, and also between the interests of different Member countries with different economic needs. All these have to be considered against the backdrop of the rapid

transformation of traditional businesses resulting from technological advances.

5. Dr Poomintr Sooksripaisarnkit (Lecturer in Maritime Law, Australian Maritime College, University of Tasmania)

9 Dr Sooksripaisarnkit gave some responses to the speeches. He followed up on the issue with using electronic bills of lading, given that bills of lading are still regulated by existing international conventions like the Hague Rules and the Rotterdam Rules. He further highlighted the complication with determining the natural forum for contracts involving international elements such as blockchain contracts, in light of the territoriality of conflict of laws rules. Dr Sooksripaisarnkit also affirmed the need for the enforcement of foreign judgments and the harmonisation of laws, and mentioned some of the ongoing work with regard to international conventions.

6. Dr Rebecca Fatima Sta. Maria (Senior Policy Fellow, Economic Research Institute for ASEAN and East Asia)

10 The NTM database uses a classification system which is not as useful for business entities. This should be recoded for the business community to find the laws that need to be complied with to export their products. Dr Fatima is working with the ASEAN Advisory Council. She looked at the data across ASEAN and discovered that the most traded product is ice cream.

11 Dr Fatima mentioned that while tariffs have come down, NTMs have gone up. This is natural as when a country develops, more NTMs will be imposed for safety and health measures. The question is then whether these measures are trade restrictive. She added that it is important for the legal profession to engage with policymakers and governing bodies. The policymakers have regular consultations with the ASEAN Business Advisory Council, but not with the ASEAN Law Association. The ASEAN Law Association needs to bring their policies to the attention of the policymakers, because the baby that cries the loudest gets fed.

B. COMMENTS/QUESTIONS FROM PARTICIPANTS AND RESPONSES FROM PANELLISTS

S/No	Questions and responses
1	**Justice Syamsul Ma'arif**: General response? **Prof Locknie Hsu**: In response to Dr Sooksripaisarnkit, before we even talk about advanced technology such as blockchain, we should first consider electronic documents for old-fashioned letters of credit. We should also focus on legal connectivity between Member countries to help with physical connectivity between them as well. Small incremental steps will add to the bigger picture. In response to Dr Fatima, I agree that the way forward may be to bring the conversation to the next level to policymakers.
2	**Unidentified delegate**: With regard to NTMs, to harmonise the market in agricultural products in Europe, Germany had to lower its standard. Would ASEAN likewise go that far? What should come first, trade or health? **Dr Rebecca Fatima Sta. Maria**: We are not there yet in terms of harmonisation of regulations. The closest that we have is one ASEAN cosmetic directive. Even then, the challenge was in the implementation of this directive and the effectiveness of implementation is unclear. Having an ASEAN NTM database is a start. Push for that cosmetic directive came from the business community. The ball is in the court of the business council and the policymakers to take it to the next level.
3	**Unidentified delegate from Japan**: There should be mutual respect and mutual reliance between ASEAN and Asian countries at all levels to remove the obstacles between them for businesses.
4	**Unidentified delegate**: Do you have an update on the ASEAN Single Window? **Dr Rebecca Fatima Sta. Maria**: The national single windows are in place. However, a lot of the back-end work is still in paper form, and some of the agencies are not integrated. Singapore's implementation has been the best. Malaysia is getting there, and there are still a lot of countries which need to work on theirs. There are indicators that show the degree of implementation by each country and these will be presented to the ministers when they meet in September 2018.

Chua Xyn Yee and Lu Yiwei
Rapporteurs
28 July 2018

Chapter III

Rapporteur-General's Report

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REPORT OF THE RAPPORTEUR-GENERAL, PROF TAN CHENG HAN SC

Chairman, E W Barker Centre for Law and Business, National University of Singapore

13th ASEAN Law Association General Assembly and The ASEAN Law Conference 28 July 2018, Singapore

Representative of the ASEAN Secretariat, Deputy Secretary-General Dr AKP Mochtan,
The President of the ASEAN Law Association, Attorney Avelino Cruz,
The Executive Secretary of the Republic of the Philippines, Mr Salvador Medialdea,
President of ALA Singapore, Chief Justice Sundaresh Menon,
Chairpersons of the National Committees, Heads of Delegations, Chief Justices and Judges of the ASEAN Judiciaries, and Attorneys-General of ASEAN,
Secretary-General of ALA, Attorney Regina Padilla Geraldez,

Members of ALA and distinguished guests

1 I present to you my report as Rapporteur-General for the 13th ASEAN Law Association ("ALA") General Assembly. In the preparation of this report, I acknowledge with grateful thanks the valuable support of a number of Justices' Law Clerks from the Supreme Court of Singapore whose names are listed in the following footnote.[1]

1 Ashley Ong, Daniel Ho, Sarah Siaw, Damien Chng, Kang Jia Hui, Eden Li Yiling, Ho Jiayun, Taufiq Suraidi, Dennis Saw, Reuben Ong, Torsten Cheong, Andre Soh, Samuel Koh, Tan Jun Hong, Chua Xyn Yee and Lu Yiwei. Special thanks also to Charles Lim, Chair of the Programme Committee, and Justin Yeo and Alison See of the Supreme Court.

