

Volume 6 (2024)



ASEAN LAW JOURNAL

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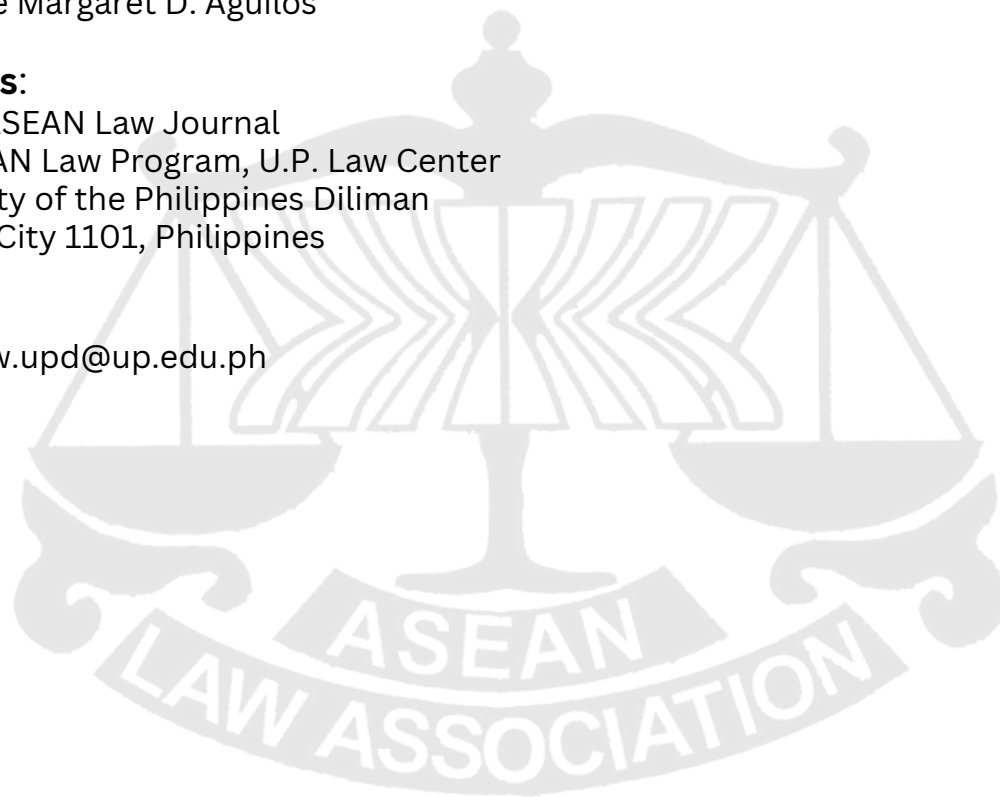
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EDITOR'S NOTE

The ASEAN Law Journal is produced by the ASEAN Law Association (ALA), through its ASEAN Law Institute, and published by the ASEAN Law Foundation, Inc.

The Journal was first published in 1982 with Prof. Purificacion Valera-Quisumbing as Editor-in-Chief and Prof. Myrna S. Feliciano as Associate Editor. Volume 2 was published in 1986 with Atty. Teodoro L. Locsin, Jr., as Editor-in-Chief and Prof. Feliciano as Assistant Editor. The third and fourth volumes were published in 2009 and 2012, respectively, with Prof. Feliciano and Atty. Victoria V. Loanzon as Editors.

After a twelve-year hiatus, ALA has revived the Journal to support ALA's objective of developing ASEAN regional cooperation in (1) "the study of and research in the laws of the ASEAN countries with a view to harmonizing those laws"; and (2) "promoting, exchanging and disseminating information of the laws, legal systems and legal development of the ASEAN countries."

In 2019, ALA established the ASEAN Law Institute to support ALA's aims of "promoting the harmonization of ASEAN national laws and regulations" and "developing ASEAN regional laws and legal structures." Pursuant to these aims, the Institute invited each ALA National Committee to examine whether their country's national laws and regulations were harmonized with their national commitments under the ASEAN Comprehensive Investment Agreement (ACIA), and to hold a round table discussion (RTD) on their findings.

In response to the Institute's invitation, four ALA National Committees examined their country's national laws and regulations in relation to ACIA and held their respective RTDs: Philippines RTD in August 2020, Singapore RTD in March 2021, Malaysia RTD in December 2021, and Thailand RTD in May 2022. The reports on the RTDs are contained in this issue of the Journal.

ANDRE C. PALACIOS



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Report on the Round Table Discussion on Philippine Foreign Investment Rules and the ASEAN Comprehensive Investment Agreement

Reported by ALA Philippines

I. Introduction

On 24 August 2020, the Philippine National Committee of the ASEAN Law Association, (ALA) in collaboration with the ASEAN Law Institute and the Asian Institute of Management, held a virtual round table discussion via the videoconferencing platform Zoom. The round table discussion examined Philippine laws and rules on foreign investment vis-à-vis national commitments under the ASEAN Comprehensive Investment Agreement (ACIA).

Leading the list of speakers was former Chief Justice Artemio V. Panganiban, as Chairman of the Philippine National Committee of the ALA, who delivered the welcome remarks. This was followed by remarks from Dr. Jikyeong Kang, President and Dean of the Asian Institute of Management, and Chairman Avelino V. Cruz of the ASEAN Law Institute. Dr. Federico Macaranas from the Asian Institute of Management spoke on the investment situation in ASEAN amidst the COVID-19 pandemic. Professor Andre Palacios of the University of the Philippines talked about ASEAN integration and harmonization of national rules with ASEAN agreements.

A detailed presentation on Philippine national rules and national commitments under the ACIA was delivered by Patricia-Ann T. Prodigalidad, senior partner of the law firm ACCRALAW. This was followed by reactions from Dr. Rebecca E. Khan of the De La Salle University – College of Law, Acting Director Melissa Anne Telan of the Department of Foreign Affairs – Office of Treaties and Legal Affairs, lawyer Domingo Egon Cayosa as National President of the Integrated Bar of the Philippines, Dr. Samuel D. Bernal of the Asian Institute of Management, and Dean John Paolo Villasor representing the Philippine Association of Law Schools.

