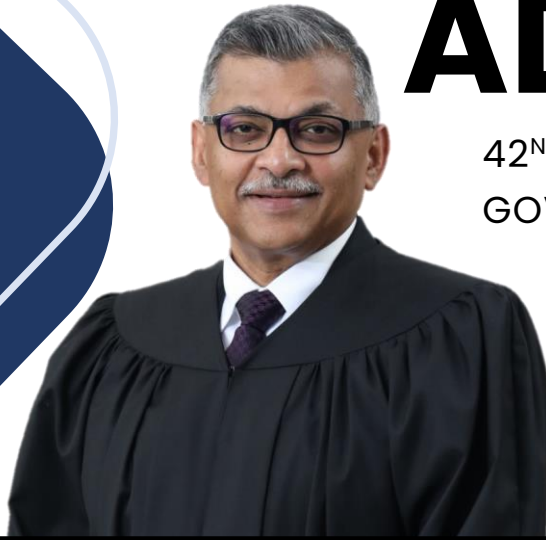




**ASEAN  
LAW  
ASSOCIATION  
2021**

# OPENING ADDRESS



42<sup>ND</sup> ASEAN LAW ASSOCIATION  
GOVERNING COUNCIL MEETING

**ALA PRESIDENT**

THE HONOURABLE CHIEF JUSTICE  
SUNDARESH MENON

A very good afternoon, and welcome to this virtual meeting of the ALA Governing Council.

Let me begin today's proceedings by expressing on behalf of all of us our heartfelt appreciation to our hosts, ALA Cambodia. This is historic because it is the first time that ALA Cambodia is hosting the meeting of the Governing Council, and what a wonderful job they have done! We hope before long that we will be able to repeat the experience in Cambodia and we look forward to that. I also wish to extend an especially warm welcome to the new ALA Vice-Presidents. These are the new Chairs of the ALA National Committees of Brunei, Cambodia, Indonesia, Myanmar, and Thailand.

First, the new Chair of ALA Brunei, Yang Berhormat Awang Haji Ahmad bin Pehin Orang Kaya Laila Setia Bakti Diraja Dato Laila Utama Haji Awang Isa, who was appointed Attorney-General of Brunei on 6 October 2020, and who succeeds the outgoing Chair, Yang Berhormat Dato Seri Paduka Haji Hairol Arni bin Haji Abdul Majid.

Second, the new Chair of ALA Cambodia, Attorney Ly Chantola, who was appointed President of the Bar Association of Cambodia on 16 October 2020, and who succeeds the outgoing Chair, Attorney Soun Visal.

Third, the new Chair of ALA Indonesia, the Honourable Chief Justice Muhammad Syarifuddin, who was elected Chief Justice of the Supreme Court of Indonesia on 6 April 2020, and who succeeds the outgoing Chair and a long-time stalwart of the ALA community, the Honourable Chief Justice Muhammad Hatta Ali.

Fourth, the new Chair of ALA Myanmar, Dr Thi Da Oo, who succeeds the outgoing Chair, U Tun Tun Oo.

Finally, the new Chair of ALA Thailand, the Honourable Chief Justice Piyakul Boonperm, who was appointed President of the Supreme Court of Thailand on 1 October 2021, and who succeeds the outgoing Chair, the Honourable Chief Justice Metinee Chalodhorn.

I extend my heartiest congratulations to the new Chairs and ALA Vice-Presidents on their appointments, and look forward to collaborating with them to advance the work of the Association. I also extend my deepest appreciation to the outgoing Chairs and ALA Vice-Presidents for all their support and contributions to ALA over the years, and for their tremendous friendship.

Many of us last met in person in Phuket in 2019, when ALA Thailand graciously hosted us to a truly memorable meeting. At that time, we had looked forward to being welcomed by ALA Cambodia in Siem Reap last year, but as with so many other plans, the pandemic got in the way.

The painful decision was thus taken to hold over last year's meeting to this year and to hold it online instead of in person. As a result, we are, as I have said, attending the first virtual ALA Governing Council Meeting. And I again thank ALA Cambodia for doing such a wonderful job and making all the arrangements to host us today. In the midst of all the disruptions, they have ably and enthusiastically taken on this challenge, and have worked tirelessly with the ALA Secretariat to adapt the proceedings to a suitable online format.

Last year, in our annual newsletter, I wrote of my pride that our Association had been resolute in the face of the COVID pandemic. Under some of the most trying circumstances, we responded by giving our best. Far from coming to a standstill, ALA's work has continued apace and there have been a number of developments since our last meeting that I would like to briefly mention.

The ASEAN Law Institute held its 3rd Governing Board Meeting virtually in July last year. Under the auspices of the Institute, ALA Philippines and ALA Singapore also respectively hosted the first and second Roundtable discussions on the ASEAN Comprehensive Investment Agreement. The Institute's 2020 annual report and proposed 2021 workplan are being tabled for endorsement at today's meeting.

We also continued our engagement with the ASEAN Senior Law Officials Meeting ("ASLOM"). Last year, ALA Singapore represented ALA and presented our proposed Guidelines for the Enforcement of Arbitral Awards within ASEAN at the 9th ASLOM Working Group Meeting. This is an important step towards closer collaboration between ALA and ASLOM, and we hope to work towards the eventual adoption of the Guidelines by ASLOM. ALA Singapore will be updating the Governing Council later today on developments on this front.