A. 26 JULY 2018 – DAY 1

1. Opening Ceremony

2 A constant theme that ran through the speeches at the opening ceremony (including the remarks of ALA Heads of Delegation) was that while our narratives are singular, our destiny is shared and it is only by harnessing "The Power of One" that we can succeed. ASEAN's ability to hold together as one region and to leverage on its respective strengths will be the key to all its countries' mutual prosperity. Many of the speakers therefore expressed the view that it was important to press forward towards greater convergence and even harmonisation so that the promise of the ASEAN Economic Community ("AEC") can be more fully realised, with the Guest of Honour, Minister for Finance Mr Heng Swee Keat, specifically mentioning the law governing commercial contracts and cross-border enforcement as obvious candidates for convergence. The Minister also thought that it would be profitable for the region to explore deeper collaboration or even seek meaningful convergence, if possible, in more challenging areas such as intellectual property. ALA President, Attorney Avelino V Cruz, in his address to the Assembly, called on the Association to intensify its role as an ideas generator particularly in the key ALA objective of harmonisation of laws and that this required proactive engagement with the ASEAN secretariat. As Chief Justice Menon stated in his welcome address, integral to the process of becoming one economic community is the law which is both the instrument as well as the guardian of economic integration.

3 The law is crucial for all transnational economic integration because all commercial activity is conducted in the shadow of the law, and we depend on the legal system to uphold our bargains and to enforce our agreements. Economic integration will remain a noble idea until and unless the hard and prosaic work is done to translate that vision into legislation that eliminates trade tariffs, enacts changes to customs procedures, and establishes a consistent approach for addressing common commercial disputes. At the same time, legal uncertainty created by the heterogeneity of laws has been cited as one of the biggest obstacles to trade and investment in Asia, a theme that was repeated many times throughout the conference. This uncertainty generates significant transactional costs and acts as a fetter on investment, consumption and growth. This is why efforts to promote

legal convergence are so worthwhile and significant. How legal integration can be brought about is something that academics, practitioners, and members of government must all think deeply about.

4 Many of the speakers also highlighted the benefits of economic integration as a means to better the lives of the citizens of the various ASEAN Member States. This was a point also made by several speakers in the other sessions such as Mr Stephen Brogan from the US who spoke about how law that facilitates integration and economic development can advance human development.

5 In this regard, the rule of law is important as many speakers both at the Opening Ceremony and the other sessions emphasised. In particular, Minister Heng expressed the view that the rule of law gives rise to outcomes that are consistent instead of capricious; where economic relations between persons are governed by rules instead of the whims and fancies of the powerful; and where the relationship between the Government and the governed is marked by transparency and accountability, instead of opacity and abuse. In this way, the rule of law secures the promise of economic integration for all, and not just the few.

2. Plenary Session I: A New Phase (and Face) of Law: Opportunities and Challenges in the ASEAN Economic Community (AEC) (incorporating Parallel Session 2: The Role of National Courts, if any, in Ensuring Compliance with ASEAN Obligations – A Mock Trial)

6 An interesting perspective was presented by Prof Joseph Weiler of New York University who suggested that domestic courts are already well equipped to overcome one of the major challenges faced by the AEC, and this is an opportunity that has not been utilised.

7 Prof Weiler's starting point is that the promise of the AEC is adversely affected by public officials who do not fully understand or appreciate the treaty obligations entered into by their countries. As a result, they make mistakes in the discharge of their public functions, *eg*, misapplying tariffs or rules of origin, which Prof Weiler refers to as "micro infractions".

8 Prof Weiler suggests two approaches that domestic courts can use to overcome such infractions. The first is that where the public official purports to apply domestic law in the discharge of his office, whether case

law or legislation, to the extent that the law does not clearly prohibit an interpretation that is consistent with such country's treaty obligations, the domestic court should favour such an interpretation. The second is to rely on judicial review of administrative action. Where a public official adopts an approach that is inconsistent with his country's treaty obligations, domestic courts can rule that such a decision is clearly unreasonable and should be set aside. In Prof Weiler's view, both common law and civil law countries have equivalent legal rules that are consistent with both suggested approaches.

9 Mr Minn Naing Oo from Myanmar supported Prof Weiler's suggestions. In his view, this was a pragmatic solution that was consistent with the ASEAN Way of the Member States not being confrontational. Instead, any non-compliance with treaty obligations would be resolved by national courts through a private action to correct an administrative mistake. On the other hand, Prof Hikmahanto Juwana of Indonesia expressed uncertainty over whether Indonesian courts would adopt such approaches unless the treaty obligations were expressly enshrined into domestic law.

10 Prof Weiler's thesis, if correct, represents a valuable opportunity to advance the goals of the AEC within existing national frameworks. One challenge, as Prof Juwana has pointed out, could be the reluctance of national courts to take international obligations into consideration in judicial decision-making where such obligations have not been specifically enacted into law.

11 In this regard, the observations by the judges of the mock trial at Day 1's Parallel Session 2 are particularly pertinent. This mock trial was judged by Chief Justice Sundaresh Menon, Acting Chief Justice Antonio T Carpio and Justice Vichai Ariyanuntaka from Singapore, Philippines and Thailand respectively, a mix of civil law and common law countries. All the judges expressed the view in their comments at the mock trial that domestic courts can determine legal issues in a manner consistent with their countries' international legal obligations, albeit for different reasons. For example, in the Philippines, the incorporation doctrine is adopted in which upon ratification an international treaty becomes the law of the land. As such, it is likely that national courts would adopt a reading that would lean in favour of conforming with the relevant ASEAN obligation. In Thailand, which like Singapore adopts a dualist approach, the courts allow the

assistance of international conventions such as the ASEAN instruments when interpreting domestic law. Justice Ariyanuntaka expressed the view that it would be interesting to hear counsel argue ASEAN law in domestic disputes. It may also usefully be noted that Mr K Minh Dang in Plenary Session VI on Day 3 said that in Vietnam the constitution specifically states that Vietnam's international obligations take precedence over domestic law.