The ongoing global pandemic meant that in-person gatherings were not a possibility for this round table discussion. However, the use of videoconferencing successfully resulted in international participation across borders and time zones, with over a hundred people joining the event. While the audience members were predominantly from the Philippines, the online platform allowed viewers to log in from around the world, as several people from across the ASEAN region attended the event, including delegations from the different country chapters of the ASEAN Law Institute. Some of the speakers at the round table discussion were physically in Europe for their online presentations.

II. Summary of the Opening Remarks

In his welcome remarks, former Chief Justice Artemio V. Panganiban, as chairman of the ALA Philippine National Committee, gave a brief history and background of the ALA as a civic organization in Southeast Asia, formed for regional cooperation in the study of the laws of ASEAN countries with a view to harmonizing them. Focusing on the specific topic of the round table discussion, Chief Justice Panganiban stressed the importance of discussing investment laws even if the region's businesses are currently struggling in the midst of a global pandemic. He pointed out (1) the need to be "forward-looking" by preparing the regional investment climate for a postpandemic economic boost through "investment promotion, facilitation and protection"; and (2) that an organized, unified response is more effective than isolated action. He highlighted the ACIA as that much-needed organized regional response to the scarcity of investments brought about by pandemic-induced uncertainties. He emphasized the value of promoting the ASEAN region as a "single market and production base," with a free flow of investments within the region.

Dr. Jikyeong Kang, President and Dean of the Asian Institute of Management (AIM), a coorganizer of the round table discussion, remarked that management and law, along with many other related disciplines, are enablers that allow for continuously adapting responses to issues faced by emerging markets with regard to "deeper economic integration, shrinking development gaps and implementation of sustainable development". She underscored the role of AIM as one of the pioneering business schools in Asia that continuously innovates to "better serve students, companies, governments and societies in this ever-changing world", citing AIM's development of technology-centered curricula and programs. Dr. Kang also emphasized AIM's relationship with the legal community as "critical", as legal expertise is key to economic integration throughout the region. In this light, Dr. Kang highlighted the importance of AIM's continued collaboration with ALA and the ASEAN Law Institute, bringing together people from the fields of law, management, technology, and the social sciences throughout the ASEAN region to help shape the "new normal" and be "forward-thinking" given the current global health crisis.

Chairman Avelino V. Cruz of the ASEAN Law Institute provided a brief background of the Institute. The creation of the ASEAN Law Institute was conceived during Chairman Cruz's presidency of the ALA, "in Siem Reap, in the shadows of the temple of Angkor Wat", launched in Manila in 2019, with the Institute's work plan approved by the ALA Governing Council later that year. Chairman Cruz described the topic for the round table discussion as an "audit of compliance" to determine how far have ASEAN countries – particularly for this round table discussion, the Philippines – have adhered to and complied with specific provisions of the ACIA. Chairman Cruz pointed out that this regional investment treaty impacts the lives of 520 million people in Southeast Asia.

He recalled from experience that rules for foreign investments in the region have not always been straightforward nor based on international law, but rather domestic statutes and rules. Chairman Cruz pointed out that, since the ratification of the ACIA in 2009, more than eighty agreements have been signed among the ASEAN countries, but their implementation has been haphazard, necessitating the mission of this round table discussion and the other discussions to follow throughout the ASEAN, to “pinpoint where such implementation can be improved”. This mission is pursuant to a specific request for legal assistance addressed by the ASEAN Secretariat itself to incumbent ALA President Chief Justice Menon of Singapore in March 2019. Chairman Cruz underscored the pertinence of mufakat (consensus) in ASEAN action, and stressed that “perfect compliance” was not an achievable goal, and thus “substantial compliance” would be sufficient. Chairman Cruz highlighted that this forum inaugurates the project of the Institute to start monitoring compliance with the ACIA.

III. ASEAN Investment Situation Amidst the COVID-19 Pandemic

Dr. Federico Macaranas, adjunct professor at the Asian Institute of Management, discussed the ASEAN pandemic investment climate, emphasizing the need for the region to adapt to the “new normal”. Dr. Macaranas stressed that “the pandemic makes deeper ASEAN integration imperative,” and that this would require internal reform in each country, including legal commitments and how social, economic and governance structures fit. He further stated that laws need to change to reflect new developments as technologies and behavioral sciences advance. Pointing out that there will probably be lower government spending after pandemic stimulus expenditures, it would be essential to “rebalance” individual economies in the ASEAN region with a view to what fellow ASEAN member states are doing. On this point, Dr. Macaranas said that investment and trade liberalization must be accompanied by economic and technical cooperation, “to lift up capabilities of lagging sectors” especially for newer ASEAN members lagging behind in development.

Dr. Macaranas highlighted that foreign direct investors are available for long-term development, and thus ASEAN economies must provide updated facilities, infrastructure and technology to attract investment. Dr. Macaranas specifically highlighted the need for investments in health and education, mindful not just of economic goals but also social, environmental and governance objectives. Dr. Macaranas identified specific examples where ASEAN cooperation could focus: tax-subsidy schemes for talent developed in ASEAN, rehabilitation of mining areas and overfished waters, and joint exploration of resources in exclusive economic zones to assure freedom of navigation and overflight. Emphasizing the urgent need for integration, Dr. Macaranas said that the ASEAN member States’ “economic baskets are now interconnected”, thus requiring “cooperation while competing” towards achieving sustainable development goals.

Professor Andre Palacios of the University of the Philippines – College of Law delivered a presentation intended to provide the legal context of foreign investment rules in ASEAN. Professor Palacios illustrated how harmonization is essential to achieving ASEAN regional integration. Asserting that ASEAN integration will bring greater peace and prosperity to the region, Professor Palacios explained the rationale of harmonizing the national rules of the ASEAN member States with each other (horizontal harmonization), and also the rationale of harmonizing national rules with commitments made pursuant to intra-ASEAN treaties (vertical harmonization). Vertical harmonization will strengthen the rule of law in the ASEAN region, as well as complementing and accelerating horizontal harmonization.