This year, ALA's operations have intensified, with the various ALA Working Groups meeting to discuss and finalise their recommendations on a number of initiatives that will be instrumental to the development of ASEAN law. These include the promotion of ASEAN legal instruments, the proposed ASEAN Protocol for communication with non-disputing states on treaty interpretation issues, and the idea of an ALA Virtual Marketplace for training opportunities. The ALA Standing Committees and the Trade and Investment Group have also been able to meet this year, and a number of interesting proposals have arisen from their deliberations. I look forward to hearing the updates from the Working Groups and the Standing Committees later today.

# LOOKING AHEAD

Looking ahead, ALA Malaysia has been working extremely hard to plan the next ALA General Assembly. The General Assembly was originally scheduled to take place this year, but we took the difficult decision last year to defer it to 2022, in view of the uncertain outlook of the pandemic. The present situation justifies continued caution in our social interactions, and we have therefore recently agreed that the General Assembly will be further deferred to 2023. The plan – and no doubt the fervent hope that we all share – is to hold the 2023 General Assembly in person. ALA Malaysia will update us on the status of their planning later today.

Before we reunite in Malaysia in 2023, there will be another Governing Council Meeting next year. This is likely to be another virtual meeting. We are exploring the possibility of ALA Indonesia hosting this event, and this will be the subject of the final discussion of today's meeting.

Finally, the pandemic may also have an impact on the leadership renewal of ALA. Judge Paul Quan and I were due to relinquish our respective positions as Secretary-General and President of the Association this year. However, in the light of the postponement of the General Assembly, a proposal has been tabled at today's meeting to correspondingly extend our terms until 2023, when Malaysia will take over. This is not an unprecedented move. As a result of the Asian financial crisis, Malaysia held the positions of ALA President and Secretary-General from 1995 until Singapore took over in 2003. In many ways, the COVID pandemic poses challenges that are as great, if not even greater, than back then. Both the Secretary-General and I wish to inform the Governing Council that we stand ready to continue serving ALA should the proposal to extend our terms be endorsed.

# ACKNOWLEDGEMENT

Here, let me take a moment to acknowledge and express my deepest gratitude to my colleague, Judge Paul Quan, whose assistance as Secretary-General has been crucial to the day-to-day running of ALA. The details of the good work done by the ALA Secretariat can be found in the Secretary-General's report, which has been tabled before the Governing Council.

I am also deeply appreciative of the Vice- Presidents, the ALA National Committees, and each and every member of the ALA family in extending us their full support despite these challenging times.

The past two years have not been easy, to say the least. However, the strong bonds that we share in the ALA family have allowed us to weather the storm thus far and to stay the course in the face of formidable challenges. I am delighted that we gather here today to discuss an agenda rich and filled with many exciting and promising developments that will continue advancing the cause of ASEAN law. I am confident that ALA will emerge from the pandemic even stronger than before, with all of us standing shoulder to shoulder with each other.

Thank you.

# 42<sup>ND</sup>

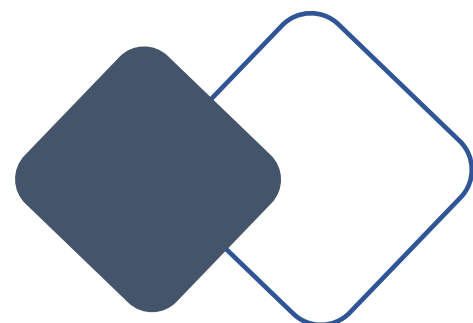
# GOVERNING COUNCIL MEETING

REPORTED BY ALA CAMBODIA



The ongoing Covid-19 pandemic has drastically altered global activities and mobilities in an unprecedented way. The planned activities of ALA have also been affected by this global phenomenon. However, with strong cooperation and support within the ALA family, ALA Cambodia was able to fulfil its commitment to host the 42nd Governing Council Meeting of ALA on 11 November 2021.

After the welcome address by the Chair of ALA Cambodia, the Chairs and Heads of Delegation of the ALA National Committees also expressed their remarks.

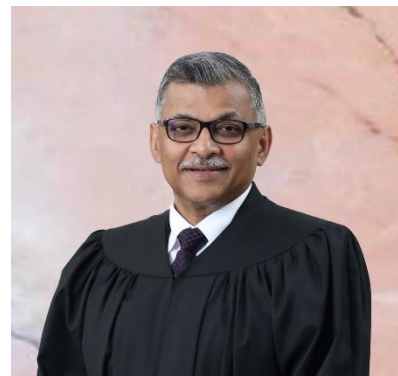




# ADDRESSES



**The Honourable Chief Justice Sundaresh Menon** welcomed ALA members to the Meeting and commented that it was a historic moment, not only because this was the first time that ALA Cambodia hosted the Governing Council meeting but also the first virtual Governing Council Meeting ever held. He expressed his appreciation to ALA Cambodia for enthusiastically taking on the challenge in hosting the first virtual ALA Governing Council Meeting and for tirelessly working with the ALA Secretariat to adapt the process to a suitable online format.



The Chief Justice also extended a warm welcome and congratulated new chairs of the ALA National Committees of Brunei, Cambodia, Indonesia, Myanmar and Thailand on their new appointments and looked forward to collaborating with them to advance the work of ALA. He also expressed his deepest appreciation to the outgoing Chairs and ALA Vice-Presidents for all their support and contributions to ALA over the years.

The Chief Justice then highlighted a number of developments in ALA's work despite the pandemic. These include ALA's engagement with the ASEAN Senior Law Officials Meeting, the roundtable discussions on the ASEAN Comprehensive Investment Agreement organised by ASEAN Law Institute, and the various ALA Working Groups Meetings to discuss and finalise their recommendations on a number of initiatives that would be instrumental to the development of ASEAN Law.