12 To facilitate Prof Weiler's suggestion, Mr Minn suggested that there be sufficient training for judges and lawyers. This is a useful recommendation as lawyers and judges require a better understanding of ASEAN treaty obligations before they can argue and apply such instruments to the cases they are involved in. Also valuable is a suggestion from Chief Justice Menon that an ALA moot competition on ASEAN law be started so as to sensitise law students to thinking of and applying ASEAN law. It is also suggested in this report that consideration be given to a research project that studies the law of each ASEAN country to determine if the approach outlined by Prof Weiler can be applied. A well-researched and authoritative paper can be valuable to lawyers who may be prepared to make such arguments, and to judges who decide such cases.

13 In addition to Prof Weiler's suggestion, Prof Fan Jian from China proposed a model for the harmonisation of Chinese and ASEAN commercial law through mutual respect and the legal recognition of each other's domestic law as well as the basic precepts of international law. This proposal is to be welcomed as it is consistent with ASEAN's approach to convergence.

3. Parallel Session 1: Fair, Effective and Efficient Dispute Resolution to Facilitate the Success of the AEC

14 Dr Colin Ong QC from Brunei suggested the creation of an ASEAN Arbitration Centre ("AAC") to complement and augment the current dispute resolution infrastructures that exist in ASEAN. The AAC will deal with commercial disputes between private parties (which will constitute the bulk of its cases) and investor-State disputes in ASEAN. Each tribunal will be drawn from a group of 250 arbitrators comprising 25 arbitrators nominated by each ASEAN State. The AAC will have a permanent base within ASEAN with its juridical seat being located in a neutral non-ASEAN State to avoid disputes between ASEAN Member States over whose judiciary should exercise supervisory jurisdiction.

15 The AAC should be jointly owned by all member countries who will also be responsible for the cost of running the AAC. The rules of the AAC should be informed by best international practices such as the International Bar Association Rules on the Taking of Evidence in International Arbitration and the Chartered Institute of Arbitrators Protocol for the Use of Party-Appointed Expert Witnesses in International Arbitration. Additionally, ASEAN Member States should work towards defining the scope of the public policy exception as well as matters susceptible to arbitration with a view to limiting the grounds on which arbitral awards can be challenged. This would help to harmonise the various Member States' approaches towards enforcement, as they presently interpret arbitrability and public policy differently. The neutral seat will have to be a party to such treaty.

16 There was general agreement from all the panellists for steps to be taken towards harmonising member countries' approaches towards enforcement. In addition, Mr Pasit Asawawattanaporn of Thailand suggested that this could potentially be done by modelling any ASEAN agreement on the Organization for the Harmonization of Business Law in Africa which subjects the recognition and enforcement of arbitral awards to the oversight of the Common Court of Justice and Arbitration. Prof Choong Yeow Choy of Malaysia opined that consistency of enforcement could come about through the Singapore International Commercial Court ("SICC") as it incorporated the best features of litigation and arbitration and could overcome the trust deficit with its pool of international jurists particularly if there were jurists drawn from within ASEAN. A similar suggestion was raised by Justice Kannan Ramesh in Plenary Session II on Day 2.

17 Some of the panellists were hesitant over the necessity of the AAC. Mr Francis Xavier SC of Singapore was of the view that it may not be necessary given the plethora of existing avenues for dispute resolution. If such an institution is established, Mr Xavier suggested that it was not necessary for it to be seated but could (like International Centre for Settlement of Investment Disputes awards) be delocalised, with an internal annulment procedure. If not annulled, the award would be enforceable in every ASEAN Member State in the same way as a judgment of a superior court. Dr Xuan Hop Dang emphasised the importance of identifying the precise problems which the AAC sought to be addressed and whether other solutions were available. For instance, if the issue was one of enforcement,

unified legislation throughout ASEAN may be the solution. If the quality of arbitrators was thought to be the problem, it should be addressed through training. Prof Choong also highlighted the importance of judicial training to acquaint ASEAN judges with the underlying principles of international commercial arbitration especially in relation to the recognition and enforcement of international arbitral awards.

18 These reservations were shared by some of the panellists in Plenary Session VI on Day 3 including Mr Christopher Leong of Malaysia, Mr David Rivkin from the US and Mr K Minh Dang from Vietnam. They felt that for private disputes, it was difficult to see what such a centre would add that the Singapore International Arbitration Centre ("SIAC") could not already provide. Mr Pasit, while feeling that Dr Ong's proposal was viable, said that there were complications in seating the AAC in a neutral country as a number of discrete matters would have to be negotiated with this country. Moreover, domestic courts within ASEAN may still adopt different interpretations of the provisions relating to enforcement.

B. 27 JULY 2018 – DAY 2

1. Plenary Session II: Law as an Instrument to Facilitate the Success of the AEC

19 Justice Kannan Ramesh began this plenary session by saying that it is important for judges of ASEAN countries to have greater interaction so that they understand each other's judicial philosophies. This was the rationale behind the Judicial Insolvency Network and perhaps a similar model can be considered for ASEAN judges. It would provide a constant interactive platform for the exchange of ideas and through this convergence can be developed. Soft law efforts by institutions such as the Asian Business Law Network can also help to achieve commonality of principles in ASEAN and Asia in commercial business laws. This will facilitate convergence. This idea was echoed by Mr Brogan, Prof Ignacio Tirado of Spain and Mr Patrick Ang from Singapore. Regulators can also be brought together to encourage adoption of common principles. One example is the INSOL Legislative and Regulatory Colloquium that took place in New York earlier this year. Mr Ang also agreed with this suggestion.

