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SPECIAL ISSUE ON THE ASEAN CHARTER

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EDITORS' NOTE

The signing of the Asean Charter on 20 November 2007 and its ratifications by member countries took effect on 15 December 2009. As an inter-government organization with a legal personality, the Agreement on the Privileges and Immunities of the Association of Southeast Asian Nations followed on 25 October 2009 which until now has been ratified by Singapore and the Philippines in 2010. This significant event set forth a flurry of activities with the establishment of task forces and committees to study the Charter and its ratifications.

Duting the early part of 2010, ALA Philippines, in preparation of the first ALA Governing Council Meeting after five years, decided to launch "ALA's 30th Anniversary" on the Asean Charter under the sponsorship of ALA Philippines, the Philippine Supreme Court and the Philippine Judicial Academy on 12 February 2010. The lectures were given by the eminent Ambassador Rosario G. Manalo who served as Philippine Ambassador to the European Community from 1979-1987. Deputy Solicitor General Jeffrey Chan Wah Teck of Singapore and EU Ambassador Alistair Bell MacDonald. The contents of all these papers were replicated in this issue of the Journal.

Likewise, the 10th General Assembly held in Hanoi, Vietnam from 14-18 October 2009 had the "Resolution of Issues Under the Asean Charter" as its theme. Asean Secretary-General Surin Pitsuwan called on ALA to actively participate in the roadmap to a full Asean Community by 2015. It is with this in mind that we reproduced the different country perspectives on this topic by notable ALA experts, as well as pertinent documents and reports.

The Asean Law Foundation acknowledges with gratitude the financial assistance of Prof. **Dr. O. C. Kaligis** which made possible the publication of this ALA Journal. The contents of the articles found in this Journal are current at the time of their submission

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Distinguished Lecture Series
Jointly Sponsored by the Supreme Court
of the Philippines, Philippine Judicial Academy
and the Asean Law Association in Manila
12 February 2010

WELCOME REMARKS

By Atty. Avelino V. Cruz

Mr. Chief Justice Puno and the Honorable Members of the Supreme Court; ALA President, Mr. Pham Quoc Anh, our Secretary-General, Ms. Le Thi Kim Thanh, both from Vietnam; the distinguished Chairmen of the various ALA National Committees and members of their delegations, among them, Chief Justice Kifrawi Kifli of Brunei and Chief Justice Sobchock Sukharomna of Thailand; Justices of the Highest Courts in the Asean region, distinguished judges, lawyers and teachers of law, who have journeyed from their respective countries to be present here today.

That said, I would also like to particularly extend, in behalf of ALA Philippines, our grateful appreciation to the entire Philippine Supreme Court and its members whose steadfast support of ALA activities through the years has been incalculable. Our own Chairman is none other than the Chief Justice of this Honorable Court; Chief Justice Artemio V. Panganiban, with ALA from its inception, is a pillar of our Governing Council. Justice Antonio T. Carpio, ALA veteran, founded the first Asean Business Law program at UP in 1996 and Justice Renato C. Corona, ALA Philippines' premier paper writer for the Judiciary at last two General Assemblies in Thailand and Vietnam. They are the two most senior justices of the Court. Likewise, Justices Leonardo A. Quisumbing and Presbitero J. Velasco, Jr. who have served in the Philippine National Committee for quite a while. Justice Adolf S. Azcuna of the PhilJA, who collaborated to produce today's program is another ALA veteran. For making this morning's "Distinguished Lecture Series" possible, let us all give them and the members of the Philippine Supreme Court a warm round of applause, please.

If your honors please – that is how we Filipino lawyers would begin to address this honourable Court En Banc in this august Session Hall. Indeed, for one senior moment, I was wondering what the docket number and caption title was of the case to be heard this morning. We are, in fact, in the midst of a colloquium of select speakers, distinguished for their expertise in the newly minted Asean Charter.

The "Distinguished Lecture Series," in fact, launches the 3-day celebration of ALA's 30th Anniversary and the first Governing Council Meeting in Manila in five years. Thirty years ago, the words of Mr. Teuku Mohamed Radhie, our first Secretary-General,

resonates on the shared vision of ALA, which is – "to organize the legal community of Asean as an institution and leave a deep and lasting impact on greater Asean cooperation."

Underscore "Legal Community." It thus appears that the Asean legal community antedated the declared goal of "Asean community" in the Asean Charter. Rising from the seeds of that shared vision, ALA grew to a vibrant and strong institution bringing under one umbrella, members of the Judiciaries, the legal profession and the academe of the Asean, its roles were filled with the most distinguished names in the Asean legal community. ALA has since regularly published a law journal and over the years has published the 8-volume Asean Law Series culminating in the 1995 authoritative volume "Asean Legal Systems" produced under past ALA President Chief Justice Marcelo Fernan.

For the past thirty years, therefore, ALA has been most successful in promoting a better understanding of our respective laws and legal systems and in ascertaining how legal problems are solved. There being no copyright in law, we are able to copy freely what is workable, thus profiting from that experience.

That journey is now on its 30th year. It is a milestone year for ALA and Asean. It was not until late last year, however, in Hanoi, when Asean Secretary-General Surin Pitsuwan, speaking before the ALA General Assembly sounded the clarion call for ALA to actively participate in the roadmap to a full Asean community by 2015.

ALA responded by creating a high level task force that would assist the Governing Council achieve these goals. We have become energized to study the Charter to answer questions such as the implication of Asean legal identity, the codification of Asean norms, rules and values to guide member-states, appropriate and effective dispute settlement mechanisms and for the legal profession, a protocol on enforcement of arbitration judgments, the promotion of Asean identity and solidarity and so on, that will form a base for the Asean community.

Thus, the Governing Council meeting this week in Manila, is the first even Asean Assembly of top ranked members of the Judiciary, the Bar societies and the academe to gather as a focus group for legal cooperation vis-à-vis the new Asean Charter.

ALA's institutional framework has transcended its conference rooms, workshops and legal publications and has spilled over to such fellowships as golf competitions and musical presentations. Because ALA has forged enduring bonds of friendship and seamless modes of legal cooperation amongst its members, then without doubt, a full ASEAN legal community would be achieved ahead of the 2015 target date for the ASEAN community itself.