In his welcome address, **H.E. Ly Chantola** expressed his appreciation to ALA for entrusting ALA Cambodia to host the 42nd Governing Council Meeting. Although the Meeting was conducted virtually instead of in Siem Reap initially planned, he assured the Meeting that the distance would not separate the friendship and brotherhood of the ALA family and welcomed the ALA family to visit Cambodia in future.



H.E. Ly Chantola highly appreciated the relentless efforts of ALA since its establishment in 1979. He also recalled the four objectives of ALA that he viewed as great contributions to the development of ASEAN law. ALA Cambodia shared those objectives and looked forward to continuing fruitful and successful cooperation with the rest of the ALA family.

The Chair of ALA Cambodia shared with the Meeting the efforts taken by the Royal Government of Cambodia, under the leadership of Samdech Techo Hun Sen, to develop the country and ensure a stable economic growth. He also talked about the measures taken by the Royal Government of Cambodia in response to the Covid-19 outbreak, particularly on the successful vaccination program.

The Meeting discussed the following agenda:

1. The approval of the minutes of the 41st Governing Council Meeting;
2. The proposed resolution to adopt the proposal on the extension of the terms of the ALA President and Secretary General;
3. The proposed resolution to endorse the ASEAN Law Institute (AsnLI) Annual Report 2020 Workplan 2021 and Note on Liability, the written update on ALA/AsnLI website, and AsnLI Annual Report 2021 and AsnLI Workplan 2022;
4. The update on the presentation on the “Guidelines on Best Practices on the Enforcement of Arbitral Awards within ASEAN” at the 9th ASEAN Law Official Meeting (ASLOM) Working Group Meeting on Examining Modalities for Harmonisation of ASEAN Trade Law;
5. The update by the Chairpersons on the progress of each working group;
6. The proposed resolution to endorse the written updates of the Standing Committees as well as the Trade and Investment Group;
7. The proposed resolution to endorse the written reports on the ALA Foundation and ALA Journal;
8. The update by ALA Malaysia on the 14th General Assembly; and
9. The discussion on the date and the host of the 43rd Governing Council Meeting in 2022.

ALA Indonesia has graciously agreed to host the next Governing Council Meeting in 2022 in an online format.

ALA Malaysia reported on the preparation for the 14th ALA General Assembly, with the theme, “ASEAN Tapestry – Our Pride”. The proposed date is tentatively scheduled from 19 to 23 September 2023, either in Kuala Lumpur or Putrajaya.

On that note, the Meeting was adjourned and the ALA family looks forward to the 43rd Governing Council Meeting which will be hosted in 2022.

# ASEAN LAW INSTITUTE

**REPORTED BY ALA SINGAPORE**



## **SINGAPORE & THE ASEAN COMPREHENSIVE INVESTMENT AGREEMENT**

On 9 February 2021, the ASEAN Law Association (“ALA”) held a virtual roundtable discussion on the topic of “Singapore & the ASEAN Comprehensive Investment Agreement (the “Roundtable Discussion”). This was the second roundtable discussion and nearly two hundred participants attended the event. ALA Singapore organised this in collaboration with the ASEAN Law Institute (“AsnLI”).

This Roundtable Discussion aimed at providing an overview of Singapore's main investment-related laws and the ASEAN Comprehensive Investment Agreement (“ACIA”).



### **ASEAN LAW ASSOCIATION (SINGAPORE)**

SINGAPORE ROUNDTABLE: PROGRAMME

9 February 2021, 2.30pm - 5.30pm



The ACIA came into force in February 2012, with the aim of creating a free and open investment environment towards the achievement of ASEAN economic integration, due to the competitive global environment for foreign direct investment. The ACIA is envisioned to facilitate the transformation of ASEAN into an investment hub that would be able to compete effectively with other emerging economies.

A key feature of the ACIA is the protection of investors with commitments made by host governments to safeguard investments. Hence, the Roundtable Discussion focused on: (1) canvassing the benefits that investors can obtain under the ACIA, (2) areas that investors should note, (3) discussing Singapore's implementation of the ACIA, and (4) outlining the recent developments in Singapore law that are of relevance to dispute settlement under the ACIA.



# OPENING REMARKS

## SINGAPORE & THE ASEAN COMPREHENSIVE INVESTMENT AGREEMENT



In his opening remarks, the Chair of ALA Singapore and Vice-Chair of AsnLI, **the Honourable Justice Lee Siu Kin** expressed that it was fortunate that technology enabled such discussions to continue despite the COVID-19 pandemic, and the event's successful hosting would serve as testament that online conferences are feasible. Even with the eventual return to normalcy, the current medium would retain its advantages of saving time and costs, which would in turn help channel ALA's resources to other projects that would increase its reach and output.



The Chair of AsnLI, **His Excellency Avelino V. Cruz** highlighted, in his opening remarks, the importance of ALA's role in taking a granular look at the ACIA provisions, and reiterated the concerns that were identified in the previous virtual roundtable organised by ALA Philippines: (1) national commitments span the lifetime of an investment and (2) special foreign investments cover a wide set of laws that cannot be neatly regulated by a single legal code. Hence, this year's Roundtable Discussion would be useful in examining Singapore's progress in addressing these concerns.



**Dr Romesh Weeramantry** (Head, International Dispute Resolution, Centre for International Law, National University of Singapore and Foreign Legal Consultant, Clifford Chance LLP) kicked off the first presentation. In his presentation, Dr Weeramantry explained the ACIA's history, structure, and purpose, outlined ASEAN's investment agreements, and surveyed ACIA's important provisions.

