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**Legal Obstacles to Trade and Investment in ASEAN**

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**1. Introduction**

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.<sup>1</sup>

All ten ASEAN countries are members of the World Trade Organization and signatories to the New York Convention on recognition and enforcement of foreign arbitration awards.

The ASEAN Economic Blueprint 2007 set out four main goals:

- creating a single market and production base with a free flow of goods, services and skilled labour and a freer flow of capital;
- developing a competitive region with clear competition policies;
- promoting equitable economic development; and
- developing a region integrated into global networks.

Building on this, the AEC Blueprint 2025, launched in 2015, sets out the following further aims:

- A Highly Integrated and Cohesive Economy;
- A Competitive, Innovative, and Dynamic ASEAN;

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<sup>1</sup> See ASEAN, <http://asean.org/wp-content/uploads/archive/5187-10.pdf> (accessed on 6 June 2018).

- Enhanced Connectivity and Sectoral Cooperation; A Resilient, Inclusive, People-Oriented, and People-Centred ASEAN; and
- A Global ASEAN.<sup>2</sup>

The AEC Blueprint aims to address trade barriers which can increase business costs and impeded trade, including non-tariff measures (NTMs).

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.<sup>3</sup> 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.<sup>4</sup>

As ASEAN faces uncertainty arising from global trade tensions, shifting trade alliances, challenges to the multilateral trade rules regime and the WTO<sup>5</sup> 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.

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.

## 2. Trade and Investment Legal Obstacles

### *The “Power of One” - Tariffs and NTMs*

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

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<sup>2</sup> See ASEAN, [astnet.asean.org/docs/AEC-Blueprint-2025-FINAL.pdf](http://astnet.asean.org/docs/AEC-Blueprint-2025-FINAL.pdf) (accessed on 6 June 2018).

<sup>3</sup> 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 on 6 June 2018). The research was supported by a grant of the Singapore Ministry of Education (Academic Research Fund Tier 1 grant, number 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 roundtable discussions with businesses, regulators and lawyers in a number of ASEAN cities.

<sup>4</sup> 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 report include corporate and land use barriers in ASEAN, which are highlighted at the end of this paper.)

<sup>5</sup> See e.g. the recent remarks of Ms Christine Lagarde, “Creating a Better Global Trade System”, 29 May 2018, <https://blogs.imf.org/2018/05/29/creating-a-better-global-trade-system/>.

of streamlining activities for customs procedures and documents, establishment of customs processing portals known as ‘single windows’, adoption of a harmonized tariff classification system for greater uniformity in categorizing 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).

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.<sup>6</sup>

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.<sup>7</sup>

### *The “Power of One” in Trade Facilitation*

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 facilitate trade. Countries which are signatories to the TFA commit to, *inter alia*, expedited customs and related procedures according to their stage of development.

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.<sup>8</sup> To this end, most ASEAN countries have established National Single Windows (NSWs) designed to connect to the ASW. The ASEAN Trade in Good Agreement (ATIGA) also sets out a number of other trade facilitation commitments for each member state.<sup>9</sup>

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;

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<sup>6</sup> See e.g. ASEAN Secretariat, <http://asean.org/asean-economic-community/asean-free-trade-area-afta-council/other-documents/> and the ASEAN verified NTMs lists at: [http://www.aseansme.org/zfta\\_ntms](http://www.aseansme.org/zfta_ntms) (accessed on 15 June 2018).

<sup>7</sup> See e.g. “SMEs still facing ‘very big’ hurdles in export markets, says WTO director-general”, 8 November 2017, *The Business Times*. See also generally, APEC Policy Support Unit, “Promoting Ecommerce to Globalize MSMEs”, (2017).

<sup>8</sup> See the Agreement to Establish and Implement the ASEAN Single Window, Kuala Lumpur, Malaysia, 9 December 2005.

<sup>9</sup> See also the AEC 2025 Trade Facilitation Strategic Action Plan, at: <http://asean.org/storage/2012/05/AEC-2025-Trade-Facilitation-SAP-FINAL-rev.pdf> (accessed on 15J 2018).

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.

### *Complex Rules of Origin in FTAs*

The following view expressed by Canadian business leaders summarises the complicated Free Trade Agreement (FTA) rules of origin succinctly:

“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.”<sup>10</sup>

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.<sup>11</sup> 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.<sup>12</sup>

### *The “Power of One” in Paperless Trade Opportunities*

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

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<sup>10</sup> Canadian Council of Chief Executives paper (June 2014).