On this note, I would like to reiterate warm words of welcome, in behalf of ALA Philippines and the Philippine National Committee, to our foreign guests and brother lawyers, judges and teachers of law from the Asean countries, our special guests, and especially my colleagues who have worked in cooperation with the Supreme Court and the Philippine Judicial Academy in putting together this milestone "Lecture Series."

Thank you.

OPENING REMARKS

By Justice Antonio T. Carpio
Supreme Court of the Republic of the Philippines

Chief Justice Reynato S. Puno, my esteemed colleagues on the Court, President Pham Quoc Anh of the Asean Law Association, our Distinguished Lecturer Ambassador Rosario Manalo, Mr. Jeffrey Chan and Ambassador Alistair MacDonald of the Panel of Reactors, Chief Justice Dato Kifli of Brunei Darussalam, Chief Justice Sobchok Sukharomna of Thailand, other justices and judges from the Asean countries, Chancellor Adolfo Azcuna and other officials of the Philippine Judicial Academy, President Avelino Cruz of the ALA Philippines National Committee, ambassadors and members of the diplomatic community, the heads and members of delegations from the member countries of the Asean Law Association, my co-workers in the Philippine Judiciary and in government, distinguished guests and friends: a pleasant morning to you all.

On behalf of the Supreme Court of the Philippines, I warmly welcome all of you to this Chief Justice Reynato S. Puno Distinguished Lecture, the first for the year 2010. This Lecture is jointly sponsored by the Supreme Court, the Philippine Judicial Academy, and the Asean Law Association.

The Distinguished Lecture Series, which is named after the incumbent Chief Justice of the Philippines, is the most prestigious law and public policy lecture in the Philippines. The Lecturers are Chief Justices or members of the highest court of various countries, well-known legal scholars, and public policy experts in fields related to law.

The Distinguished Lecture Series started in 2001 when the Supreme Court celebrated its centennial anniversary. The Supreme Court has continued the Distinguished Lecture as one of its knowledge sharing activities under its judicial reform initiatives. The Lecturers are invited to address a select audience of jurists, academics, policy makers, practicing lawyers and law students.

In the past, the Distinguished Lecturers covered topics such as judicial reforms, the judicial legacies of our Chief Justices, Shari'a law in the modern age, comparative studies on Philippine and foreign laws, and international humanitarian law. This morning, we continue this unique academic tradition with a discourse on a landmark and evolving

regional community law – the Asean Charter.

This morning's Lecture is part of the 30th Anniversary Celebration of the Asean Law Association of ALA. ALA was organized 30 years ago in 1979 as the professional grouping of lawyers from the Asean countries. One of the principal objectives of ALA, as stated in its Charter, is to encourage the harmonization of laws within Asean as may be required for the economic development of the Asean region.

The Asean Charter, signed in November of 2007, requires, as one of its founding Principles, adherence to multi-lateral trade rules and a rules-based regime to implement the economic goals of Asean. Trade rules implement trade and economic laws. Harmonizing trade rules means harmonizing trade and economic laws.

For the last 30 years, ALA members studied, researched and debated how to harmonize trade and economic laws within Asean. However, all this was purely academic discussion. There was no treaty, binding as domestic law in Asean countries, requiring the standardization or harmonization of trade rules. This has suddenly changed with the adoption of the Asean Charter, which expressly requires a rules-based regime on trade and economic matters within Asean. There is now renewed interest for ALA members to assist their governments in the harmonization of trade rules within Asean. Ultimately, this will realize ALA's goal of harmonizing trade and economic laws within Asean.

I am personally happy that our Distinguished Lecturer this morning is Ambassador Rosario Manalo who served as the Philippine Ambassador to the European Community from 1979 to 1987. As a young lawyer, I served as the Philippine trade representative for textile negotiations. Whenever I had negotiations in Brussels, the capital of the European Community, I would report to Ambassador Manalo before and after the negotiations. Even then, Ambassador Manalo was already steeped into the trade and economic rules that govern a regional economic community. Like everyone here, I look forward to this Lecture of Ambassador Manalo.

Once again, on behalf of the Supreme Court of the Philippines, a warm welcome to everyone.

THE ASEAN CHARTER AND THE BUILDING OF THE ASEAN COMMUNITY

By Ambassador Rosario G. Manalo of the Philippines

The Honorable Chief Justice,
The Honorable Justices of the Supreme Court of the Philippines
Excellencies,
Distinguished Guests,
Friends,
Ladies and Gentlemen,

I wish to convey my appreciation to the Supreme Court of the Philippines, the Philippine Judicial Academy and the ASEAN Law Association for their kind invitation for me to address this august gathering on a topic which is highly significant to our country and the Asia-Pacific reguion.

I started working on issues relating to the then newly-organized Association of Southeast Asian Nations (ASIAN) in this very hall, as a junior Foreign Service Officer, when this majestic building was the home of the Department of Foreign Affairs.

It is with a feeling of homecoming that I render this presentation on ASEAN as it passes to the forty-first year of its existence.

I would have wanted to address this gathering of learned persons in the law and other disciplines as a practicing lawyer, arguing for the client. For the longest time, however, the client I serve is our government and the Filipino people. If I have accomplished some in the international arena, it is because I was able to draw on the skills of a lawyer and the knowledge of the law, initially obtained in the hallowed halls of my Alma Mater, the College of Law of the University of the Philippines...and where, I may add, the law is taught in the most majestic way..

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[1] *Ambassador Manalo nolds a law degree from the University of the Philippines' College of Law and passed the Bar in 1958. She passed the competitive Foreign Service Exams for Filipino Career Diplomats in 1959 making her the first Filipina to successfully hurdle these examinations, thus pioneering for Filipino women to be career diplomats.*

A few members of this court have made similar marks in the international arena—Ceasar Bengzon and Florentino Feliciano as a members of leading international tribunals, and Roberto Regala and Hilario Davide in the frontlines of the Philippine diplomacy. All were deeply aware that law has a large role in diplomacy, in that inter-state relations is stable and mutually beneficial to all when based on amity international law.