The significance of ASEAN's investment agreements and Singapore's bilateral investment treaties ("BIT") with other ASEAN states is that these treaties operate in parallel to the ACIA, and parties can opt to bring a claim under these agreements or under the ACIA. Dr Weeramantry highlighted that there are no known arbitrations under the ACIA, but there have been two arbitrations under the ASEAN Agreement for the Promotion and Protection of Investments (1987).

Dr Weeramantry pointed out ACIA's important provisions and areas that investors should note. First, footnote 1 of 4 (Definitions), paragraph (a), defining "covered investment" provides that investments must be specifically approved in writing by the competent authority of a Member State. However, it is unclear as to: (1) which specific types of investments require specific approval in writing, and (2) which ministry/agency in each Member State is designated as the competent authority to provide such approval.

Secondly, Article 19 (Denial of Benefits) provides that benefits under the ACIA may be denied to investors who have "no substantive business operations" in their ASEAN State of incorporation. It is unclear what "substantive business operations" means in this context as it is not defined. To this end, Dr Weeramantry suggested that having examples or illustrations in the provisions would be helpful in resolving this uncertainty.

Thirdly, Article 6 (Most-Favoured Nation Treatment) provides that Singaporean investors shall be treated no less favourably than other foreign investors in like circumstances. In this regard, investors should note that Article 6 ACIA provides broader coverage than equivalent provisions under other treaties, e.g. Article 5 of the Myanmar-Singapore BIT.

Fourthly, Article 37 (Consolidation) requires parties' agreement in order for the consolidation of separate arbitral proceedings submitted under the ACIA (see Article 32 (Claim by an Investor of a Member State)). This is worded differently from other agreements such as the Singapore-Myanmar BIT, where parties' agreement may not be required for such consolidation (see Article 19 of that BIT, which provides for a specific tribunal to be established for the purpose of determining consolidation upon the request of a disputing party).

Lastly, Article 33 (Submission of a Claim) contains a "fork in the road provision", where a disputing investor may submit a claim to one of the various stipulated *fora*, but resort to one shall exclude resort to the other. Dr Weeramantry noted that this provision may result in investors being reluctant to go to court because their right to arbitrate the dispute may be precluded.

Mr Loh dealt with Singapore's compliance with ACIA from two angles – when the agreement was negotiated and in its implementation. Negotiation is relevant to compliance as one should not sign an agreement unless one is able to implement it. ACIA took a shorter time to negotiate as compared to other investment treaties.

First, the ACIA builds on two prior agreements: (1) ASEAN Agreement for the Promotion and Protection of Investments (1987) and (2) ASEAN Investment Area Agreement (1998).

Secondly, ASEAN was in negotiations with other countries in parallel, which already resolved many investment agreement-related issues by the time ASEAN member countries negotiated the ACIA among themselves.

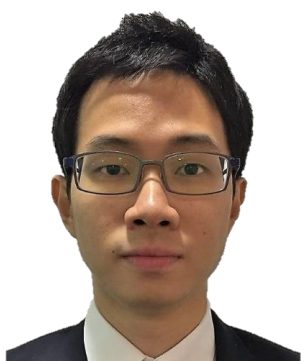
Thirdly, ACIA is applicable to only five sectors and its ancillary services. For Singapore, negotiation of ACIA posed no difficulties as Singapore had already given more extensive commitments to bilateral trading partners.

Nevertheless, Singapore negotiated a list of reservations in order to preserve the freedom to impose measures that may be incompatible with ACIA disciplines in limited areas.

On implementation, Mr Loh noted that no legislative action was needed to bring Singapore's domestic laws into compliance as they were already compliant with the ACIA when it entered into force. Accordingly, there are no specific references to the ACIA in Singapore's domestic legislation. He also pointed out that before any new measure is adopted in Singapore, extensive consultations are carried out within the government to ensure that such measure complies with Singapore's international obligations.



**Mr Derek Loh**  
Deputy Director-General  
(Economic & Social)  
International Affairs Division  
Attorney-General's Chambers



**Mr Eric Peh**  
Assistant Director  
ASEAN Division  
Ministry of Trade & Industry

Mr Peh touched on the institutional mechanisms established in ACIA to monitor compliance of ACIA's provisions, notably the ASEAN Investment Area (AIA) Council. Mr Peh mentioned that in the Ministry of Trade and Industry (MTI), there is a dedicated team that ensures that the Singapore government's new policies are consistent with its international obligations.

He then gave some examples of how Singapore ensured compliance with Article 21 (Transparency) of the ACIA. He shared that to satisfy the requirement of making all relevant laws publicly available, Singapore has ensured that all Singapore's statutes and subsidiary legislation are available online.

He also shared that Singapore undergoes a peer review process to ensure compliance with Article 21, paragraph 1(b), to inform the AIA Council of, *inter alia*, new investment-related agreements or arrangements entered into. At the end of every year, a report is then submitted to the AIA Council.

Professor Hsu, presented on the recent developments in Singapore law that are of relevance to ACIA dispute settlement on a state's Investment-related measure.

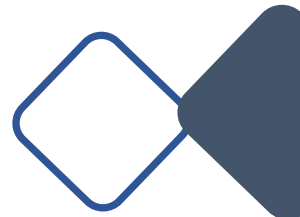
Professor Hsu highlighted the potential for parties to use mediation in ACIA disputes. This was of especial relevance, given that: (1) Singapore's Civil Law (Third-Party Funding) Regulations 2017 allows for third-party financing of mediation proceedings arising out of or connected with international arbitration proceedings, and that (2) the Singapore Convention on Mediation has entered into force in September 2020 ("Singapore Mediation Convention"), which gives recognition to mediation settlements internationally. Investors seeking to commence such proceedings under ACIA should thus note these important developments.