20 Mr Brogan emphasised that for law to be an instrument to facilitate the success of the AEC, the rule of law was crucial. Rule of law facilitates convergence because different jurisdictions are then guided by principles of fairness and equity that are likely to have common features. Mr Brogan additionally suggested that the SICC and SIAC could provide short-term opportunities to achieving greater convergence. The SICC and SIAC could create possible forums to bring parties together. Ms Natasha Nababan of Indonesia, who is general counsel of the Indonesian subsidiary of a large global oil company, supported this. She said that it is already a reality, at least from the point of view of Indonesian investors, in particular private businesses with bigger transaction values, that Singapore is the preferred neutral venue for dispute resolution because of its reputation.

21 Prof Tirado went further and said that a full-fledged court is a good short-term solution and this was key in the European Union. The question then is of jurisdiction. In Europe, the "centre of main interest" ("COMI") test was supposed to resolve this but instead of looking at the facts and then deciding where the COMI was, the various courts decided where COMI was and then looked at the facts. This was ultimately resolved through very clear rulings of the European Court of Justice. Thus, if there was common legislation and a common court to determine issues, things will start to work. Otherwise, the Member States may adopt different approaches to the issue of jurisdiction.

22 He also expressed the view that for harmonisation to work, laws need to be well drafted, clear and predictable. In addition, there has to be strong institutional support. These are challenges because they don't just require time, but also financial resources. At the same time, the law needs to be adapted to the reality of and mirror the needs of each State. A similar point was made by Ms Nababan who said that globalisation has created demand for countries to have more streamlined laws and regulations to attract investments. However, hard law, like treaties, cannot move at a fast-enough pace. The quality of the judicial system and efficient dispute resolution systems is also essential when businesses invest in a country.

23 Prof Tirado felt that from a practical standpoint, given language and cultural barriers, it may be challenging to achieve strong collaboration between courts of different countries in the short term. There is a need first to pave the way by harmonising laws before there can be proper communication; this way, concepts will be familiar and judges will be more

open to sharing ideas and coming up with solutions. Insolvency practitioners and the Bar, in general, play important roles in helping judges to coordinate. Mr Ang agreed that if courts in the area of insolvency law can coordinate with each other on practical things, like timing of proof of debt, matters can move more smoothly. With globalisation, insolvency issues are often not limited to a single jurisdiction.

2. Plenary Session III: Disruptive Technologies on Business Landscapes in ASEAN: Opportunities and Challenges

24 Mr Sriram Raghavan of India, the Chief Technology Officer of IBM Research in India and Singapore, provided a broad overview of the landscape. He stated that three foundational technologies that are poised to become cornerstones of disruption are: (a) artificial intelligence ("AI"); (b) blockchain; and (c) the Internet of Things ("IoT"). These technologies are reshaping industries, professions and economies at a tremendous pace. A flexible, balanced and forward-looking regulatory and policy framework is essential to ensure responsible, ethical, safe and fair use of these technologies without curtailing innovation and value creation.

25 AI models are built through a process of training, which entails data preparation, the building of an AI model from a data set, and finally the rollout of the model in a business application. Ethical and regulatory challenges include: (a) the governance of the AI supply chain to ensure traceability of all steps taken to train a model, transparency in the development of the model, and data privacy; (b) the mitigation of bias in all steps of training an AI; and (c) rights and ownership over AI models.

26 Blockchain technology represents the next generation of secure multi-party trusted transaction systems built on top of a shared ledger. It enables permissioned parties to come together in real time to conduct secure authenticated transactions and securely exchange data while preserving confidentiality and privacy, without a central trusted party. As a technology that structurally and operationally cuts across many entities and industries, the governance of blockchain networks is an important and complex problem. Governance refers to not only the private relationships and obligations of participants in a blockchain network but also the broader policies on the admission of new members to a blockchain network, security and confidentiality of data, control of transactions recorded in the ledger, and so on. As an example of how the technologies that are creating

new challenges in trust and governance also provide key elements of the solution, we may explore adopting blockchain to ensure traceability and transparency in how data is used in the AI supply chain.

27 With these technologies dramatically transforming our societies, countries, businesses and personal lives, it is crucial to establish the right frameworks, principles and policies to ensure they are used responsibly and equitably. This task requires a multi-disciplinary approach with collaboration among technologists, lawyers, policymakers, government and academia. It will be increasingly difficult to draw silos between different businesses, professions and functions. In this regard, Mr JJ Disini of the Philippines highlighted the need to engage social scientists because technology can give rise to social issues.

28 Mr Yeong Zee Kin of Singapore shared his experience of government policy. The role of government is to provide a regulatory framework to support technological innovation and the widespread adoption of new technology while addressing consumers' concerns. He agreed that such an endeavour had to involve different key stakeholders. One way was to create a platform for key stakeholders – tech providers, businesses that use AI, and representatives of societal and consumer interests – to discuss and engage the public so as to develop a governance framework for AI and codes of practice for industries using AI. An important framework that should be developed is one that identifies who is responsible for the AI supply chain and ethical compliance; how to manage transparency, communication and interaction with consumers; and the company's approach to decision-making and risk assessment in its adoption of AI. The creation of a research programme whereby industry, academia and the Government engage in dialogue about the legal, regulatory and governance issues surrounding the AI ecosystem should also be considered. This report notes that such initiatives at the ASEAN level may also be useful to unlock opportunities in the region.