<sup>11</sup> For example, automotive parts for use in assembly into vehicles are imported and exported in ASEAN regularly.

<sup>12</sup> See e.g. “SMEs still facing 'very big' hurdles in export markets, says WTO director-general”, 8 November 2017, *The Business Times*, available at: <http://www.sgsme.sg/news/government/smes-still-facing-very-big-hurdles-export-markets-says-wto-director-general> (accessed on 15 June 2018).

promoting the use of digitalized and paperless cross-border trade in ASEAN. Inadequate digital trade facilitation will hinder the realization of the AEC's benefits as businesses increasingly embrace digitalized commercial tools and business platforms. Examples of such tools are digitalized trade documents and legal documents which exist in code (such as 'smart contracts'). In the area of 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.<sup>13</sup>

A 2017 report provides two important findings regarding ASEAN's implementation of trade facilitation measures, the second of which relates to digital trade facilitation:

“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.**”<sup>14</sup>

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.<sup>15</sup>

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)<sup>16</sup> and the Framework Agreement on the Facilitation of Cross-border Paperless Trade in Asia and the Pacific.

The MLETR is a Model Law promoting the use of digital transferable documents. Countries which adopt the MLETR undertake to recognize the use of digital documents of title, paving

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<sup>13</sup> See SMU research report, pp. 43-44.

<sup>14</sup> UNESCAP, “Trade Facilitation and Paperless Trade Implementation in ASEAN – Results from the UN Global Survey 2017”, p. 20 (emphasis added).

<sup>15</sup> See UNESCAP, “Trade Facilitation and Paperless Trade Implementation in ASEAN – Results from the UN Global Survey 2017”, pp. 10 and 17.

<sup>16</sup> [http://www.uncitral.org/pdf/english/texts/electcom/MLETR\\_ebook.pdf](http://www.uncitral.org/pdf/english/texts/electcom/MLETR_ebook.pdf) (accessed on 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-etr-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 on 11 June 2018).

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.<sup>17</sup>

The 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.<sup>18</sup>

Both the MLETR and the FA are instruments worthy study by ASEAN countries, to determine whether and how their provisions and principles can promote digital trade facilitation in the region.

### *The “Power of One” in E-commerce Laws and Regulations*

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.<sup>19</sup> 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.

Indeed, under the AEC Blueprint 2025,<sup>20</sup> ASEAN is to develop an ASEAN Agreement on e-Commerce, which includes implementing the following strategic measures:

1. Harmonisation of consumer rights and protection laws;
2. Harmonisation of legal framework for online dispute resolution, taking into account international standards;
3. Development of inter-operable, mutually recognised, secure, reliable, and user-friendly e-identification and authorisation (electronic signature) schemes; and
4. Development of a coherent and comprehensive framework for personal data protection.

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<sup>17</sup> See, for example, the ASEAN-India and ASEAN-Hong Kong FTAs which expressly require the submission paper documents (original and copies) for purposes of obtaining certificates of origin.

<sup>18</sup> 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 on 7 June 2018).

<sup>19</sup> See, for example, the typology of laws identified in the World Economic Forum White Paper, “Making Deals in Cyberspace: What is the Problem?”, pp. 7-8, at: [http://www3.weforum.org/docs/WEF\\_White\\_Paper\\_Making\\_Deals\\_in\\_Cyberspace.pdf](http://www3.weforum.org/docs/WEF_White_Paper_Making_Deals_in_Cyberspace.pdf) (accessed on 6 June 2018).

<sup>20</sup> Part C.3.

At the time of writing, negotiations are ongoing in ASEAN to conclude such an e-commerce agreement by the end of 2018.<sup>21</sup> It is likely that this agreement would aim to address the above areas in a comprehensive manner.

Apart from the matters listed above, laws and 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 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.”

It would be useful to ensure that such an agreement also addressed specific obstacles in e-commerce faced by ASEAN MSMEs.<sup>22</sup>

#### *The “Power of One” in ASEAN Business Regulations for the “Industry 4.0” Era*

The Fourth Industrial Revolution – or “Industry 4.0”<sup>23</sup> – era, characterized by an increasing use of diverse technologies with unprecedented levels of data flows, is reshaping the global

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<sup>21</sup> See Singapore Ministry of Trade and Industry announcement on 1 March 2018, at: <https://www.mti.gov.sg/MTIInsights/SiteAssets/Pages/COS%202018/Factsheets/Support%20for%20Internationalisation%20and%20Innovation/ASEAN%20Agreement%20on%20Ecommerce%20MTI%20COS%2018%20Factsheet%20-%20final.pdf>. Singapore is the Chair of ASEAN in 2018. See also generally, ASEAN’s work programme on e-commerce for 2017-2025, at: <http://asean.org/asean-economic-community/sectoral-bodies-under-the-purview-of-acm/e-commerce/> (accessed on 15 June 2018).