**Professor Locknie Hsu**  
Professor of Law  
Singapore  
Management  
University

Investors should also take note of two important amendments to the International Arbitration Act from November 2020. In multi-party arbitration situations, section 9B of the Act provides for a default mode of appointment of arbitrators. Section 12(1)(j) also introduces clarity by conferring on the High Court and arbitral tribunal the express power to enforce confidentiality obligations. Investors should also note that the Singapore International Commercial Court, established in 2015, is a viable forum for dispute resolution.

## DISCUSSION



**The Honourable Justice Pang Khang Chau** ("Justice Pang"), Vice-Chair of ALA Singapore, moderated the question and answer session ("Q&A Session").



**Mr Francis Xavier, SC**, Regional Head, Disputes Practice, Rajah & Tann Asia) kicked off the Q&A Session with a few remarks. He noted that Singapore's reservation list in the ACIA is the shortest in ASEAN, which evidences its great degree of compliance with the ACIA provisions. As a result, Singapore has benefitted greatly. In respect of outbound investments, Singapore is the second largest investor within ASEAN: 82% of Singapore-incorporated businesses have a presence in one of the ASEAN Member States ("AMS"). In respect of inbound investments, ACIA has helped to generate 22,000 jobs in Singapore annually.

A member of the audience asked whether special and differential treatment in applying ACIA's commitments is justified.

**Mr Minn Naing Oo**, Managing Director, Allen & Gledhill (Myanmar) Co. Ltd opined that such special and differential treatment is needed at the outset to attract member states to enter into the ACIA. Nevertheless, the goal of harmonisation remains strong and it would be ideal for all AMS to have the same rights and obligations ultimately.

Another member of the audience queried about the enforceability of a settlement agreement concluded pursuant to Article 30 (Conciliation), which stipulates that disputing parties may at any time agree to conciliation.

**Mr Xavier SC** opined that in practice, one would have two choices. Firstly, one may choose to rely on the Singapore Mediation Convention and have a mediated settlement agreement that is enforceable among Convention countries. Secondly, one may choose to have the settlement agreement recorded as an arbitral award. This method would require the commencement of arbitration and the recording of a consent award. This would be enforceable in countries who are party to the New York Convention (i.e. Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

In closing, **Justice Pang** thanked the speakers and audience, and expressed his hope that this Roundtable will spur more discussions regarding ACIA, including suggestions on how to improve ACIA.

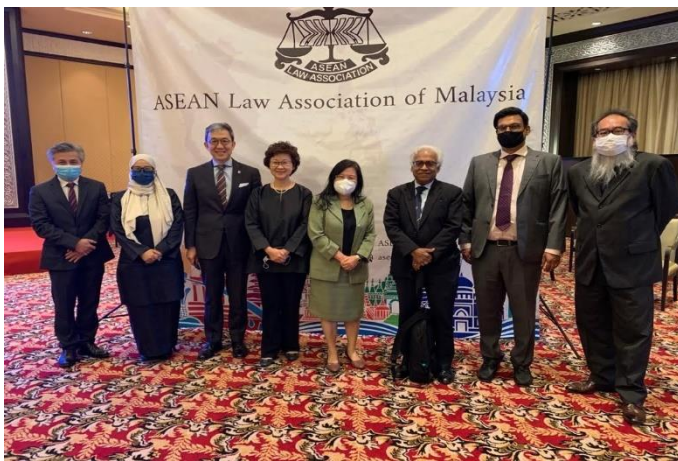


**Mr Minn Naing Oo**  
Managing Director  
Allen & Gledhill (Myanmar)  
Co. Ltd

# ASEAN LAW INSTITUTE

**REPORTED BY ALA MALAYSIA**

Consistent with its commitment to legal learning and sharing of valuable opinion towards the betterment of ASEAN, the ASEAN Law Association of Malaysia (ALA Malaysia) organised and hosted the Malaysia Roundtable Discussion on the ASEAN Comprehensive Investment Agreement (ACIA) at 1500 hours on 10th December 2021 (Friday) virtually via Zoom.



The principal objective of the Roundtable Discussion was a familiarisation and promotion of the ASEAN Comprehensive Investment Agreement (ACIA) to the Malaysian legal and judicial fraternity. In particular, the focus was on the impact and utility of ACIA in resolving investor disputes in light of treaties entered both before and after ACIA; and the availability of recourse to the dispute resolution mechanism under ACIA where domestic remedies may, for some reason or other, have not been satisfactory or forthcoming.

The further objectives of the Roundtable Discussion were succinctly summed up in the Welcoming Remarks **of The Right Honourable Tun Tengku Maimun binti Tuan Mat**, the Chief Justice of Malaysia in her capacity as President of ALA Malaysia, where Her Ladyship made the following comment:



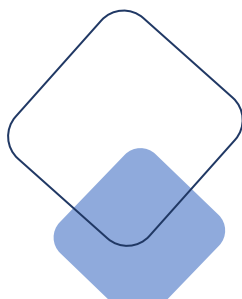
"In this regard, this virtual platform is not only to share experiences but the implementation and application of ACIA from the Malaysian perspective, but also serves as a platform for all of us to come together to exchange views and insights in order to build and foster a knowledge sharing culture amongst the legal fraternity as well as the legal academia in the ASEAN community. It is therefore truly an opener in this sense of the legal complexities within ASEAN and how we have overcome differences to achieve a common goal, namely, consistency and uphold the rule of law."