Noting that the COVID-19 pandemic has disrupted the steady flow of persons and goods across the ASEAN region, Professor Palacios also observed that the pandemic demonstrated that “coordinated action, collective response, and collaborative effort” are necessary to overcome the common threat posed by the pandemic to ASEAN economies. He further proposed that ASEAN countries can, post-pandemic, build on their shared experiences to achieve ASEAN integration.

Recalling that the ASEAN charter set out the goal of establishing ASEAN as a single market and production base, Professor Palacios described the ASEAN vision of a region with the free flow of goods, services and investments across borders; the facilitation of free movement of businesspersons, professionals, talents, and labor; and the freer flow of capital across the region. Emphasizing the necessity of horizontal harmonization, Professor Palacios pointed out that this free flow of goods cannot be achieved unless countries within the ASEAN region have similar legal definitions of property, ownership, transfer of ownership, and other legal concepts. He emphasized that lack of harmonization translates to economic cost in the movement of goods, to the detriment of ASEAN consumers, citizens and governments. With respect to investments, he pointed out that a lack of harmonization with respect to the definition of investment, and the rights accorded to foreign investors, among other related legal concepts, was a hindrance to the free flow of FDI.

The role of vertical harmonization in accelerating horizontal harmonization was explained by Professor Palacios as a way to bypass the issue of identifying which national law within ASEAN would serve as a model or a standard for other member States to follow, considering that all member States are sovereign equals. Using the relevant ASEAN agreement as the standard, member States would then use its own national commitments under the treaty as a guidepost towards harmonization. Save for a few reservations to ASEAN treaties, most ASEAN countries make the same commitments when signing on to ASEAN agreements, thereby achieving a common standard for all member States upon which to harmonize their national rules.

As specific examples under the ACIA, countries made the commitments to streamline and simplify procedures for investment applications and approvals, and also to provide advisory services to the business communities of other Member States. Emphasizing the need for vertical harmonization, Professor Palacios cited

observations from legal scholars that ASEAN member States “do not obey ASEAN law” and that “regional compliance is hovering at about 30%.” Monitoring compliance is an area where the ASEAN Secretariat and the ASEAN Law Association can work together in supporting and promoting a rules-based ASEAN.

V. Philippine National Rules and National Commitments under ACIA

The main agenda item for the round table discussion was an examination of the investment laws and rules of the Philippines to assess their alignment with national commitments of the Philippines as a treaty member of the ACIA. Lawyer Patricia-Ann T. Prodigalidad, senior partner of the law firm ACCRALAW, delivered this presentation as the ASEAN Law Institute Country Monitor for the Philippines.

As an overview of her team’s findings about Philippine law and rules on foreign investments, Atty. Prodigalidad reported that: (1) the Philippines does not have a unified investment law; (2) the Philippines has two generally worded investment laws (the Omnibus Investment Code and the Foreign Investments Act) that predate the ACIA and do not specifically relate to the commitments under the ACIA; (3) Philippine investment law do not operate in isolation but are interrelated with the Constitution and other domestic laws; and (4) judicial decisions form part of the Philippine legal system.

During the review of relevant Philippine laws, it was discovered that inconsistencies existed across laws, rules and jurisprudence. This renders the level of harmonization of Philippine laws with the ACIA as dynamic rather than static, as the alignment of commitments can be affected by future court decisions or legislation. It is therefore difficult to come up with a singular and categorical assessment of Philippine national rules and actions and their level of harmonization with commitments under ACIA. Nonetheless, harmonization appears to be a target.

With respect to facilitation of investments during the pre-investment stage, the commitment under the ACIA “to streamline and simplify procedures for investment” are addressed across a number of laws and regulations, including: (1) the Omnibus Investment Code; (2) the Anti-Red Tape Act; (3) the Ease of Doing Business and Efficient Government Service Delivery Act; and (4) the launch by the Board of Investments of the “One Window Network”. Considering all this, Philippine laws are set towards harmonization with the aforementioned ACIA commitment.

At the investment stage, the ACIA demands national treatment by host countries of foreign investors in the admission, establishment and management of investment; prohibition on nationality requirements for senior management; and restrictions on imposing nationality requirements for boards of directors. The Philippines has generally met this commitment, as the Omnibus Investment Code and the Foreign Investments Act treats investments the same without regard to national origin. However, the Philippine Constitution and certain statutes exclusively reserve certain areas of investment to Philippine citizens. These limitations are reflected in the

Philippines' reservation clauses to the ACIA. Furthermore, industries that are nationalized or partially nationalized pursuant to statute, rather than the Constitution, have been subject of legislative amendment to allow entry to foreign investors; specific examples include the banking sector, SMEs, and retail trade. However, this liberalization comes with potentially excessive capitalization requirements, and the legislation has been subject of jurisprudence interpreting the definition of capital in a manner that may be viewed as incompatible with national treatment obligations. As for the participation of foreigners in the management, administration, operation or control in a business, the Constitution and Philippine laws, such as the Anti-Dummy Law, place nationality restrictions on the selection of who can manage the investment.

The provisions of the ACIA on the protections accorded to investments were also examined by Atty. Prodigalidad and her team. As for the treaty protections of fair and equitable treatment and full protection and security, Philippine constitutional guarantees of due process ensure compliance with this treaty standard. Philippine law and rules on expropriation and the computation of valuation and compensation are generally aligned with the ACIA's provisions reflective of the international minimum standard that expropriation may only be carried out (1) for a public purpose; (2) in a non-discriminatory manner; (3) with payment of prompt, adequate, and effective compensation; and (4) with due process of law. However, Philippine law provides different legal avenues for expropriation. For example, the government can expropriate through the Right of Way Act, and it can also exercise the right of eminent domain through Rule 67 of the Rules of Court. The latter rule allows taking first and with compensation placed in a government depositary for later payment to the property owner, and uses assessed value rather than fair market value in determining compensation, and is thus incongruent with the obligation under the ACIA's expropriation provision.