For a developing country like the Philippines, there is no other path as the Constitution itself states that the Philippines "adheres to the policy of peace, equality, justice, freedom, cooperation, and amity with all nations". We have been guided by this constitutional mandate in the various facets of the country's relation which the rest of the world and most especially with e the ASEAN.

We, the peoples of ASEAN, are journeying in a significant crossroad of our region's destiny. Our states and societies are together in major regional effort towards greater integration to realize by 2015 the vision of an ASEAN Community.

ASEAN was established on 06 August 1967, out of an earnest desires of its five (5) founding Members – Indonesia, Malaysia, the Philippines, Singapore and Thailand- ensures stability and security in South East Asia, which at that time was besieged with tensions and conflicts arising from the Cold war. This common aspiration for regional peace and harmony found expressions in the ASEAN Declaration of 1967. From a simple document consisting of five (5) clear articles, the Association of Southeast Asian Nations, or ASEAN was born and built, operating for little more than forty years to the present.

As ASEAN moved from strength to strength, coping with the many challenges posed by the political realities of changing times, countries of the region joined ASEAN---**Brunei** in 1984, **Viet Nam** in 1995, **Lao PDR** and **Myanmar** in 1997 and **Cambodia** in 1999. Well before the start of a new century, ASEAN emerged as a concert of ten peace-loving South East Asian States cooperating and strengthening relations among themselves, and relating to friendly states outside its region.

In 1989, with the end of the Cold War and the outset of globalization, the world order and the dynamics of international life were drastically altered. New actors and elements beyond the traditional nation-states, with their challenges have turned the conduct of international relations and diplomacy more complex. The evolving global challenges of the

21st century compelled the ASEAN of 1967 to rethink its vision, its objectives, its approach, and its structure and operations.

The ASEAN Charter: the Way Forward

After surveying the region's prospects for the future, and preoccupied in maintaining the Organization's credibility and relevance, the Member-States concluded that ASEAN had to become increasingly integrated to be able to respond to the demands and needs of the region.

Under the 1967 Declaration, ASEAN suffered from the absence or the presence of idiosyncrasies described as follows: it had no legal personality, its decisions were not legally-binding, its meetings were quite, informal, it had no political legal framework, nor a set of principles and purposes attuned to the times. It was in need of an updated machinery, and more efficient processes to formulate policies and decisions as a region.

To summarize ASEAN is to be served by the Charter in three (3) interrelated ways: (1) formally accord ASEAN a legal personality, (2) establish greater institutional accountability and compliance system, and (3) reinforce the perception of ASEAN as a serious regional player in the future of the Asia-Pacific region.[2]

The Three Pillars of the ASEAN Community

The ASEAN Community's foundation are to be solidly built on three pillars which are all equally important, namely: (1) ASEAN Political-Security Community (APSC) pillar; (2) ASEAN Economic Community (AEC) pillar; and (3) ASEAN Socio-Cultural Community (ASCC) pillar. To bolster efforts to realize these three community pillars, the ASEAN Charter provides the creation of their respective community councils.

The three (3) pillars have developed their respective Blueprints, all incorporated in a program document entitled, **"Roadmap for an ASEAN Community"**. The Blueprints contain action points to deliver outputs during a period of six years, that is, from 2009 up to 2015.

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[2] *http://www.aseansec.org/21085.htm: "ASEAN Leaders Sign ASEAN Charter", Media Release Secretariat, 20 November 2007.*

But the evolution towards an integrated **ASEAN community**, sustained by the political will of the Member States, will necessarily lead to the development of an ASEAN law regime. The creation of such a legal system will form part of the ASEAN's own body of laws, apart from the municipal or national laws of each Member State, akin perhaps to what the European Union labels the EU Law built on an ***acquis communautaire***. Standard setting activities and norms are at the core of a rules-based community, hence the role of an ASEAN law and its system to sustain the ASEAN Community will be crucial and indispensable.

The ASEAN Political-Security Community (APSC)

Political-security cooperation continues to be at the heart of ASEAN's existence.

Originally, this community was known as the ASEAN Security Community. The inclusion of the term "political" in the nomenclature was an initiative of the Philippines. We believe that in recognizing the comprehensive nature of security, there exists equally, if not even more highly and more significant, the political dimension of state relations. The non-acknowledgement of this reality will not allow ASEAN to effectively address or resolve any security concern. We only have to remind ourselves that in the international arena, regardless of whatever the sectoral source of dispute or conflict, the ultimate prevention or peaceful resolution of the crisis will always be political, for these solutions will be found only in the game called, the power politics of states.

By its very nature, the APSC emphasizes the pivotal role of ASEAN in addressing both traditional military security concerns and non-traditional security issues, such as for example, effective border controls so necessary in preventing and managing transnational crimes which involve military and/or police cooperation. It is obvious that the work of the APSC is directed towards realizing in concrete terms a peaceful, stable, safe and secure **ASEAN Community**.

The important contribution in this Community by the legal sector of the region is hereby acknowledged and underscored. The APSC has linkages with the following ASEAN sectoral bodies dealing on legal matters, namely: the ASEAN Law Ministers Meeting (ALAWMM) and the ASEAN Senior Law Officials Meeting (ASLOM). In addition, the ASEAN Charter in its Annex 2 recognizes the ASEAN Law Association (ALA) and the ASEAN Law Student Association (ASLA) as entities associated with ASEAN.

In the Blueprint of the APSC, a major action point relates to the establishment of programs for mutual support and assistance among Member-States to develop strategies that will strengthen the rule of law, the judiciary systems and legal infrastructures of the member states. As a step towards this direction, it is proposed that a comparative university curriculum be established on the legal systems of each ASEAN Member-State. This is, indeed, well and good. However, this effort is still nationally rather than regionally oriented, and the legal needs of an ASEAN Community, which is the regional as such, is still not being addressed nor responded to by this strategy.

This therefore is a challenge I pose to all the legal luminaries in this distinguished audience. Please study and prepare for the role of an ASEAN law because it will have to be there in building a rules-based **ASEAN community**.