To illustrate and better appreciate the role, efficacy and relevance of the ACIA, a case study on the case of Boonsom Boonyanit will be made at the Roundtable Discussion. This was a case where a Thai investor who had unsuccessfully prosecuted her claim in the national Courts for the loss of her lands due to fraud and forgery had then initiated a claim under the auspices of the ACIA. A discussion of the key issues in that claim by the persons involved would assist in the better appreciation of the ACIA.



In his opening remarks welcoming speakers and attendees, **His Excellency Avelino V. Cruz**, Chairman of the ASEAN Law Institute pointed out that ALA Malaysia is the third member Association to conduct the Roundtable Discussions following Philippines and Singapore. Each roundtable discussion seeks to encourage discussion on and promote recourse to the ACIA and to assist member Associations on matters of compliance and convergence.

The Roundtable Discussion was in two parts. Part 1 discussed the position of investment agreements pre and post ACIA while Part 2 was dedicated to a case study of the claim by the Estate of Boonsom Booyanit under the ACIA.





Part 1 was moderated by **Justice Mary Lim Thiam Suan**, Judge of the Federal Court of Malaysia. Three speakers, **Ms. Sarah Khalilah Abdul Rahman**, Senior Federal Counsel/Deputy Public Prosecutor at the Attorney General's Chambers of Malaysia, **Mr. Khoo Guan Huat**, partner at Skrine, and **Jern-Fei Ng, QC** at 7BR or 7 Bedford Row, were invited to share in their experiences and expertise on investment agreements and the ACIA.

**Ms Sarah** kicked off Part 1 by providing a brief overview of the historical backdrop in which the ACIA was negotiated by Member States.

Several key events and/or international documents that led to the formation of the ACIA were flagged by Ms. Sarah as follows:

- I. the 1987 Investment Agreement (IGA) and the 1998 Framework Agreement on the ASEAN Investment Area (AIA)
- II. ASEAN Member States saw rapid growth in the 80s and the early 90s with GDP rate of about 6-7 per cent on average and where there was positive investment and capital inflows, and strengthened ASEAN currencies
- III. However, by the late 90s and early 2000s, ASEAN Member States were grappling with two major financial crises.

Each crisis magnified the problem for every ASEAN Member State because investors generally saw ASEAN as an integrated region and ASEAN had to take a coordinated regional approach to pull out of the crises effectively and to restore confidence in the market.

The 1987 IGA and the 1998 AIA Agreement were the tools available to overcome the crises. The two complemented each other, but separately, were in fact incomplete. The IGA stood on the pillar of investment protection and promotion, while the AIA Agreement consisted of the other elements- facilitation and liberalisation. There were also inconsistencies between the two agreements, even at the basic level such as the scope and definitions of investment, and different applicable standards for non-discrimination.



The ACIA was concluded to resolve those problems. It preserved the principles under the IGA and the AIA Agreement and combined the four pillars of investment. Under the ACIA, there was progressive liberalisation in five sectors and services incidental, namely manufacturing, agriculture, fishery, forestry, and mining/quarrying.

The ACIA also had all the necessary elements including:

- i. non-discrimination, namely National Treatment and Most-Favoured Nation Treatment;
- ii. minimum standard of treatment comprising Fair and Equitable Treatment and Full Protection and Security;
- iii. protection against expropriation; and
- iv. structured investor-state dispute settlement provision which promotes alternative dispute resolution methods namely consultation and conciliation.

For added measure, the ACIA extends a bridge to a sister treaty, that is, the ASEAN Framework Agreement on Services, which deals with liberalisation in trade in services within ASEAN, by ensuring that the protections accorded to investments under the ACIA are also extended to services supplied through investments that have commercial presence in the host country.

The provision on Most-Favoured Nation Treatment (MFN) is crucial to the ASEAN centrality theme. This automatic MFN feature is not extended under other ASEAN investment or FTA agreements with its foreign partners, because the purpose under the ACIA is to safeguard priority towards ASEAN investors. This priority is, however, limited to only the five-named sectors and the incidental services to those sectors.

**Ms Sarah** further explained that there is a broad spectrum of practice among ASEAN members on how each Member State translates her commitments under ACIA into domestic law and policy. In the case of Malaysia, while Malaysia has signed International Investment Agreements with over 70 countries and numerous with ASEAN, there is no specific governing law on foreign investments and foreign participation in local businesses.

The position is that no major legislative changes are required when ratifying the ACIA. Instead, Malaysia utilised its Foreign Investment Committee (FIC) under the Economic Planning Unit at the Prime Minister's Department to screen foreign acquisitions and takeovers of Malaysian businesses. This has since been repealed to make way for sectoral regulators to impose whatever equity restrictions for their respective sectors guided by the policies of the day.

According to her, Malaysia's laws, regulations and policies affecting foreign investment are dealt with at both the Federal and State levels:

- I. at the Federal level, the central government regulates the broader investment policies that are implemented by the federal ministries and agencies;
- II. at the State level, such as on issues related to land-use which come under the purview of the State governments, those require approval by state authorities.

Guided by the provisions in the Federal Constitution of Malaysia where there is division and demarcation of power and authority between the respective Federal and State governments (see also Concurrent Lists), for the purpose of the ACIA, regulation of sectors where there is specific sensitivity is through the operation of ASEAN countries' respective reservation lists. Malaysia placed reservations in those sectors and industries which it still needs to protect either for the benefit of vulnerable domestic stakeholders or for strategic or national interests. Some commitments however, do not need specific laws, and can be implemented administratively. For example, the commitment under transparency to publish laws and information on investment.