On the matter of dispute resolution, the Philippines is a treaty member of both the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, and the Washington Convention establishing the International Centre for Settlement of Investment Disputes. Commitments under these treaties is further underscored by the Alternative Dispute Resolution Act of 2005, and the Special Rules of Court on Alternative Dispute Resolution.

In closing, Atty. Prodigalidad noted that FDI in the Philippines was on an upward trend until 2018, but drastically reduced by 38% in 2019. Based on reports, most of the investments, whether foreign or intra-ASEAN in the region are going to countries other than the Philippines. Consistency and predictability are key to attracting foreign investment. Harmonization with treaty commitments must be obtained through an integrated approach, rather than piecemeal amendments.

VI. Reactions from Stakeholders

1. Dr. Rebecca E. Khan, panel chair

Dr. Khan began by providing a brief overview of the checklist she crafted as an assessment instrument as well as the text studied to compare national laws. The checklist serves as a preparatory tool for the country monitors in preparing country

reports describing the ASEAN Member State's regulations and actions – this is not just executive or legislative actions but other governmental action as a whole – concerning investments by foreign investors in that country's territory, for the purpose of assessing whether such laws, regulations and actions are in harmony with the country's commitments under the ACIA. Dr. Khan emphasized that the focus of the ACIA is for the promotion and protection of investments. While investment regulation is involved, the main theme is promotion of investments within the region and also attracting investment into the region. Dr. Khan referred to the points made by Prof. Palacios: the vertical harmonization of national laws with the ACIA is the first step in achieving this aim of regional integration and fostering an effective investment environment within ASEAN.

Towards these goals, the national commitments under ACIA span the entire lifetime of a foreign investment. Dr. Khan explained that this is why the checklist to be used by country monitors directly reflects the commitments under the ACIA. National laws vary – the form, the substantive content, the government agencies involved – these vary from State to State. However, because this is a multilateral treaty, each State's national commitments are the same under the treaty. Thus, the text of the ACIA is the starting point in determining exactly where each country is – and the region as a whole – in terms of harmonizing relevant investment laws. Because the ACIA is used as the base text, Dr. Khan organized the checklist according to investment phases. Four investment phases portend national commitments that ACIA imposes under each of these four phases. First, the pre-investment or pre-establishment phase; second, the investment phase, or when the investment has become a going concern; third, post-investment, or when the investment activity in the host State ends and the investor exits the territory; and fourth, dispute resolution. Of course, not all investment activities end in disputes, but if it does, the ACIA has provisions about that as well. Thus, the ACIA covers the span or lifetime of an investment, and the checklist reflects this. The ACIA itself does not organize the provisions in this way; but for purposes of country monitors looking at their various laws, it might be helpful to analyze laws from a chronological perspective when it comes to investment activity.

The salient feature of the ACIA is the treatment of foreign investors within the territory of the Member States. These treatment provisions are something that ACIA has in common with most international investment agreements or IIAs. These key features of IIAs are: the obligations to provide fair and equitable treatment, full protection and security, access to justice, national treatment, most-favored-nation treatment, the obligation to allow the free transfer of capital, and the obligation to follow international legal standards for expropriation. Dr. Khan noted the significant discussion of expropriation in Dr. Prodigalidad's presentation. These features are "treatment obligations", and the ACIA has these in common with most other IIAs. Dr. Khan pointed out that the ACIA goes a step further and provides some unique and very particular provisions with regard to the pre-investment phase that are not found in all IIAs. The ACIA contains specific national commitments in the pre-

investment phase, such as establishing “onestop investment centers” and providing mechanisms for access to information regarding investment policies and rules. These unique, concrete commitments underscore the ACIA’s aim to create a welcoming investment environment within ASEAN. Dr. Khan noted Atty. Prodigalidad’s findings that the Philippines has centers established by the BOI and DTI specifically for disseminating information to possible foreign investors.

Dr. Khan agreed with Atty. Prodigalidad’s observations that laws with respect to corporations, the banking sector, tax regulations and laws, laws that deal with export zones, immigration, and labor – these laws all come into play in determining a country’s compliance with national commitments under the ACIA. Even in countries that have a more comprehensive investment law that covers a wider scope of activities than the Philippines does in its fragmented investment statutes, other laws will also have to be assessed with respect to that country’s international obligations under the ACIA. Lastly, Dr. Khan highlighted the point made by Prof. Macaranas that a “granular look” at particular sectors of investment was necessary to identify what kind of regulation is present in these sectors, as laws which do not pertain directly to foreign investment may have an impact through regulation of certain activities. The key takeaways here are that national commitments under the ACIA span the lifetime of an investment, and that it covers a wider set of laws than what might be identified specifically as investment laws.

2. Acting Director Melissa Anne Telan of the Department of Foreign Affairs – Office of Treaties and Legal Affairs, representing the government sector

Atty. Telan shared Atty. Prodigalidad’s view that there is an absence of a unified investment law which makes it a challenge to track whether Philippine commitments under the ACIA are complied with. Atty. Telan noted that having investment laws appear throughout several rules and statutes was incongruent with the commitment under the ACIA to improve transparency and predictability of investment rules, regulations and procedures for promoting investments across the ASEAN member States. Underscoring the importance of transparency, Atty. Telan pointed out that investor confidence would be improved if relevant information on investment conditions was easily available.