The ASEAN Economic Community (AEC)

The ASEAN Economic Community is most significant in that it touches on the wealth of the nations in ASEAN. Currently, the AEC pillar has crafted three major Agreements: the ASEAN Free Trade Area Common Effective Preferential Tariff (AFTA-CEPT), which is now metamorphosing into the ASEAN Trade in Goods Agreement; the ASEAN Framework Agreement on Services (AFAS), and the ASEAN Comprehensive Investment Agreement.

All these Agreements may be considered as being derived from the Charter's call for an ASEAN Community. The commitment of each ASEAN Member-State to the Charter and subsequent agreements will necessarily demand an alignment of domestic or national laws, regulations, policies and practices. It is an important task for all the branches of the Governments of ASEAN Member-States to accept the reality that changes have to come nationally, albeit gradually, in their respective legal landscape and in the national policies of each Member-State, if these Governments are truly serious to create the **ASEAN Community**.

For example, these trade engagements in ASEAN are instruments to stimulate change for the better in every ASEAN country's economic functions and the region as a whole. The judiciary of an ASEAN country concerned may be called upon to rule on an issue on any of these instruments, and its ruling may be pivotal to attain a proper settlement, bearing in mind the ASEAN Charter and its vision.

The Philippine Supreme Court, for its part, has exhibited a keen appreciation of trade liberalization and other developments in the world economy. In *Wigberto Tañada v. Edgardo Angara*[3] which dealt with the radification of the World Trade Organization, the Court observed:

> *...Aside from envisioning a trade policy based on "equality and reciprocity," the fundamental law encourages industries that are "competitive in both domestic and foreign markets," thereby demonstrating a clear policy against a sheltered domestic trade environment, but one in favor of the gradual development of robust industries that can compete with the best in the foreign markets. Indeed, Filipino managers and Filipino enterprises have shown capability and tenacity to compete internationally.*

The ASEAN Socio-Cultural Community (ASCC)

Primary in the goals of the third pillar of ASEAN is a people-oriented and socially responsible ASEAN Community, wherein development is to the exclusion of no one, and that the rights and welfare of all, especially women, children, and the most vulnerable are promoted, protected and upheld.

The ASEAN Socio-Cultural Community brings to the fore the conceptualization and eventual realization of (1) human development, (2) social welfare and protection (3) social justice and rights, (4) environmental sustainability, (5) building an ASEAN identity, and (6) narrowing the development gap.

The 17 sectoral ministerial bodies that compose the ASCC Council are challenged to meet the goal of a One Caring and Sharing ASEAN Community by 2015.

It is thus in this context that we look into ourselves as a Member-State of the ASEAN and determine our role in the noble task of building the ASEAN Community. For the Philippines, we have contributed, among others:

- In ensuring environmental sustainability through the hosting of the ASEAN Center for Biodiversity in Los Baños, Laguna and in the ratification of the ASEAN Agreement on Disaster Management and Emergency Response, which eventually led to the

[3] *G.R. No. 118295, May 2, 1997, 272 SCRA 18, 62-63 (1997)*

agreement's entry into force on 24 December 2009. Let it be known, too, by this highly esteemed body that this year, the Philippines takes chairmanship of the ASEAN Committee on Disaster Management and is committed to ensuring that the ASEAN Community is prepared and ready to respond to disasters and manage risks within the region.

- In promoting social justice and mainstreaming people's rights as we take lead, together with Indonesia, in working towards an instrument to operationalize the ASEAN Declaration on the Protection and Promotion of Rights of Migrant Workers. Perhaps this may call for an eventual ASEAN Agreement on Migration.

While thinking out of the box, **I would add my own proposal hoping to contribute to social justice, social cohesion and understanding in the ASEAN Community**, and that is: that the working masses of ASEAN must enjoy the coverage and benefit of **an ASEAN Social Charter**. This is perhaps another challenge to tackle and pass on to the political and legal luminaries of the region.

The Regional Mechanism to Promote and Protect Human Rights: The ASEAN Intergovernmental Commission on Human Rights (AICHR)

The topic most debated by the High Level Task Force (HLTF) charged with the Drafting of the ASEAN Charter was the establishment of a human rights body. Initially, there were some who believed that there is actually no need to establish a human rights body in ASEAN. Majority, however, thought otherwise. But even then, it was unclear what type of body will be established: will it be a "Commission", "Forum", "Board", "Body", "Agency", "Mechanism", etc. As such, the HLTF decided to recommend an enabling clause in the Charter towards the establishment of an ASEAN Human Rights Body. But in order to determine what this "body" would really be, the HLTF recommended that the nature of the "body" be defined in the terms of reference (TOR) that was to be adopted by the ASEAN Member States at a later date.

The TOR creating the ASEAN Intergovernmental Commission on Human Rights (AICHR), hereinafter called the Commission, is more of a political document than a legal one. It is still a legal document in a sense, since it is an extension of the Charter as far as the

[3] *G.R. No. 118295, May 2, 1997, 272 SCRA 18, 62-63(1997)*

establishment of the Commission is concerned. And yet, it is more of a political document since it was crafted to be flexible, to accommodate the varying comfort levels on human rights of the different ASEAN Member-States with respect to human rights issues and concerns. This is only a starting point.

If there are some differences in the interpretation on the TOR, the Commission can rely on the summary records of the High-Level Panel that drafted it. If still no consensus is achieved, then the solution is not a legal one but a political one. The Commission does not go to court but submits the question of interpretation to the Foreign Ministers to decide, also by consensus.

The Commission is an intergovernmental and consultative body. It is intergovernmental and reflects the nature of ASEAN itself: an intergovernmental organization. As such, the membership of the Commission consists of the Member-States of ASEAN, each appointing a Representative.

With regard to the Commission being a consultative body, it was agreed by the drafters of the TOR that the term "consultative" is not the same as the context of "consultative status" under the United Nations system. Unlike in the UN system where a non-governmental organization with a consultative status is not a part of the UN body concerned, but can be consulted on matters within its competence, the Commission is part and parcel of ASEAN as one of its principal organs. The AICHR as being a "consultative body" merely relates to its decision-making process which is by consultations and consensus.