Valuable lessons have been learnt in relation to investor rights versus the right to regulate. While some Member States required enforcement of principles like fair and equitable treatment, these basic and universal standards and practice are already embedded in parts of our Federal Constitution and procedural laws. Despite this, the ACIA which is modelled after the 1994 NAFTA investment chapter, and the early 2000s US BIT model, needs to continuously evolve and innovate. This has been achieved through the ACIA protocols. The fourth and most recent protocol is the most progressive one yet, because it has incorporated a WTO-level commitment on prohibition of performance requirements, and will require new reservation listing methodology.

The ACIA contains a robust ISDS mechanism, but thus far, no dispute has been brought under its umbrella. The one ICSID case between a Singaporean company against Indonesia (2016) was under the Singapore-Indonesia BIT and not, the ACIA. The case was subsequently discontinued.

Recent investment data indicated that intra-ASEAN share of FDI in the region makes up just 17 per cent. A significant portion of these investments originate from outside the region through conduits. While one cannot draw conclusions, there is nevertheless indication that the ACIA is effectively serving its facilitative and promotive functions rather than exist as a mere tool for conflict management.

**Ms Sarah** shared her views on the new challenges faced by the ACIA, especially in relation to matters concerning climate change and the Covid pandemic. There is also an increasing demand that investment protection and regulation be incorporated alongside broader disciplines such as environment, government procurement, anti-Corruption to name a few.

Although some may criticise that there is an unfair advantage of developed countries against Member State, some of those disciplines are seen as necessary, as a check on governments to practice good governance and to meet the challenges. But, ASEAN needs to continue the conversation about the threat of ISDS versus regulation in issues such as public health and the environment, especially when it plans to upgrade the ACIA and other ASEAN treaties in the future.

A lesson for all national stakeholders from the experience on the ACIA is to understand and ensure that measures and policies taken are in line with the country's international commitments and that basic guarantees under national laws are ensured. Local authorities at the federal and state levels, and even judicial or quasi-judicial decision making bodies must also do their part in enforcing treaty obligations, checking on measures against expropriation, and denial of justice.

The second speaker for Part 1 was **Mr. Khoo Guan Huat**, sharing his experience as a private practitioner, advising potential investor clients of the features of the ACIA.

Mr. Khoo shared similar views with Ms Sarah as expressed above.

While the domestic legal fraternity may not be as familiar with investment agreements in general, and the ACIA in particular, Mr Khoo expressed confidence in that those who practised in the area are nevertheless aware and familiar with the workings of the ACIA.

He, nevertheless drew the attention of the audience to the relationship between the ACIA provisions and domestic laws, particularly from the perspective of the Federal Constitution of Malaysia. He observed that Article 13 of the Federal Constitution makes no distinction between a citizen and a foreign entity or foreigner, not to be deprived of any property without adequate compensation. Arguably, this fundamental liberty is enjoyed by all corporate entities including those established outside Malaysia, due to the use of the word “person” in Article 13. This is seen as both significant and important from the aspect of foreign investor rights.

The final speaker for the first panel discussion, **Mr. Jern-Fei, QC** discussed the dispute resolution mechanism under the ACIA by guiding the audience through his four-point presentation as outlined below:

- I. the provisions of the ACIA do not just provide for the protection of investors against direct expropriation, these provisions also recognise indirect expropriation;
- II. the manner in which “indirect expropriation” can be defined for the purposes of the ACIA, given its broad definition;
- III. the specific measures provided by the ACIA for investors that have suffered direct or indirect expropriation; and
- IV. the manner in which the ACIA protects the Host State's interests by providing general exceptions to regulations and measures that would otherwise be deemed to have allowed for expropriation, direct or indirect.



Part 2 was moderated by **Mr Christopher Leong**, Managing Partner with Chooi & Co + Cheang & Ariff [CCA] and the speakers were **Mr Mohanadass Kanagasabai**, Managing Partner at Mohanadass Partnership and **Dato Chan Seong Ngoh**, retired Head of the Research Division at the Attorney General's Chambers of Malaysia. ALA Malaysia is privileged and honoured that it was able to invite these two key persons who were involved in the claim by the estate of Boonsom Boonyanit. They provided valuable genuine and productive insights that hugely assisted in the appreciation and understanding of the operation and application of investment agreements and the ACIA.

ALA Malaysia prepared a short video explaining the brief facts of the 'Boonsom Boonyanit Saga' that had spanned nearly three decades.

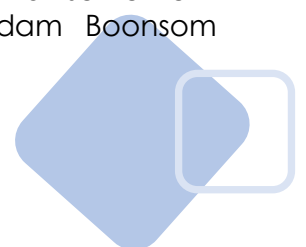
1. The late Madam Boonsom was a Thai national who lived in Thailand but who had bought some valuable beachfront properties in Malaysia in December 1966. Her eldest son managed those properties. In June 1989, her son noticed in a local Thai newspaper an advertisement inserted by a Malaysian law firm, requesting any person having a claim on the properties to contact them. The properties specified were his mother's beachfront properties.
2. Investigations revealed that those properties had been sold to a company called Adorna Properties Private Limited by someone claiming to be Madam Boonsom. That same person [imposter] had affirmed a statutory declaration claiming to be Madam Boonsom in order to obtain a replacement title to those properties. This imposter then sold and transferred the properties to Adorna. Both parties were represented by different sets of solicitors and this gave Adorna an opportunity to disclaim knowledge of wrongdoing, especially forgery.
3. The distraught Madam Boonsom took Adorna to Court. On 28 April 1995, the High Court decided that though Madam Boonsom legitimately owned the properties, she failed to provide enough evidence of forgery. The High Court also noted that even if Madam Boonsom could establish forgery, Adorna had nonetheless acquired an indefeasible title under Malaysia's National Land Code 1965. This was because Adorna had successfully proven that it was a bona fide purchaser for value having dealt with the sale and purchase at arm's length.
4. Dissatisfied, Madam Boonsom appealed to the Court of Appeal. On 17 March 1997, her claim was unanimously allowed. The Court of Appeal disagreed with the High Court. It found that forgery had actually been established. The Court of Appeal also held that the law did not allow Adorna, as the first or immediate purchaser, to claim indefeasibility of title even if it was a bona fide purchaser for value. Adorna was thus effectively ordered to return the properties to Madam Boonsom.