<sup>22</sup> See e.g. APEC Policy Support Unit, “Promoting Ecommerce to Globalize MSMEs” (2017).

<sup>23</sup> See e.g. Klaus Schwab, “The Fourth Industrial Revolution”, World Economic Forum (2016).



trade landscape rapidly and disruptively. The speed at which such technology is being harnessed and embraced by businesses is leaving law-makers 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?

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 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 optimize data storage in the ‘cloud’, rather than in a national facility.

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.<sup>24</sup>

Data protection laws such as the EU’s GDPR can pose serious challenges to ASEAN businesses – particularly MSMEs – joining global supply chains.<sup>25</sup> 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.

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, ‘immutability’ and cost benefits is another area in which a unified ASEAN regulatory voice on key aspects can be helpful.

As another example, as businesses increasingly seek to commercialise the use of artificial intelligence, autonomous vehicles and drones (unmanned aircraft systems or UAS), questions will arise within ASEAN (and elsewhere) as to the legal permissibility and responsibility which such use might entail.<sup>26</sup> This is therefore an area in ASEAN needs to examine urgently the legal and ethical positions, to provide clarity for businesses.

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<sup>24</sup> 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 IoT products.

<sup>25</sup> See SMU research report, pp. 78-79.

<sup>26</sup> On the commercial exploration of using drones to deliver increasing loads of goods and cargo, see e.g. <http://www.scmp.com/tech/china-tech/article/2148692/chinese-companies-are-testing-civilian-drones-can-carry-tonne-cargo> (accessed on 6 June 2018) and <https://www.wired.com/story/boeing-delivery-drone/> (accessed on 6 June 2018).



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.

### *Investment Obstacles*

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.<sup>27</sup>

The ACIA liberalization provisions exclude measures under services under the ASEAN Framework Agreement on Services (AFAS), whose liberalisation negotiations are handled separately.

ASEAN countries are working towards a new agreement for services liberalisation, the Agreement on Trade in Services (ATISA).<sup>28</sup> Under AFAS, the following priority sectors have been identified:<sup>29</sup> air transport, business services, construction, financial services, maritime transport, telecommunications and tourism.

Under the AEC Blueprint 2007, particular services were identified as Priority Sectors for accelerated liberalisation.<sup>30</sup> 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

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<sup>27</sup> Art. 3.3, ACIA. On ASEAN investment liberalisation, see generally, Ponciano S. Intal Jr, “AEC Blueprint Implementation Performance and Challenges: Investment Liberalization”, ERIA-DP-2015-32, April 2015.

<sup>28</sup> See text of the ACIA, at: [www.asean.org/storage/images/2013/.../ACIA\\_Final\\_Text\\_26%20Feb%202009.pdf](http://www.asean.org/storage/images/2013/.../ACIA_Final_Text_26%20Feb%202009.pdf) (accessed on 18 June 2018).

<sup>29</sup> Bangkok Declaration, signed at the Fifth ASEAN Summit, 1995.

<sup>30</sup> See ASEAN Integration in Services (2015), pp. 18-19.

services, by 2013. The Blueprint set the following target dates for Mode 3 (commercial presence) liberalisation, allowing for foreign (ASEAN) equity participation:

of not less than 51% by 2008, and 70% by 2010 for the four priority services sectors; not less than 49% by 2008, 51% by 2010, and 70% by 2013 for logistics services; and not less than 49% by 2008, 51% by 2010, and 70% by 2015 for other services sectors.

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:

“... 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.”<sup>31</sup>

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.<sup>32</sup> Other restrictions exist in the form of local-content requirements applicable to electronic devices commonly used in e-commerce, such as cellular phones, notebooks and tablets devices.<sup>33</sup>

Notably, the AEC Blueprint 2025 requires ASEAN countries to “explore alternative approaches for further liberalisation of services”.<sup>34</sup>

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

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<sup>31</sup> See Position Paper, “Enhancing Connectivity in ASEAN Area: What Opportunities of Cooperation for Italian and ASEAN Players”, High Level Dialogue on ASEAN Italy Economic Relations, Jakarta, May 15-16, 2017, The European House – Ambrosetti and Italia ASEAN, available at: [https://www.ambrosetti.eu/wp-content/uploads/ASEAN-2017-Paper-CONNECTIVITY\\_eng\\_sito.pdf](https://www.ambrosetti.eu/wp-content/uploads/ASEAN-2017-Paper-CONNECTIVITY_eng_sito.pdf) (accessed on 18 June 2018). (Italic emphasis added.)