Towards a Rules-Based Organization

The ASEAN Charter formally accorded the ASEAN a distinct legal personality which is separate from those of its Member-States as well as established a system for greater institutional accountability and compliance.

The ASEAN Foreign Ministers established a High Level Legal Experts' Group to work on the legal issues arising from the ASEAN Charter which required implementation, namely:

(a) Legal personality of ASEAN in accordance with Article 3;
(b) Privileges and immunities of ASEAN pursuant to Articles 17, 18 and 19; and
(c) Dispute settlement mechanisms in accordance with Article 25 and 26.

After extensive negotiations, the experts group submitted the following agreements for adoption:

(a) The Agreement on the Privileges and Immunities of ASEAN; and
(b) Protocol on Dispute Settlement Mechanisms and its attached Rules of Arbitration, Rules of Conciliation, Rules of Mediation and Rules of Good Offices.

A Legal Personality for ASEAN

The Agreement on Privileges and Immunities of ASEAN was signed on 25 October 2009 by the Foreign Ministers of ASEAN Member-States. It is awaiting the ratification of the Member-States before it enters into force.

The Agreement will operationalize two important aspects of the ASEAN Charter. The first concerns the legal personality of the ASEAN Charter. Accordingly, ASEAN will have relevant legal capacities both under the domestic laws of the ASEAN Member-States and under international law. These pertain to its capacities to enter into contracts, acquire and dispose of movable and immovable property, to institute and defend itself in legal proceedings, and to conclude agreements with other countries or sub-regional, regional and international organizations.

Secondly, the Agreement lays down the harmonized minimum standards of privileges and immunities to be conferred upon ASEAN (Article 3) and entities mentioned in the ASEAN Charter, namely, the Secretary-General of ASEAN (Article 5),Permanent Missions (Article 6),Permanent Representatives and officials of ASEAN duties (Article 7), staff of the Permanent Missions (Article 8) and officials of the Member States (Article 9).

Dispute Settlement Mechanisms

The ASEAN Foreign Ministries also approved the proposed Protocol on Dispute Settlement Mechanisms and its relevant Rules on 14 January 2010. It is expected to be signed shortly, and thereafter ratified according to the national laws of the Member-States.

In accordance with Article 25 of the ASEAN Charter, the Protocol establishes appropriate dispute settlement mechanisms, where such mechanisms are not otherwise specifically provided, for disputes which concerns the interpretation or application of the ASEAN Charter and other ASEAN instruments.

The Protocol encourages the Parties to the dispute to make every effort to mutually agree on a solution to their dispute. If the Parties are unable to do so, including through the dispute settlement mechanisms specified in the Protocol, the Protocol provides for a procedure whereby the Parties may bring the dispute to the attention of the ASEAN Coordinating Council, composed of ASEAN Foreign Ministers. The ASEAN Coordinating Council may then direct the Parties to the dispute to resolve their dispute through good offices, mediation, conciliation or arbitration.

Attached to the Protocol as an integral part are the rules of procedure for good offices, mediation, conciliation or arbitration.

Arbitration will take place in two instances: (a) when there is mutual consent by the disputing Parties to proceed to arbitration; and (b) when there is a direction by the ASEAN Coordinating Council for the disputing Parties to proceed to arbitration, provided that both disputants go along with the Council's decision.

An important feature of the Rules of Arbitration is the provision of an indicative list of arbitrators to be maintained by the ASEAN Secretary-General. Each ASEAN Member-State may nominate ten individuals to the list. The list is only an indicative one, in recognition of the right of sovereign states to choose their own arbitrators, and considering the eventuality that there might be no one in the list with expertise on the subject matter of a particular dispute. Disputing parties may therefore choose arbitrators from outside the list.

The Protocol and its attached Rules is an important step towards realizing the dream of the ASEAN leaders to transform ASEAN into a rules-based organization.

Other Instruments

Besides the Agreement and the Protocol, other instruments are necessary to address important legal issues under the ASEAN Charter. However, HILEG was unable to finalize said instruments due to time constraints and the complexity of issues to address. These instruments are the following:

(1) Procedures for ASEAN to exercise its legal capacities at international and domestic levels;

(2) Rules of procedure for referring unresolved disputes to the ASEAN Summit;

(3) Rules of procedure for requesting the ASEAN Secretariat to interpret the Charter, and

(4) Comprehensive Agreement on Privileges and Immunities of ASEAN (to be proposed to Dialogue Partners and other Parties).

Perhaps, the legal community in ASEAN may wish to make contributions in the development of these instruments.

Conclusion

I have laid before you the ASEAN Charter and its ramifications. We have worked hard for all of these in the last four years together with our counterparts from the other ASEAN capitals. As ASEAN's stakeholders yourselves, you Honorable Justices, judges and distinguished lawyers in ASEAN, I now invite you to do your share in the building of this immense political edifice, and as partners, we shall be the architects of an ASEAN Community as set out in the ASEAN Charter.

I am certain that together, we will succeed in contributing to out region's peace, prosperity and solidarity.

Thank you all for your kind attention.

MAKING THE ASEAN CHARTER MEANINGFUL*

By Jeffrey Chan Wah Teck, SC
Deputy Solicitor-General
Singapore

SIGNIFICANT POINTS

ASEAN suffered a number of "idiosyncrasies." It had no legal personality, decisions were not binding and the meetings held by its representatives were informal. To better integrate ASEAN and to enable to meet the needs of the future, an ASEAN Charter was drafted where the importance of the legal sector must be recognized.

Under the Charter, ASEAN is to be a "rules-based community." Its structure and functions are established by rules.[1] Having a legal personality, the Secretary-General and staff of ASEAN Secretariat as well as the Permanent Representatives or officials on ASEAN duties are entitled to immunities and privileges.[2] A special feature is that disputes are to be resolved through legal processes.[3]

ORIGINS OF ASEAN CHARTER

The concept of an ASEAN Charter started with the Vientiane Action Plan (2004-2010) which stated:

> "We recognize the need to strengthen ASEAN and work towards the development of an ASEAN Charter."