Atty. Telan noted that the process of Atty. Prodigalidad’s analysis of Philippine compliance with ACIA commitments was the same process that the Department of Foreign Affairs – Office of Treaties and Legal Affairs undertakes along with the implementing government agency prior to endorsing an international agreement for ratification. Ratification, not signature, binds the country to a treaty, and the Constitution requires Senate concurrence to presidential ratification. Section 7 of Executive Order No. 459 (s. 1997) provides that all executive agreements, after signing, shall be transmitted to the Department of Foreign Affairs for the preparation of ratification papers. The endorsement issued by the Department states whether the international agreement is in consonance with Philippine laws and policies. If an enabling law or regulation is required in order to meet the country’s commitments under that international agreement, such laws and regulations must be enacted prior to ratification to avoid a situation where the Philippines is bound by a treaty to which its laws are incongruent.

Atty. Telan further noted that, more than examining Philippine law for the presence of provisions that “tick the boxes” for commitments under ACIA, further study must be made whether Philippine laws in totality meet country commitments under ACIA. Atty. Telan cited the specific example of expropriation, wherein Philippine law provides the same standards for a lawful direct expropriation; however, as the ACIA also provides for protections against unlawful indirect expropriation, Philippine law needs to be examined to assess whether this concern is addressed as well. In sum, Atty. Telan noted that the Philippines ratified the ACIA because it is a progressive investment treaty adopting international best practices that would increase the flow of investments to the Philippines from both ASEAN and ASEAN-based investors. To make the ACIA work for the Philippines, the Philippines has to meet its commitments.

3. Atty. Domingo Egon Cayosa, National President of the Integrated Bar of the Philippines, representing the legal profession

Atty. Cayosa expressed the view that it would be helpful to determine which Philippine laws were crafted expressly to meet treaty commitments, as well as adopting a comparative approach to examine how Philippine compliance with the ACIA compares to that of other ASEAN member States. Atty. Cayosa further posed the question of the role of China in ASEAN integration. He further stated that the business community should be consulted in determining whether laws address their concerns and are implemented effectively.

4. Dr. Samuel D. Bernal, Adjunct Professor – Asian Institute of Management; Senior Fellow – ASEAN Law Institute, representing the academe

Dr. Bernal noted that the presentations at the round table were helpful because it adopted an interdisciplinary approach: law, economics, business, health, technology.

On this note, Dr. Bernal shared information about the collaborations engaged in by the Asian Institute of Management with the ASEAN Law Institute, particularly in the area of law and technology, and its impact on investments. Dr. Bernal shared that the AIM emphasizes the context of ASEAN integration in its graduate courses on data science and innovation.

Dr. Bernal observed that even if the topic of the round table discussion was the ACIA, much discussion involved the impact of the COVID-19 pandemic. He noted that the virus will be around for a long time and the mutation of the virus will pose challenges. Underscoring the importance of innovation, Dr. Bernal ended by saying that investments in health technologies directly impact economic and political stability and growth. Scientific evidence and innovation should be at the core of lawmaking in relation to pandemics and health issues. Dr. Bernal emphasized that pandemics are not national issues, but international ones; a regional and collaborative approach in ASEAN is therefore necessary.

5. Dean John Paolo Villasor, University of Negros Occidental-Recoletos; Executive Vice President, Philippine Association of Law Schools, representing the academe

Dean Villasor began by acknowledging the fragmentation of investment rules in Philippine law and the need for a unified investment law. However, he pointed out that Philippine investment law in its totality emphasizes economic development, rather than social development. He posited that a paradigm shift from the purely economic to a more balanced socio-economic approach was necessary in crafting a national investment priority plan. Citing public health as a current and relevant example, he proposed studying the viability of measures such as tax incentives at the national and local government levels for foreign investors in the healthcare industry, developing medical tourism, and developing research and development. Dean Villasor suggested activating the ASEAN university network, as the academe can play its part in finding solutions to emerging global solutions.

On the matter of ease of doing business, Dean Villasor noted that great strides had been achieved over the years, noting that one-stop shops can be reactivated to attract foreign investment. He emphasized the importance of being able to access services online, noting that the pandemic has restricted movement. Dean Villasor suggested that the Data Privacy Act and its application to investment activity has a role in boosting investor confidence because of its reflection of the approach the European Union took to data privacy. Dean Villasor emphasized “cyberspace engagement” relies heavily on cybersecurity and the privacy of individuals interacting in that space. On this point, he suggested special investor’s visas for entrepreneurs in the cybersecurity field, as well as tax incentives in the information technology field.

Dean Villasor ended by citing forecasts from economists prior to the pandemic that by the year 2050, the Philippines was projected to be the 16th largest economy in the world. Dean Villasor suggested that structural adjustments would keep the Philippines on this trajectory might entail special legislation and administrative rules to harmonize Philippine law with the ASEAN legal framework to reflect the legal landscape of cyberspace.

VII. Summary of the Round Table Discussion

The key observation in the report of the country monitor was that the Philippines does not have a unified piece of investment legislation, with relevant law and rules appearing not just in the Omnibus Investment Code and the Foreign Investments Act, but a wider swath of applicable law and rules. The reactors to the presentation agreed with this observation and were of the view that having a comprehensive piece of legislation on which foreign investors can rely for guidance on Philippine law and rules on investment was necessary in boosting investor confidence and thereby attracting foreign investment. Whereas Philippine law was generally consistent with its national commitments under the ACIA, there were still areas where commitments could be strengthened and the transparency of relevant information could be improved.

The COVID-19 pandemic weighed heavily on the round table discussion, necessitating not only the virtual format of the event, but also appearing as a theme throughout the discussion. The need for improving the investment climate in the ASEAN region was viewed as an impetus for accelerating economic integration in the region in order to attract foreign investment and boost the economies of member States as well as ASEAN collectively to recover from the pandemic.





ASEAN Law Association (Singapore) Roundtable Report on Singapore & the ASEAN Comprehensive Investment Agreement

Reported by ALA Singapore

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.

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

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.

In his opening remarks, the Honourable Justice Lee Seiu 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.

His Excellency the Honourable 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.

The first presentation was by Dr Romesh Weeramantry (Head, International Dispute Resolution, Centre for International Law, National University of Singapore and Foreign Legal Consultant, Clifford Chance LLP). 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.