29 Mr Lam Chee Kin of Singapore also expressed the view that the development of appropriate legal frameworks must begin so that there can be clarity over the use of AI and blockchain technology. Mr Supawat Srirungruang of Thailand opined that advances in technology mean that regulators have to consider whether to relax banking regulations to allow banks to penetrate new businesses or to expand the coverage of financial

regulations to include new financial intermediaries such as Alipay. This is just one example of new issues the law has to confront.

30 Other examples include the need for legal frameworks surrounding data use (sharing, protection, retention, deletion); the need for a suitable approach towards managing the risks of cloud computing; and as the capability of in-memory processing increases and quantum computing is introduced, there will have to be further evolution in the way risks associated with data use are managed.

31 In this process, Mr Disini is of the view that there is a need for clarity on why we strive to regulate particular aspects of technology, so as to guide our focus. There is also a need for flexibility in the way that we conceptualise problems posed by technology. For instance, the emergence of driverless cars could change the way that we think about property ownership, resource sharing and space allocation.

32 This report suggests that there may be a unique opportunity here within ASEAN to build, from the outset, an ASEAN-wide set of model frameworks, principles and policies that can guide all ASEAN countries and facilitate the development and use of such technology within the entire region. Indeed, Mr Lam feels that it is of critical importance to cross-border trade that we harmonise laws across jurisdictions, not only thematically (*eg*, data privacy) but as a holistic system. From a business/bank's perspective, the suite of laws and regulations involved within a jurisdiction is formidable, much less across jurisdictions. Academia can make a valuable contribution to this dialogue. The challenge, according to Mr Srirungruang, is how to achieve meaningful cross-border conversations when deliberation on a coherent framework within a country itself is a challenge.

3. Plenary Session IV: Power of ONE – AEC Financial Integration

33 Mr Tan Boon Gin of Singapore opined that the benefits of deeper financial integration are evident, *eg*, greater liquidity, choice and ease of trading; what merited further discussion were the challenges integration has encountered. Two difficulties came to fore, namely the significant differences in the levels of development of the financial systems across ASEAN, and the challenge of getting the necessary buy-in from all stakeholders, including the private sector. As such the ASEAN Trading

Link presently involving Thailand, Malaysia and Singapore has not managed to provide a holistic or effective solution. There are three success factors/solutions to keep in sight. First, the need to persevere with the process of achieving end-to-end integration, even if the economic benefits are not immediately apparent. Second, while it is likely that integration will grow the economic pie to be shared, equal emphasis must be placed on equalisation of economic benefits. This could be done via capacity building in less developed financial systems, aligning interests through joint ventures or other revenue sharing arrangements and taxing the routing of funds from less developed jurisdictions to more developed jurisdictions. Third, the need to engage the private sector, especially in arriving at a compelling value proposition in favour of financial integration.

34 While there are quite a number of ASEAN initiatives to advance financial integration, they lack an effective coordination system. While ASEAN is nowhere near the level of centralisation achieved in the European Union (and neither does ASEAN desire that level of centralisation), ASEAN may find that there are benefits to having a body to coordinate its initiatives more effectively. One obvious candidate was the ASEAN Secretariat. If the Secretariat is resourced adequately and given the necessary support, that would be a big step forward.

35 Mr Francisco Ed Lim from the Philippines observed that the common thread underlying the pursuit of greater integration in capital markets, insurance and banking was the matter of harmonisation. While true harmonisation would be overly ambitious due to constraints of time and political will, a regime of mutual recognition could take its place. In this regard, he mooted the example of the Trans-Tasman Mutual Recognition Scheme entered into between Australia and New Zealand. The key challenge from Mr Lim's experience as a Past President of the Philippine Stock Exchange is that promoting ASEAN financial integration has generally been low on most governments' lists of priorities. For example, the Philippines does not participate in the ASEAN Trading Link. Things may be different if the benefits of financial integration are made clear.

36 Mr Ng Wai King of Singapore agreed with Mr Lim that harmonisation and mutual recognition were important for successful capital markets integration. Although Malaysia, Thailand and Singapore have, to some extent, achieved such integration through the ASEAN Trading Link initiative, he agreed with Mr Tan that there is still much more to be done.

In his view, a viable next step would be to address the issue of mutual recognition of professionals and offerings which would be attractive to investors as it would lower transaction costs. Mr Ng also warned that the contemporary challenge for the industry comes from other forms of fundraising. These new and unconventional forms of fundraising, such as initial coin offerings, fall outside the conventional securities regulation regime. The problem for the financial industry is that if it did not move quickly towards integration, there were other stakeholders out there who could usurp the role that conventional fundraising was meant to play.

37 Mr Truong Nhat Quang of Vietnam noted similarly that while it was an appealing proposition for companies to be able to raise funds in different jurisdictions, the reality was that the present ASEAN Trading Link was not appealing enough to be of interest to Vietnamese investors. This was largely because the ASEAN Trading Link had not yet resolved post-trade issues. The long-term solution is to look at such issues.

38 Mr Truong said that for financial integration to happen by 2025, as envisioned by the AEC Blueprint, apart from the three success factors Mr Tan raised, there must also be three other "must-haves". First, buy-in from the various governments and stock exchanges, as well as the political will to change. Second, given the reality that there were different levels of market development in different ASEAN countries, those who were ahead should take the lead first. Singapore, Malaysia, and Thailand already have the ASEAN Trading Link from which they could establish mutual recognition arrangements between themselves as the other countries buy in with a view to eventually working towards regional harmonisation. Indeed, this report believes that building on the existing ASEAN Trading Link arrangements potentially affords a practical way forward. Third, buy-in had to be not just from the perspective of lawyers, but also from all key players in the market, including investment banks and other professionals like auditing firms, *etc*. Mr Ng agreed with these observations.