During the 2005 ASEAN Summit in Kuala Lumpur, the members established the Eminent Persons Group (EPG) which comprised the elder statesmen of ASEAN. They were tasked to make "bold and visionary recommendations on what should go into the ASEAN Charter."

**This article is based on the author's powerpoint presentation (Editor's note).*

[1] *ASEAN CHARTER, Chapter IV, arts. 7-15.*

[2] *ASEAN CHARTER, arts. 18 & 19.*

[3] *ASEAN CHARTER, Chapter VIII, arts. 22-28.*

The EPG held extensive consultations and submitted their report which was accepted by 2006 ASEAN Summit held in Cebu City. What were the major conclusions of the EPG?

> "... ASEAN's problem is not one of lack of vision, ideas, or action plans. The problem is one of ensuring compliance and effective implementation.... ASEAN must have a culture of commitment to honour and implement decisions, agreements and timelines."

Likewise, the EPG made the following critical recommendations:

1) ASEAN should have legal personality.
2) Member-States shall ensure that they give effect to the separate legal personality of ASEAN, within their respective legal systems.
3) ASEAN is to have capacity to own property, enter into contracts, and to sue and be sued.
4) ASEAN must establish a culture of honouring and implementing its decisions and agreements, and carrying them out on time.
5) Dispute Settlement Mechanisms (DSM) should be established in all fields of ASEAN cooperation. It should include compliance monitoring, advisory consultation as well as enforcement mechanisms.

The ASEAN Charter was formulated by a High Level Task Force which sought to give effect to the EPG recommendations. Thus, the ASEAN Charter provides structural framework and directions for ASEAN to be implemented through legally binding agreements among ASEAN Member-States. A High Level Legal Experts Group (HLEG) was appointed to address legal means of establishing ASEAN as a "rules-based community."

What is a "rules-based community"? It is a community of nations established through legal processes. Its structures, governance and processes are prescribed by legally binding rules. Agreements among members are legally enforceable which assures certainty and confidence for those who rely on the organization or the agreements under its auspices. Basic to legal enforceability is a mandatory process for resolution of disputes .

Models of "rules-based" organizations are the European Union, a supra-national organization and the World Trade Organization which provides Mandatory "Dispute Settlement Understanding."

ASEAN is not a supra-national organization. To date, most agreements are unenforceable. Many agreements never entered into force but moving towards a "rules-based community" in economic matters as seen in the ASEAN Dispute Settlement Mechanism found in the "Ventiane Protocol." There are different understandings of what a "rules-based community" is or should be.

The HLEG is charged with addressing legal issues to establish ASEAN as a "rules-based" community. The major outcomes of their work are the Draft Agreement on the Privileges and Immunities of ASEAN and the Draft Protocol to the ASEAN Charter on Dispute Settlement Mechanisms.

The Agreement on the Privileges and Immunities of ASEAN is based on the 1946 Convention on the Privileges and Immunities of the United Nations but with major deviations to provide for specific interests.[4] It provides for ASEAN to have same level of equal personality and the same level of privileges and immunities in all ASEAN Member-States. It must be given legal effect in domestic law.

The Protocol to the ASEAN Charter on Dispute Settlement Mechanisms has limited application because it applies only to agreements not subject to other DSM. It departs from EDSM model (WTO DSU model). EDSM provides for arbitration to be in default. DSM where there is mandatory arbitration will result in the resolution of dispute. Under the Protocol, disputes are to be resolved consensually and arbitration is only one mechanism that can be applied to resolve disputes. Thus, there is no certainty that the dispute be settled. The DSM Protocol in a "rules-based ASEAN" is not aligned with the intentions of EPG and ASEAN Charter that disputes be resolved with certainty. There were different undertakings among HLEG members over intent underlying dispute settlement provisions of the ASEAN Charter. Political resolution is preferred over resolution through legal processes. Thus, there is clear preference among many HLEG members for disputes that cannot be resolved consensually to be referred to the ASEAN Summit.

Towards a "Rules-based" ASEAN, it is important that officials take seriously the agreements negotiated by them. Thus, it is important that mechanisms be put in place to ensure that obligations entered into by ASEAN Member-States can be enforced even if the defaulting state party does not wish to be exposed to being directed to carry out what it has bound

[4] *Agreement of the Privileges and Immunities of ASEAN was signed at Cha-am Hua Hin Thailand on 25th October 2009.*

itself to do. Failure to ensure this means that ASEAN cannot be relied upon and ASEAN will then not be taken seriously.

What are the obstacles to a "rules-based ASEAN"? First, there is inconsistent understanding among politicians and bureaucrats of what is meant by "Rule of Law." Second, there is fear of legal processes because of unfamiliarity and the abdication of control over outcome. Third, there is resistance to change and preference for the "ASEAN Way."

In removing obstacles to the "Rules-Based ASEAN," there is need to sensitize government leaders and bureaucrats to the Rule of Law by:

- A need of a common understanding of what "rules-based community" means.
- Need to underscore necessity and advantages of "rules-based" culture as opposed to the uncertainties of the "ASEAN Way."
- Need to underscore that with the ASEAN Charter, the paradigms of the old ASEAN are past.

ASEAN Law Association has important role in removing obstacles to a rules-based ASEAN. Note that the ASEAN Law Association is the only ASEAN-wide organization focused on law in ASEAN and is recognized in Schedule II of the ASEAN Charter. It has a unique membership profile of judges, government lawyers, private lawyers and law teachers and its present focus is on cooperation. After the ASEAN Charter, ALA must re-focus to highlight the importance of Rule of Law and a "rules-based" ASEAN. Domestically, it must work with society generally especially governmental leaders and bureaucrats. It must work with ASEAN bodies especially ASEAN SOM/ACC and ASLOM/ALAWMM. Finally, it must lead in the development of "ASEAN Law" because it is the only ASEAN organization capable of these tasks.

In conclusion, let us all make the ASEAN Charter meaningful.