Firstly, 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 Derek Loh (Deputy Director-General (Economic & Social), International Affairs Division, Attorney-General's Chambers) and Mr Eric Peh (Assistant Director, ASEAN Division, Ministry of Trade & Industry) spoke on the role of the rule of law in Singapore in relation to compliance with the ACIA.

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. Firstly, 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 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 Locknie Hsu (Professor of Law, Singapore Management University) ("Prof Hsu"), presented on the recent developments in Singapore law that are of relevance to ACIA dispute settlement on a state's Investment-related measure.

Prof 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.

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.

The Honourable Justice Pang Khang Chau ("Justice Pang") moderated the question and answer session ("Q&A Session"). Mr Francis Xavier, SC, PBM, C. Arb (Regional Head, Disputes Practice, Rajah & Tann Asia) ("Mr Xavier SC") 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; Partner, Allen & Gledhill LLP) 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.



ASEAN Law Association (Thailand) Roundtable Report on Thailand & the ASEAN Comprehensive Investment Agreement

Reported by ALA Thailand

On 26 May 2022, the Thailand National Committee of the ASEAN Law Association (ALA) in collaboration with the ASEAN Law Institute, held a virtual roundtable discussion on the topic of “Thailand & the ASEAN Comprehensive Investment Agreement” via Zoom.

The roundtable discussion was participated by over seventy representatives from ALA Malaysia, Myanmar, the Philippines, Singapore, and Thailand. The event commenced with the welcoming remarks delivered via pre-recorded video message by Hon. Chief Justice Piyakul Boonperm, followed by the opening remarks from H.E. Atty. Avelino Cruz.

Hon. Chief Justice Piyakul Boonperm, the President of the Supreme Court of Thailand, the Chairman of the Thailand National Committee of the ASEAN Law Association expressed her gratitude to all distinguished guests and participants who expressed keen interests for this roundtable discussion. Due to the pandemic of COVID-19, countries in the region have suffered from an economic recession for almost three years. Nowadays, there has been a lift of measures to prevent the spreading of the virus in many countries, especially, the border entry measure. This benefits the countries which depend mostly on the tourism industry like Thailand and other countries in ASEAN, and also benefits the investment in various kinds of industries like tourism and manufacturing as well. The ASEAN Comprehensive Investment Agreement mainly aims to maintain freedom, convenience, transparency, and a competitive investment environment. The objectives of ACIA also contribute to the developments in related fields such as labor skills, infrastructures, and transportation. Besides the benefit of the economic growth and region development, the problems of the climate change crisis are much concern as it causes various natural disasters like floods, severe storms, and also the pandemic which affect directly the oversea investment reliability. The new trend of investment is focusing on the sufficient use of the natural resources, the management of the use of the limited resources with the highest profit, and the development of the eco-friendly production technology and the product to reduce the effects of the climate-changing which will be occurring in the future, to ensure the entrepreneurs to invest and to stabilize the well-being of people in the region.

The roundtable discussion on “Thailand and the ASEAN Comprehensive Investment Agreement” hosted by the Thailand National Committee and the ASEAN Law Institute is aimed to be the think-tank on the ASEAN Comprehensive Investment Agreement and the related laws in Thailand. The objectives of the discussion are to contribute to the recognition of the enforcement and practice of the ASEAN Comprehensive Investment Agreement in Thailand and to enhance the regional collaboration in law study and research in ASEAN, and what has been discussed will be useful in motivating and promote the investment in the region in the future.

H.E. Atty. Avelino V. Cruz, Chairman of ASEAN Law Institute, greeted the President of the Supreme Court of Thailand, the head of the delegation of ALA National committee members; Singapore, Philippines, Myanmar, the Secretary-General of ALA, the member of the ALA Thailand, distinguished guests and participants. He expressed his gratitude to the Thailand National Committee and the ASEAN Law Institute for arranging this virtual meeting. The brief background of the ASEAN Law Institute was given with the expression to H.E. Dr. Surin Pitsuwan, the former Secretary-General of ASEAN, regarding the importance of the ASEAN Law Association as a very charter of law in the ASEAN. The objectives of today’s meeting are focusing on the ASEAN Comprehensive Investment Agreement or ACIA enforcement and compliance in the ASEAN countries, in this meeting, Thailand. The matters he had in his mind concerning these matters were 1) to clarify all accompanying benefits from the ACIA; 2) to identify the specific areas which investors should take note of; and 3) to discuss Thailand’s climate for foreign investments, especially outlining the latest developments in dispute settlements mechanisms under the ACIA.

Judge Paul Quan, Secretary-General of ASEAN Law Association (ALA), and Mr. Ngwe Zaw Aung, Director, Ministry of Legal Affairs (Myanmar) also delivered a short speech, expressing their gratitude to ALA Thailand and wishing ALA Thailand a very successful and fruitful roundtable discussion.

Judge Thiti Susaoraj (Moderator) introduced the background of this roundtable discussion on the current situation in the development of Thailand, during the pandemic era. ASEAN has proved itself for a long time and becoming a new regional economic powerhouse. According to the draft economic data, in the year 2019, before the COVID-19, ASEAN is the highest ever inflow of Foreign Direct Investment or the FDI which is 183 billion USD, this is making ASEAN the largest recipient of FDI in the world. Even in the COVID-19 era, the years after 2020, there was 137 billion USD in FDI, also there are several developments in regional cooperation, especially, the ASEAN Comprehensive Investment Agreement (ACIA) which is the most important instrument to deal with the issue of investment among ASEAN, including ASEAN plus non-ASEAN countries’ agreements such as the Regional Comprehensive Economic Partnership (RCEP) or some adoption of ASEAN Comprehensive Recovery

Frameworks. At this time, we apparently see roughly growth of ASEAN in terms of infrastructure development, in order to facilitate investment, for example, the new high-speed railway between Laos and China, and there is the construction of the high-speed railway to the eastern part of the country called EEC to link the transportation in all means, etc. Thailand is a part of ASEAN and concerted effort has been made to keep up with this commitment to make ASEAN more prosperous by adopting regional agreements or measures for dealing with the post-pandemic era.