39 Mr Kyaw Zin Htet from Myanmar began by stating that Myanmar's financial system is relatively undeveloped. However, the flipside to this was that Myanmar is very porous – it represents a golden opportunity for ASEAN to get involved with assisting in its development. Thus far, it has been non-ASEAN entities taking the lead. For ASEAN to play a bigger role in financial integration, it must be prepared to take on a more concerted and deliberate effort, or risk losing the initiative to non-ASEAN entities.

40 Mr Nattarat Boonyatap from Thailand made a similar point. It was necessary to support fellow ASEAN members with less mature capital markets to develop the same. It was in the interest of ASEAN as a whole to develop its capital markets to the point that even non-ASEAN investors would find it overwhelmingly attractive to invest in ASEAN.

41 In response to a question from the floor about whether the ASEAN Way was still useful or was instead an impediment to a stronger ASEAN, Mr Ng, Mr Boonyatap and Mr Lim expressed the view that the ASEAN Way was still relevant. Mr Ng additionally said that decision-making was not the issue but rather the commitment and will to see decisions through. He gave as an example the agreement to substantially liberalise the insurance sector in ASEAN. Notwithstanding this consensus, very little has been done to realise it. Mr Lim suggested harmonised standards that were for the large part not mandatory (with the exception of some baseline standards) but subject to a "comply or explain" regime.

4. Parallel Session 3: Competition Law in the AEC

42 Mr Lim Chong Kin of Singapore began the session by remarking that having effective competition regulations and policies are important to ensure a level playing field for businesses, which will therefore attract more businesses into the ASEAN region. Nine of ten ASEAN Member States now have competition laws in place. The shift is therefore to move from enactment to effective enforcement and harmonisation.

43 One possible opportunity was to use the ASEAN enforcement network to focus on cross-border cartels and improving coordination on merger reviews for countries that have merger regimes. The network will set the stage for exchanges of information on cases and mergers, and will allow ASEAN to move to the next phase of building capacity and enforcement.

44 Mr Toh Han Li of Singapore also spoke about the ASEAN enforcement network which allows ASEAN Member States to cooperate on a broad range of issues relating to competition law. The recent Grab-Uber merger which primarily affects the ASEAN region is one case in which competition authorities have cooperated on through the network, and illustrates the need for cooperation between Member States. Dr Nasarudin Abdul Rahman of Malaysia and Mr Johannes Bernabe from the Philippines agreed that cooperation was important. Mr Abdul Rahman felt that to have

100% harmonisation is impossible because the legal systems are different and this underscored the importance of effective cooperation. Mr Bernabe stated that the level of information sharing currently is dependent on how different Member States treat confidentiality. If Member States could provide waivers of confidentiality, that would go a long way towards promoting cross-jurisdictional cooperation. Without such waivers, competition authorities would not be able to use the information provided by their counterparts. Mr Toh expressed a similar view.

45 Other practical measures suggested by Mr Lim were: (a) publishing enforcement decisions and translating them into English; (b) issuing harmonised guidelines to ensure a consistent approach to the enforcement of competition laws in the region and to help businesses understand how the law will be enforced; (c) implementing consultation processes to gather regular feedback from businesses across the region; and (d) providing clear regulatory timelines.

46 As of now, the leniency programmes available in Member States differ. This may lead to multinational cartel participants being less willing to blow the whistle, even in jurisdictions that do have leniency programmes, as they may inadvertently increase their exposure to liability in jurisdictions without leniency programmes. Moving forward, harmonisation for leniency programmes should, ideally, be available in all ASEAN jurisdictions, where immunity may be offered on similar terms. This would allow businesses some degree of certainty, and may even tip the scale in favour of whistle-blowing cartel participants stepping forward for leniency. This report observes that this is an excellent example of why different regimes in ASEAN can lead to suboptimal outcomes not just for businesses but also for Member States. Indeed Ms Joy Fuyuno of the Philippines, who is Asia regional counsel for a large international business, referenced this issue of having to navigate different regimes as a major problem for multinational corporations.

47 Dr Kodrat Wibowo of Indonesia agreed that the different laws and approaches creates difficulty dealing with cross-border issues which frequently arise in competition cases because sophisticated businesses operate across more than one jurisdiction. This was one of the challenges faced by ASEAN in implementing its ambitious target on competition policy. Other challenges include pending amendments to the laws of several Member States; an imbalanced competition culture across ASEAN, both

from policymakers and businesses; and reduced support from development partners of ASEAN.

48 To meet some of these challenges, ASEAN needs to rethink its ambitions. This may involve shifting the timeline for achieving output targets and simplifying outputs, in particular by eliminating less important targets or incorporating closely-related targets. Second, ASEAN needs to accelerate the establishment and implementation of the enforcement network. Third, ASEAN needs to increase the role of ASEAN countries in assisting other ASEAN countries. Indonesia and Malaysia have resources. Singapore and Indonesia are the first two to contribute to the formation of ASEAN law and they can help too.

49 Dr Wibowo did not think that harmonisation of competition policy and law is the ultimate answer, at least not in the short term. Harmonisation must come from a need, not from coercion to achieve the set target. Instead, ASEAN should increase interaction between competition commissions, regulators and other stakeholders. More studies also need to be conducted so that policymakers can be equipped with information to make good laws.