THE ASEAN CHARTER AND THE BUILDING OF AN ASEAN COMMUNITY

By EU Ambassador Alistair Bell MacDonald
response to Ambassador Rosario Manalo

Honorable Chief Justice and Justices, from across ASEAN, Excellencies, distinguished guests, friends and colleagues, ladies and gentlemen. Good morning, *magandang umaga*, to you all. I must say that I was really pleased to be invited to take part in this morning's discussion, partly because the building of ASEAN is an extremely important topic, both regionally and globally, partly because it's an area that I've been working on myself for more than 30 years, in one way or another, and partly because it gives me the pleasure of listening to one of the key experts on ASEAN, in the person of Ambassador Rosario Manalo.

I've had the pleasure of working with Ambassador Manalo for more years than I, or perhaps she, would care to remember. I was a junior desk officer in the EC in Brussels, when she was the Philippine Ambassador to the European Communities. I still remember when we talked about possible EC-funded rural development projects in the Philippines, and I first learned that there was a province in the Philippines called Antique (I thought), and another called Aurora. She was able to persuade the EC to carry forward the project in Aurora, while I believe she was able to persuade the Netherlands to take up the Antique project (perhaps they could pronounce it better than I could). Since then, our careers have intersected at different times, and I was absolutely delighted when I returned to the Philippines three years ago to find that she was not only the Dean of European Studies at Ateneo, but also (at that time) the Chair of the HLTF working on the ASEAN Charter. In any case, it's always a pleasure to hear her profound insights into ASEAN as it has evolved, and her very pertinent, certainly innovative, and even courageous suggestions as to how ASEAN might further evolve in the future.

1) One often hears, within ASEAN, the suggestion that ASEAN is by definition very different from the EU – that ASEAN is not Europe. Which of course is true – but at the

same time, I believe that the similarities actually outweigh the differences

It's often overlooked that the origins of the EU and of ASEAN were in fact very similar. Both were ostensibly economic integration efforts – reducing tariffs, building towards free trade, gradually moving into questions of standards and other superficially boring technical issues. But the underlying motive was in fact very deeply political, in both cases:

- in Europe, putting an end to almost a century of fratricidal conflict, of European civil war, by working for the integration of the commanding heights of our economies, at the same time as we worked to protect our security, in the context of the Cold War, by building a stronger and more cooperative economy
- in ASEAN, creating an economic smokescreen behind which Indonesia and Malaysia could bring an end to *Konfrontasi*, and later in working to protect SE Asia's security in the context of the conflict in Indochina

There also similarities in our basic statistics, though I won't spend too long on these, beyond noting that the population of the EU is just under 500 million, while that of ASEAN is some way above 500 million, or that ASEAN is the EU's third-largest trading partner, just as the EU is the third-largest trading partner of ASEAN. Nor will I put too much emphasis (though this is something which is perhaps too easily overlooked) on the fact that the EU and ASEAN are roughly similar in age – the EU founded in 1957 (if one goes by the Treaty of Rome), and ASEAN in 1967 – both of us could be considered to be middle-aged – perhaps with a few aches and pains, perhaps with more wisdom than we had when we were younger.

And I would note also that both the EU and ASEAN formally adopted our new charters, or treaties, within weeks of each other – the ASEAN Charter was adopted in November of 2007, the Lisbon Treaty in December of that year (though ASEAN was rather quicker off the mark in ratifying the Charter, so that it entered into force 50 weeks before the Lisbon Treaty did – ASEAN on 15 December 2008, the EU on 1 December 2009.

Of course there are differences, important ones

- ASEAN, and most ASEAN countries, have lower income levels than the EU, and poverty remains a key issue for too many people across the region.
- ASEAN is also more diverse than the EU, with Laos and Singapore being at opposite

ends of the spectrum in terms of per capita income, and I might add Burma and the Philippines likewise being at opposite ends of the spectrum in terms of human rights, press freedom etc.

Even there, I would have to qualify both these points:

- the EU is more diverse than you mght think, particularly since 2004 : Poland is not Denmark, just as Finland is not Spain, and Bulgaria is not the UK. And we do have 23 official working languages across the EU, which means that the EC is one of, if not the, world's greatest source of expertise on machine translation.
- and poverty is, I'm afraid, something which is always with us in Europe also – not for nothing is 2010 the European Year of Combating Poverty and Social Exclusion

So for the moment, I would just say that yes, ASEAN is not Europe and vice versa, but the challenges facing us are more similar than these differences might suggest, and therefore it is not surprising that the solutions which we are finding are not so dissimilar.

2) One other similarity, of course, is that both ASEAN and the EU have fundamentally overhauled their institutions at roughly the same time, and in both cases with the intention of ensuring that our respective institutions are "fit for purpose" for the 21st century :

- in the case of ASEAN, the entry into force of the ASEAN Charter in 2008 needs little further comment from me, after Ambassador Manalo's excellent presentation.
- in the case of the EU, the Lisbon Treaty entered into force just 10 weeks ago, and is already producing very significant changes in the way that we work. By the way, might I ask if anyone here has read the Lisbon Treaty ? I have to admit that I have not – for the very simple reason that it is completely unreadable. The Lisbon Treaty as such is an amending treaty, and a typical article in the Lisbon Treaty might read as follows (and I quote, from Article 12 of Lisbon in its entirety) : "Article 3(1) shall be repealed. Paragraph 2 thereof shall become Article 8; it shall be amended as set out below in point 21." Eighty pages of that isn't really very inspiring, I'm afraid. So in fact what you have to look at are the consolidated texts, post-Lisbon, of the TEU and TFU (what used to be called the TEU and TEC).

Let me say a few words about what the Lisbon Treaty actually does. I might begin by mentioning that one simple result of Lisbon is the abolition of the European

Community – or, more precisely, the EU (which previously was only a political concept) has taken on the legal personality of the EC. So there's no more need now to wonder about when you should say EC and when EU (the only EC which remains is the European Commission, as the executive arm of the EU).