<sup>32</sup> See SMU research report, pp. 69-71.

<sup>33</sup> 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”, 29 February 2016, *The Jakarta Post*, at: <http://www.thejakartapost.com/news/2016/02/29/govt-prepares-local-content-requirement-4g-smartphone.html>; Global Legal Monitor, at: <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 on 11 June 2018). See also the discussion in the 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.

<sup>34</sup> Para. A2.13.

the potential benefits of e-commerce.<sup>35</sup> 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.

### 3. Dispute Settlement Issues for ASEAN

#### *The "Power of One" in Enforcing Commercial Rights and Obligations*

While the liberalization 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.<sup>36</sup> 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 and efficient dispute resolution national and regional options can contribute to a more positive business environment.<sup>37</sup>

The following are some examples of areas where clarity of laws are important for businesses.

#### *Enforcement of contracts*

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.

#### *Admissibility of electronic evidence in ASEAN courts*

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.<sup>38</sup>

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<sup>35</sup> See SMU research report, pp. 62 and 80.

<sup>36</sup> See Section 5, SMU research report.

<sup>37</sup> Other Asian jurisdictions are also studying dispute settlement avenues and obstacles. For example, the SMU research was cited with regard to its findings on whether businesses in ASEAN included arbitration clauses in their contracts, in the keynote speech by Mr Rimsky Yuen, then Secretary for Justice, Hong Kong SAR, 14 October 2017, at p. 4; text available at: <https://www.doi.gov.hk/eng/public/pdf/2017/sj20171014e2.pdf> (accessed on 11 June 2018).

<sup>38</sup> See for example, "E-discovery in Asia", eds. Bryan Tan, Michael Lew and Benjamin Ang, LexisNexis (2017).

One challenge which exists in enforcement of judgments in ASEAN is that there is no regional enforcement of judgments mechanism. Enforceability of a judgment from one ASEAN country in another is dependent on national laws and treaties (where they exist).<sup>39</sup>

While all ASEAN member states are signatories to the New York Convention,<sup>40</sup> there have been some instances where arbitration awards from another ASEAN country have not been recognized or enforced in a national court of an ASEAN member.<sup>41</sup>

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.

#### **4. Corporate and Land Use Obstacles**

Apart from trade and investment barriers/obstacles, other observed obstacles include those in corporate laws and procedures and in land use regulation.<sup>42</sup>

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 facilitate matters. Other steps include consideration of common registration requirements in ASEAN and establishment of a searchable online registry of ASEAN businesses and MSMEs.

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

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<sup>39</sup> See ABLI e-book

<sup>40</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (the New York Convention). Note also the ASEAN Law Association's presented its draft Protocol and proposed "Guidelines on Best Practices on Reciprocal Enforcement of Arbitral Awards in ASEAN" at the 6th Session of the ASEAN Senior Law Officials Meeting (ASLOM) 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](https://aseanlawassociation.org/ALA%20Newsletter%20April2016-March2017.pdf) (accessed on 15 June 2018).

<sup>41</sup> Some of these instances have related to the public policy exception under Article V(2)(b) of the New York Convention. See SMU research report, Section 5.

<sup>42</sup> See SMU research report, Sections 2 (primary researcher: Pearlle Koh) and 4 (primary researcher: Yip Man). Please see the research report for a fuller discussion of the findings and other recommendations.

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.

## 5. Conclusion

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:

- Address NTMs, particularly in priority sectors identified for the AEC and especially with regard to their impact on MSMEs in ASEAN;
- Trade facilitation – promotion of implementation of the TFA, including greater utilization of AEOs and MRAs for AEOs<sup>43</sup>;
- Paperless trade – promoting digital trade facilitation and in this context, consider the usefulness of the FA and MLETR for improving ASEAN trade rules;
- Negotiating liberalization 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;
- Establishing mechanisms which can boost consumer confidence in e-commerce, such as effective and affordable dispute resolution mechanism for e-commerce disputes;
- 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;
- 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;
- Consideration of adoption of international instruments promoting commercial law harmonisation; and

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<sup>43</sup> 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 on 7 June 2018).

- 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.

Other obstacles in areas such as corporate registration and land use, as outlined above, should also be addressed.