REPORT OF THE RAPPORTEUR-GENERAL

PROFESSOR TAN CHENG HAN, SC

13TH ASEAN LAW ASSOCIATION GENERAL ASSEMBLY

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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,

Chairman 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 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 Mr Charles Lim, Chair of the Programme Committee, and Justin Yeo and Alison See of the Supreme Court.

26 July 2018 – Day 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 AEC can be more fully realised, with the Guest of Honour, Minister of 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, Atty. 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 pro-active 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 United States 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 emphasized. 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.

Plenary Session 1: 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 Professor Joseph Weiler of NYU 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. Professor 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, e.g. misapplying tariffs or rules of origin, which Professor Weiler refers to as "micro infractions".

8. Professor Weiler suggests 2 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 Professor 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 Professor 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, Professor Hikhmahanto Juwana of Indonesia expressed uncertainty over whether Indonesian courts would adopt such approaches unless the treaty obligations were expressly enshrined into domestic law.

10. Professor Weiler's thesis, if correct, represents a valuable opportunity to advance the goals of the AEC within existing national frameworks. One challenge, as Professor 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, Ag. 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 Professor 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 Professor 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 Professor Weiler's suggestion, Professor 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.

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 IBA 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 (OHADA) which subjects the recognition and enforcement of arbitral awards to the oversight of the Common Court of Justice and Arbitration. Professor 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 panelists 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 ICSID) 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. Professor 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 panelists in Plenary Session VI on Day 3 including Mr Christopher Leong of Malaysia, Mr David Rivkin from the United States 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 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.

27 July 2018 – Day 2

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, Professor 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 emphasized 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 Singapore International Commercial Court and Singapore International Arbitration Centre 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. Professor 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. Professor 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.

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 (1) artificial intelligence ("AI"); (2) blockchain; and (3) 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, policy makers, 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 (e.g 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.

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, e.g. 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 EU (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 ICOs, 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.

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 whistleblowing cartel participants stepping forward for leniency. This report observes that this is an excellent example of why different regimes in ASEAN can lead to sub-optimal 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 MNCs.

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 policy makers 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 policy makers 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.

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 inter-state protocol to facilitate requests for NDSs 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 NDSs 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. Mr Romesh Weeramantry from Hong Kong and Mr Minn Naing Oo of Myanmar similarly feel that the Protocol is a commendable and interesting proposal. Mr 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 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 clarification of the interpretation of treaties.

28 July 2018 – Day 3

Plenary Session V: Cross-Border Obstacles in ASEAN and Solutions

57. Professor Hsu Locknie of Singapore opened the session with the statement that much of what she will say in this session is drawn from an SMU 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 policy makers. 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 organization) 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. Professor 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 Professor 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, Professor 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 Sooksripalsarnkit 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.

Plenary Session VI: Stock-taking and the Way Ahead

66. Professor Yeo Tiong Min, SC of Singapore provided a summary of the previous proceedings. He then invited the various panelists 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 harmonization, Mr Rivkin said that ABLI 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 TPP 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 Jin of Singapore gave a business perspective. According to him, businesses look for 2 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 Professor 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. Professor 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.