5. On appeal, this decision was overturned. On 13 December 2000, the Federal Court allowed Adorna's appeal and reinstated the decision of the High Court. It was reasoned that while forgery was established, first or immediate purchasers such as Adorna were entitled to claim indefeasibility. Adorna was thus allowed to keep the properties.
6. Madam Boonsom passed away before this pronouncement by the Federal Court. Her estate made two unsuccessful attempts at reviewing this decision. This Federal Court's ruling was the subject of harsh criticism not only in subsequent judgments, but also by practitioners and academic writers alike.
7. Ten years later, in a case called *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1, the Federal Court had occasion to rectify the legal position in the Boonsom case. The then Chief Justice of Malaysia, Tun Zaki Tun Azmi went so far as to say that the Federal Court decision in Boonsom's case was made in 'error'.
8. While *Tan Ying Hong* finally rectified the legal position, the unfortunate fact remained that Madam Boonsom's properties were lost to her and her estate. Madam Boonsom's estate then sued the Land Office for the fraudulent transfer of the beachfront properties. Her estate claimed that the fraudulent sale and transfer was only possible due to the negligence of the Land Office. Unfortunately, the claim was dismissed due to the statute of limitations. In dismissing the claim, Justice Vazeer Alam Mydin Meera lamented that the case is a "sad saga... which is now part of the annals of the nation's legal history."
9. The estate of Madam Boonsom Boonyanit then initiated a claim under the auspices of the ACIA.

**Mr. Mohanadass Kanagasabai**, the first speaker of Part 2, was her counsel in Malaysia. He provided further insight into the background of Madam Boonsom Boonyanit's claim and the procedural history of the legal battle to recover the properties. He explained the legal strategy that he had formulated as counsel, drawing inspiration from his own personal experience in the Indian Arbitration of *White Industries v Republic of India*. He utilised the provisions of the ACIA and the 1987 ASEAN Investment Agreement to seek reparations from the Malaysian Government.

**Dato' Chan Seong Gnoh** who led the team of experts and litigators defending the claim shared her experience in how she had conducted the negotiations between the warring parties, the difficulties faced and the reasons for Malaysia's response to the claim by the estate of Boonsom, as well as some of the arguments the Malaysian Government would have taken if the claim or dispute had proceeded to arbitration.

Without breaching confidentiality, Dato Chan explained how a settlement between the Malaysian Government and the Estate of Madam Boonsom Boonyanit was finally reached.





The second panel discussion concluded with both speakers agreeing on the important relationship between the judiciary and the organs of a State which has a real impact on a State's responsibility in complying with its international treaty obligations

## CONCLUSION

By all accounts, the Roundtable Discussion was a resounding success. More than 200 participants from not just the ASEAN Member States tuned into the virtual event. Some came from as far as China, England, United States of America and Australia. The participants were also active during the Questions and Answers sessions held at the end of the Roundtable Discussion.

While the Covid-19 pandemic may have raged the world with no corner spared, it did not dim the human spirit. It provided opportunity to converge virtually, to learn and to prosper. The participants were certainly encouraged and many left the Roundtable Discussion enlightened, comforted by the presence and regime under the ACIA and, eager to learn more.

ALA Malaysia records its appreciation to all who have assisted and contributed to the success of the Roundtable Discussion.

# ALA NATIONAL COMMITTEES

These are the new Chairs of the ALA National Committees of Brunei, Cambodia, Indonesia, Myanmar, and Thailand.

## ALA BRUNEI

The new Chair of ALA Brunei, Yang Berhormat Awang Haji Ahmad bin Pehin Orang Kaya Laila Setia Bakti Diraja Dato Laila Utama Haji Awang Isa, who was appointed Attorney-General of Brunei on 6 October 2020, and who succeeds the outgoing Chair, Yang Berhormat Dato Seri Paduka Haji Hairol Arni bin Haji Abdul Majid.



## ALA CAMBODIA

The new Chair of ALA Cambodia, Attorney Ly Chantola, who was appointed President of the Bar Association of Cambodia on 16 October 2020, and who succeeds the outgoing Chair, Attorney Soun Visal.



## ALA INDONESIA

The new Chair of ALA Indonesia, the Honourable Chief Justice Muhammad Syarifuddin, who was elected Chief Justice of the Supreme Court of Indonesia on 6 April 2020, and who succeeds the outgoing Chair, the Honourable Chief Justice Muhammad Hatta Ali.



## ALA MYANMAR

The new Chair of ALA Myanmar, Dr Thi Da Oo, who succeeds the outgoing Chair, U Tun Oo.



## ALA THAILAND

The new Chair of ALA Thailand, the Honourable Chief Justice Piyakul Boonperm, who was appointed President of the Supreme Court of Thailand on 1 October 2021, and who succeeds the outgoing Chair, the Honourable Chief Justice Metinee Chalodhorn.