Dr. Kraijakr Thiratayakinant (Counsellor, Head of International Agreements SubDivision, International Economic Policy Division, International Economic Affairs Department, Ministry of Foreign Affairs of Thailand)

Dr. Kraijakr Thiratayakinant provided the presentation on 3 topics of (i) the key feature of ACIA and the benefit of the commitments, (ii) how Thailand responds to the commitment, and (iii) the challenges from other treaties.

(i) The key feature of ACIA and the benefit of the commitment

ASEAN Comprehensive Investment Agreement entered into force on 29 March 2012. It aims to create a free and open investment regime in ASEAN in order to achieve the end goal of economic integration under the ASEAN Economic Community or AEC (Article 1, ACIA). There are four pillars of investment, namely liberalization, protection, promotion, and facilitation. It enhances the investment collaboration and cooperation among the member states of the ASEAN members. ACIA adopts the international best practices and more comprehensive Investor-States Dispute Settlement (ISDS) provisions. According to the 4 pillars of ACIA, the provisions on investment promotion and facilitation are less onerous than the provisions of investment liberalization and investment protection. The investment liberalization mostly focuses on 5 business sectors accordingly to the single negative-list approach which are manufacturing, agriculture, fishery, forestry, mining and quarrying, and services incidental to the previous five sectors. The provisions in ACIA such as the National Treatment, the Most Favoured Nation (MFN) treatment, the Compensation in Cases of Strife and etc are comparable to the international best practices. ACIA provides benefits to both investors and the host country of the investment. Investors can enjoy protection of their businesses and investments under ACIA while the government of the host country has maintained the right to regulate for public purposes. The most contemporary example is the potential losses caused by measures imposed by the governments in ASEAN to contain the spread of the COVID-19 pandemic in the past few years.

(ii) How Thailand responds to the commitment

In the past 60 years, Thailand has experienced two ISDS cases, which are “Walter Bau vs. Thailand (2005)” and “Kingsgate vs. Thailand (2017)”. The cases make the government and the public become cautious when it comes to international investment agreements. Since 2017, the Thai government has approved the Negotiation Framework for Bilateral Investment Treaties (BITs) in 2018, developed the Model treaty for BITs in 2020, and in 2019 established a new overseeing mechanism in the form of the “Committee on the Protection of International Investment” to deal international investment protection in three phases, namely the prevention phase, management phase and the dispute phase. The Committee has two sub-committees to deal with the policy as well as the legal issues concerning international investment protection.

(iii) The challenges from other treaties

ACIA and new trends in International Investment Agreements, in recent years, governments around the world have realized that they need policy space or the right to regulate to implement policies for measures that would promote public welfare objectives, for example, during the COVID-19 pandemic, the government needs the policy space to implement the necessary measure without the concern of being sued by investors through ISDS mechanism. Under ACIA, there are flexibilities and exceptions that strike the balance between investment protection and policy space/right to regulate.

For the question concerning the update of ACIA, in the past 10 years, there are 4 protocols to amend ACIA, which mainly focus on investment liberalization, including reservation list and the Prohibitions of Performance Requirement (PPR). In terms of investment protection, ASEAN member states may not have the incentive to amend because 1) ACIA already has the provisions that adequately provide policy space. In addition, investors are able to use the newer agreements under ASEAN +1 FTAs.

Ms. Prewprae Chumrum, (Executive Director, Bureau of Trade in Services and Investment Negotiations, Ministry of Commerce of Thailand)

Ms. Chumrum outlined her presentation on three main topics; namely, the current review of ACIA, the present and upcoming challenges of ACIA implementation, and future trends of investment obligations.

Ms. Chumrum presented on the current review of ACIA that the current priority deliverable for ASEAN cooperation on investment is ‘to transition ACIA Reservation Lists (RLs) from Single-Annex Negative Lists to Two-Annex Negative Lists’.

The mandate is to transition the commitments of the original ACIA. ACIA is an investment agreement that has a legalization aspect. When member states normally have the investment obligations and the legal commitment, their commitments would be negative, which is a norm, and in practice, they would have a two-annex negative-list approach.

The transition of the ACIA RLs into a two-annex negative list should adhere to the following 2 key mandates, namely: (1) The 21st AIA Council (held in August 2018) agreed to transition the ACIA RLs into a two-annex negative list which shall be completed by end-2023 unless otherwise agreed, and (2) The 4th Protocol to amend the ACIA (signed in July 2022) allows making RLs against 'Prohibition of Performance Requirements (PPRs)' which shall be concluded within 5 years from the date of entry into force unless otherwise agreed.

The pending issues concerning the transition of the ACIA RLs into a two-annex negative list were mentioned by Ms. Chumrum. In order to make progressive liberalization envisaged by ACIA and to improve the ACIA on par with other ASEAN-plus agreements, there are two additional elements for ACIA's modification. The first element is the expansion of scope beyond the existing five non-service sectors (manufacturing, agriculture, fishery, forestry, mining & quarrying). The second element is the introduction of the Ratchet mechanism to be in line with RCEP commitment (Singapore, Malaysia, Brunei, Viet Nam, and Thailand).

Ms. Chumrum observed that ACIA lags behind when compared with other ASEAN-oriented FTAs, especially RCEP, e.g., Scope, Ratchet mechanism, and PPRs. (Prohibition on Performance Requirements) and that ACIA's review is challenging.