50 The importance of building capacity was raised by Assoc Prof Dr Wan Liza Md Amin of Malaysia. This is necessary for effective cooperation and meaningful convergence to take place.

5. Parallel Session 4: Rule of Law – Role in Attracting Trade and Investments in ASEAN – Free Trade Agreements and Bilateral Investment Agreements in ASEAN Countries

51 Mr Cavinder Bull SC of Singapore stated that questions of interpretation of the treaty in question often arise in an investor-State dispute. However, the Non-Disputing State ("NDS'), who is a party to the treaty in question, is not typically involved in the tribunal's/national court's consideration of the proper interpretation of the treaty in question. This issue had arisen in investor-State disputes such as *SGS v Pakistan* and *Sanum v Lao*. His proposed solution was an interstate protocol to facilitate requests for NDSes to provide submissions or input on treaty interpretation, specifically: (a) on the proper interpretation of the treaty in question; and/or (b) whether there is any common agreement between parties to the treaty on an interpretation of the treaty and any evidence

thereof. An NDS may also request to intervene and offer its views on the interpretation of the treaty in question to the arbitral tribunal or national court even though no request has been made of it.

52 The protocol is envisioned to operate by way of providing ASEAN Member States with a directory that stipulates points of contact in the respective NDSes for which requests for consultations on treaty interpretation can be directed to. This directory would ensure clarity and certainty on the proper authority to deal with a request for submissions by an NDS. The protocol should not have mandatory effect. An NDS can choose not to respond to requests made.

53 Dr Xuan Hop Dang of Vietnam believes that the protocol embodies the collective spirit of ASEAN and that the "Power of One" should be harnessed in respect of investor-State disputes. Dr Dang recognises the public interest in creating a process to obtain the input of an NDS so that the tribunal can arrive at the best and most judicious outcome. Dr Dang is of the view, however, that the protocol should be more ambitious and should not merely be an optional set of guidelines. He thinks that the protocol should be more directive and have more bite. For example, Member States that have been issued a request under Art 2 of the protocol should be under an obligation to respond.

54 Dr Romesh Weeramantry from Hong Kong and Mr Minn Naing Oo of Myanmar similarly feel that the protocol is a commendable and interesting proposal. Dr Weeramantry does not believe that such submissions from a non-party would dictate the outcomes of interpretation disputes. He notes that such a mechanism had been introduced in Art 1128 of the North American Free Trade Agreement ("NAFTA"), and in respect of ensuing NAFTA disputes tribunals have not necessarily accepted the submissions made by an NDS.

55 One concern expressed by Mr Minn, notwithstanding his general agreement with the proposal, was that a State may be tempted to offer an interpretation that bends over backwards to support the investor. This may politicise the arbitration process, which defeats the very purpose of the investor-State dispute settlement process in its current iteration. In addition, if ASEAN enters into a treaty as a single bloc, it may be impractical to invite numerous States to submit on the interpretation of the said treaty.

56 Mrs Vilawan Mangklatanakul of Thailand expressed a contrary view. She was of the view that the protocol may give rise to: (a) political tensions that may arise from conflicting submissions on the interpretation of a treaty provision; and (b) delays in investment arbitration proceedings that are presently already very lengthy. She suggested, in lieu of Mr Bull's proposal: (a) establishing joint committees in respect of existing bilateral investment treaties and free trade agreements to jointly interpret treaty provisions in dispute; and (b) resolving any interpretation problems on a government-to-government level, leveraging existing avenues provided for the clarification of the interpretation of treaties.

C. 28 JULY 2018 – DAY 3

1. Plenary Session V: Cross-Border Obstacles in ASEAN and Solutions

57 Prof Hsu Locknie of Singapore opened the session with the statement that much of what she will say in this session is drawn from a Singapore Management University research paper she was involved in. This paper may be found at https://www.canasean.com/reports/. She then made the observation that while tariffs have been reduced significantly, non-tariff measures have increased and are now the focus of ASEAN policymakers. Issues relating to trade facilitation are also being studied seriously.

58 The ASEAN Secretariat has established an ASEAN Trade Repository and a matrix of actual cases. This is useful and to make it even more useful, it will be necessary to continually update the database and also make it fully searchable. Dr Rebecca Fatima Sta. Maria of Malaysia agreed and said that steps were being taken to make the database more business friendly. In addition, training for public officials was important to enable them to understand the universe of rules and regulations applicable. Dr Maria also opined that non-tariff measures were inevitable because as the Member States develop there will be legitimate concerns over matters such as the environment, consumer protection, *etc*. What was important was to make sure that such measures are not trade restrictive.

59 Dr Maria then had some valuable advice for ALA. She said that in all her years she had no engagement with lawyers (she may have meant lawyers from ALA as an organisation) even though rules and regulations are crucial

to policies being implemented. She suggested that ALA find a way to engage senior economic officials within ASEAN as many of the suggestions she has heard during this conference have been both useful and constructive.

60 Prof Hsu went on to say that to harness the power of one, there should be laws to support and improve digital trade facilitation. Useful instruments for ASEAN to study are the UNCITRAL Model Law on Electronic Transferable Records and the Framework Agreement on the Facilitation of Cross-border Paperless Trade in Asia and the Pacific. In relation to investment obstacles, liberalisation agendas in goods and services as well as investment agreements have to be better coordinated. The enforcement of contracts is also important, as is the need to liberalise logistics, financial and infrastructure services.

61 One weakness, according to Prof Hsu, is that AEC Blueprint 2025 does not adequately address several legal issues in e-commerce and emerging uses of technology. One solution is to establish an AEC industry 4.0 committee comprising economic and technology officials of ASEAN, business representatives and academics.

62 She also mentioned other impediments that foreign businesses face. These include different requirements in Member States relating to corporate registration, and uncertainty over land use rights. Some suggested solutions are to simplify procedures through the use of electronic forms, harmonisation of corporate registration requirements and online registries, and bringing down investment restrictions. Clarifying laws on compulsory acquisition of land would also be useful.

63 As mentioned by many other speakers, Prof Hsu also said that businesses do not find it easy to enforce contracts or foreign judgments/arbitral awards in all ASEAN countries. Courts also do not apply a uniform approach to the application of international instruments.

64 Dr Nguyen Thi Son of Vietnam expressed the view that narrowing the gaps and strengthening economic integration among Member States is important because disparities in the economic structures, political structures, rules and laws, *etc*, in Member States is holding ASEAN back. She agreed with other speakers that dispute resolution within ASEAN has to be improved and supported calls for an ASEAN commercial arbitration centre with proper mechanisms for the enforcement of arbitral awards. Mr Ahmad Basuni Haji Abbas of Brunei expressed the same view.

Dr Nguyen also suggested that harmonisation must take place in a number of areas. She identified banking payment systems, online marketplaces and logistics as particular areas that can benefit from a common regional system.

65 Dr Poomintr Sooksripaisarnkit of Thailand highlighted certain legal difficulties that have emerged because of developments in technology such as smart contracts giving rise to uncertainty with conflict of laws rules. One general obstacle was a lack of understanding of regional law and he proposed a database of contract laws of each member country.

2. Plenary Session VI: Stock-taking and the Way Ahead

66 Prof Yeo Tiong Min SC of Singapore provided a summary of the previous proceedings. He then invited the various panellists to comment on certain issues, some of which have been referred to in earlier parts of this report.

67 In relation to the issue of harmonisation, Mr Rivkin said that Asian Business Law Institute was a good initiative as soft law is effective when it reflects a consensus among different stakeholders. For hard law, perhaps a good starting point would be some of the existing international model laws. The Trans-Pacific Partnership provisions could also serve as a model across ASEAN given that some ASEAN countries have accepted these provisions which have been thoroughly negotiated by many countries. Both he and Mr Dang also advocated a common database of relevant laws and cases.

68 Mr Wong Taur-Jiun of Singapore gave a business perspective. According to him, businesses look for two things from the law, namely ease of doing business and fairness and certainty where there are disputes. Businesses are looking for leadership within ASEAN to make these happen. He echoed Prof Yeo's idea of interoperability of laws across ASEAN as a realistic goal. In similar vein, Mr Leong is of the view that the idea of ASEAN laws is still a distance away because of different policies within the Member States. It was necessary to try to align policies before more convergence can take place.

69 A participant raised a question about training and education. This is an issue that a number of speakers have touched on in previous sessions. Prof Yeo said that universities already have a lot to do. It was also not clear if the focus should be on private international law or specific laws of

ASEAN States. This report suggests that as the corpus of ASEAN law grows, it is likely that law schools will place more emphasis on it.

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ABOUT THE ASEAN LAW ASSOCIATION

The ASEAN Law Association ("ALA") is a non-governmental organisation of lawyers in ASEAN. Established in 1979, ALA brings together all the different branches of the legal profession – judges, law teachers, law practitioners and government lawyers.

The objectives of ALA, as set out in its Constitution, are as follows:

(a) To promote close relations, cooperation and mutual understanding amongst lawyers in the ASEAN countries;

(b) To provide the organisational framework for regional cooperation:

  (i) in the study of and research in the laws of the ASEAN countries with a view to harmonising those laws as required by the social and economic development of the ASEAN region;

  (ii) in promoting and facilitating the co-ordination of activities and the carrying out of collaboration projects, among lawyers' organisations, law faculties, legal research centres and other like institutions in the ASEAN countries;

  (iii) in promoting, exchanging and disseminating information of the laws, legal systems and legal development of the ASEAN countries;

  (iv) for the purpose of carrying into effect the objectives hereinbefore set out, in the publication of journals, newsletters, bulletins and in the organising of conferences, meetings, symposia, seminars and other discussions;

(c) To provide organisational facilities for ASEAN cooperation in conflict avoidance, in the arbitration or resolution of legal disputes in transnational contracts within the ASEAN region; and

(d) To cooperate with international, regional, national and other organisations in the furtherance of the aforementioned objectives.

Each ASEAN member state has a National Committee which appoints five of its members to the ALA Governing Council. The Governing Council is headed by the President and assisted by the Secretary-General, both of whom are elected at the ALA General Assembly – an assembly of the general body of members held once every three years.

ABOUT THE ASEAN LAW CONFERENCE

ALA General Assemblies have traditionally incorporated a conference to discuss ASEAN legal issues. In 2018, for the first time, the conference was elevated to the level of an international conference on ASEAN legal issues and renamed "The ASEAN Law Conference".

The ASEAN Law Conference 2018 was held in Singapore from 25 to 28 July 2018, with the theme "The Power of ONE: Unlocking Opportunities in ASEAN through Law". Sixty-three speakers and 450 participants from 20 different countries, which included all ten ASEAN countries, took part in the conference. The conference featured a variety of plenary and parallel sessions, including a mock trial, and covered a diverse range of substantive topics.

This publication is a compendium of speeches, papers, presentations and reports that were prepared for The ASEAN Law Conference 2018.

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