Ms. Chumrum shared her view that low utilization of the ACIA is the present challenge of ACIA implementation. Even though the ACIA offers a wide range of benefits for all investors, including investment liberalization, transparency, and facilitation, the level of utilization is not so high due to alternative channels for foreign direct investment (FDI) investors or other regimes which may provide investors with numerous investment incentives. The Thailand Board of Investment (BOI) provides many incentives both tax and non-tax, e.g., movements of foreign professionals, land holding, market access, and tax exemption. Other regimes may grant greater rights to allow investors to hold shares or equity up to 100%. Meanwhile, the lists under the ACIA largely allow the ASEAN ownership of up to 51% or 70% of the total shares in the locally incorporated entity and allow ASEAN investors to hold shares up to 100% in a certain sector. In addition, Ms. Chumrum mentioned other investment incentives to fast-track investments, e.g., tax holidays, income tax, and land ownership rights. In general, the investment agreements would permit only the locals to own land, which is a challenge for all member states; however, the investment incentive package will allow foreign investors to own land.

Another present challenge of ACIA implementation is a limited level of liberalization. A limited level of liberalization poses challenges to ACIA implementation because of the limited scope to five traditional non-service sectors and limited market access to agriculture, fishery, mining, and forestry.

Ms. Chumrum further highlighted that impact of the COVID-19 pandemic poses the upcoming challenges to ACIA implementation, underlining the importance of balancing between public health welfare and international obligations.

With regards to future trends of investment obligations, Ms. Chumrum reflected on Legitimate Public Policy Objectives (LPPO) and the Right to Regulate, and talked about Compulsory Licensing, Tobacco Control, and Joint determination Mechanism for measures related to financial services.

Asst. Prof. Visanu Vongsinsirikul, Ph.D. (Lecturer, Faculty of Economics, Rangsit University)

Asst. Prof. Dr. Vongsinsirikul expressed that this year world economy including the Thai economy is impacted by the Covid-19 pandemic. However, when the situation is getting better, the economy of most countries, including Thailand and its trading partners, is on a slow recovery path because they are still some problems such as supply disruption, labor shortage, Cost-Push Inflation, etc. He reflected that most countries are currently facing the problem of stagflation. Government must urgently relax the various regulations which have been issued to tackle the pandemic to ensure private investment. He further suggested that government needs to accelerate spending as a stimulus to the economy and launch more consumption-boosting programs to boost domestic consumption, especially targeting high-income consumers. Asst. Prof. Dr. Vongsinsirikul emphasized that promoting domestic consumption is the main engine to enhance the economy because, at the present, the economy of many countries depends on domestic consumption. Nevertheless, the government needs to cooperate with other countries through various agreements for building up the demand from outside the country. Small and medium-sized enterprises (SMEs) and important sectors need to be supported in terms of financing and enhancing their productivity. The government also needs to support the private sector in using high technology to create more new engineers for boosting both demand and supply sides in each industry. Asst. Prof. Dr. Vongsinsirikul concluded that only high-skilled workers will be in demand in the future.

Discussion and Q&A

Judge Susaoraj asked Asst. Prof. Dr. Vongsinsirikul if a recession will strike Thailand and ASEAN region due to a “perfect storm” of economic ills that is a recession in the global economy, the high cost of living, inflation, higher interest rates, low employment rates, and cutting government spending.

Asst. Prof. Dr. Vongsinsirikul opined that the perfect storm could lead to stagflation and most countries are facing this problem. The main engine to enhance the economy would be domestic consumption. He suggested that the government needs to launch more programs aimed at encouraging people who have high incomes to spend more and boosting domestic consumption. For example, the Half-Half Co-payment Scheme which is a project that the Thai Government pays 50% of the expense, expecting to stimulate domestic consumption and boost the economy.

Judge Susaoraj further posed the question of the government plans and policies to fight recession to Dr. Thiratayakinant and Ms. Chumrum.

Dr. Thiratayakinant opined that because of the situation concerning Ukraine and also the competitive rivalry between the U.S. and China, globalization could be stalled, countries could form new trade blocs, and the couplings, especially in trade regimes or in technologies could be seen. He also pointed out that Thailand and the other ASEAN Member States will have to face this changing environment and changing landscape, and determine whether ASEAN together can promote regional integration and use economic integration in the region as leverage in terms of economic and also political inference in the international community.

Ms. Chumrum touched on external factors causing the next recession and internal factors contributing to a solution to the upcoming recession. There are several external factors that cannot be controlled by the government of Thailand and the ASEAN Members States, that affects the economy. For example, conflicts between some countries, some measures taken by key trade partners or the world's largest players in global trade, and the COVID-19 pandemic have had negative impacts on the economy. She thereafter explained about internal factors which can be controlled by our government that is government policies and legal reforms. Government can issue measures aimed at stabilizing and expanding consumption. Regarding legal reforms, Ms. Chumrum pointed out that many countries, including Cambodia, Indonesia, and China have made changes to their investment laws. These are something the government could do to fight recession, she concluded.

The question-and-answer session was moderated by Judge Susaoraj. The first question, addressed to the panel, was posed by Asst. Prof. Dr. Chotika Wittayawarakul (Assistant Professor of Law, Chulalongkorn University), on MFN exception provided in Article 6(3)(b) which allows Thailand not to extend favorable treatment provided to U.S. investors under the agreement between the U.S. and Thailand to other ASEAN investors. She expressed that if there is not an attempt to amend this exception, U.S. investors are treated better than ASEAN investors even though ASEAN is aiming to build an integrated investment regime. Dr. Thiratayakinant opined that there is no plan to amend that provision yet and also underlined that arrangement between Thailand and the U.S. might not fall within the exception under Art.6(3) because it is not an FTA.

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The next question from Asst. Prof. Andre Palacios (Executive Director, ASEAN Law Institute) was about the ACIA ISD settlement system, and whether there is an investor-state dispute (ISD) that has been filed under the ACIA ISD settlement system. Dr. Thiratayakinant believed that there are no ISDS cases under ACIA meaning there are no investors within ASEAN that use provisions under ACIA to sue the government in ASEAN.

Another question raised, by Asst. Prof. Palacios, if there is any ISDS filed in the Thai courts, where the ISDS involves a government action that possibly may constitute an ACIA violation. Dr. Thiratayakinant stated that Thai courts do not have jurisdiction to review violations of international treaties, so in that perspective, there are no ISDS cases in Thai courts concerning ACIA or any other treaties.