More fundamentally, though, the Lisbon Treaty builds a more democratic and transparent Europe, and a more efficient Europe. And it aims to strengthen the EU's global voice, and enhance our capacity to respond to the regional and international challenges of the 21st century

- in terms of democracy and transparency, the European Parliament and the national parliaments now have a stronger role in decision-making. We've also introduced a right of citizens' initiative – though 1 million signatures are required for such a proposal to be made. We also now have a legally-binding European Charter of Fundamental Rights, setting out clearly the principles of a Europe of rights and values, freedom, solidarity and security.
- in terms of building a more efficient Europe, the Treaty introduces simplified working methods and voting rules, including a considerably expanded use of majority voting across most policy areas. We've also created the new post of President of the European Council, with Herman Van Rompuy, former Prime-Minister of Belgium, as the first President, chairing our quarterly Summits, and representing the EU at international Summits. The 6-month rotating Presidency will continue, though, for matters other than CFSP – for example in chairing the Council of Ministers in relation to all the internal policy areas such as energy, environment, justice, agriculture, regional development and so on. Spain currently holds the Presidency of the Council of Ministers, and for the second semester of this year it will be Belgium.
- and on the global stage, the EU now has a new High Representative for Foreign and Security Policy. Catherine Ashton, as High Representative and Vice-President of the Commission, will also head the new European External Action Service, the diplomatic service of the EU. This has also had a direct impact on my own job, since already from the 1st of December, all Delegations of the European Commission in third countries have become "Delegations of the European Union", and I will no longer have to correct you if you refer to me as the EU Ambassador.

Here again one can easily identify a number of similarities and differences between

Lisbon and the ASEAN Charter. Ambassador Manalo mentioned three key purposes of the Charter, namely the creation of a formal legal personality (just as Lisbon gives to the EU), the establishment of greater institutional accountability (we have increased the powers of Parliaments, both EP and national), and the reinforcement of perceptions of ASEAN as serious regional player (here, I think, we might differ – in the EU, we want to enhance the reality of EU's global role, building a global political voice more commensurate with our economic and social weight)

And of course there are very many other institutional and political differences which are – ASEAN remains intergovernmental (the EU is in many respects supra-governmental), ASEAN continues to work by consensus (the EU has further increased the scope of QMV), and the EU has a Parliament, a Supreme Court as well as a Court of Appeals, and other essential institutions to which ASEAN may or may not yet aspire.

But I would like to suggest that the underlying institutional challenges which both ASEAN and the EU must continue to face are, I believe, very easily comparable. To take just one example, the EU has had a long-standing problem of its public image, not helped by what is often referred to as our " democratic deficit" – decisions taken by governments in Brussels, which may often seem remote to the ordinary voter, or a creation of faceless Eurocrats rather than a voluntary decision by their own elected governments. This was what lay behind the rejection of the Constitution by France and the Netherlands in 2005, and the initial rejection of Lisbon by Ireland in 2008, and every opinion poll conducted across Europe suggests a degree of disenchantment, a lack of familiarity, a lack of engagement, with the European project of which we in Brussels are so proud.

I hesitate to ask what public opinion within ASEAN has to say about public attitudes towards ASEAN – but I suspect that if there may be little evident disenchantment, that is because there is even less familiarity. But I'll leave that for another discussion.

3) I should also say something about EU's relationship with ASEAN. Of course the EU was the first dialogue partner of ASEAN, and since we established a formal dialogue in 1978, we have worked hard, on both sides, to further strengthen this relationship.

- the EU therefore has a regular "bilateral" dialogue with ASEAN, at Foreign Ministers' and Senior Officials' level, in addition to taking part in "multilateral" fora such as the PMC and ARF. The EU also looks forward to signing the Treaty of Amity and Cooperation, which I understand is likely to take place in the near future, once

all the formalities have been completed.

- the EU is also a prime economic partner of ASEAN – both in trade (3rd-largest trading partner, in both directions) and in investment (the EU being the largest single source of FDI in ASEAN, well ahead of the US.
- and the EU is a long-standing cooperation partner of ASEAN. We have an extensive programme of cooperation with ASEAN as such (in addition to our bilateral programmes with many individual ASEAN countries), touching on such areas as capacity-building and the exchange of expertise in areas such as support to ASEAN economic integration, statistics, intellectual property rights, economic and social issues, air transport, and of course biodiversity. I say "of course", since we have been a founding partner of the ASEAN Biodiversity Centre here in the Philippines.

Certainly there have been difficulties, including issues such as Burma, or the lack of progress towards the proposed EU-ASEAN FTA, but I won't spend any time on these today – the issues are well-known.

Overall, though, you could say that the EU and ASEAN are sisters under the skin – similar challenges, similar solutions, similar basic approach. If one was looking for a metaphor, that of "birds of a feather" comes to mind – though given the difficulties we both face from time to time in working to promote regional integration, some might also say that "misery always looks for company".

4) Looking forward, what are the future challenges facing the EU and ASEAN ?

For the EU, I might make a brief reference to

- the search for competivity – the need to ensure that the EU is able to promote the livelihood, education and employment of our citizens in the global economy of today and tomorrow
- the need to better translate our economic / social weight into a real political weight on the regional and global stage, ensuring also that this translates into a positive contribution to our shared global futures
- and lastly, I would refer to what I said earlier about public perceptions, and the need to convince our citizens that the EU is directly and positively relevant to our citizens.

For ASEAN, I might also offer three challenges – two of which were already picked out by Ambassador Manalo. I could of course easily extend this list – since I believe that the challenges I mentioned for the EU could easily be applied also in the case of ASEAN. But I'll stick with symmetry, and mention just three examples of issues which I believe will be important for ASEAN to address, sooner or later (and probably sooner).

- As Ambassador Manalo said, in her challenge to all the lawyers in the room, for ASEAN to work towards the establishment of a rules-based ASEAN Community, where legally-binding procedures might gradually replace the rule of consensus. In this context, I was particularly struck by her reference to the dispute-settlement procedures currently being developed – where arbitration can take place when both parties agree, or if directed by the Coordinating Council (if both parties agree). To a European ear, this sounds remarkably minimalist.
- Second, Ambassador Manalo also suggested that it would be important to work towards creating an ASEAN Social Charter. It may be that many social issues must continue to be addressed by national governments (as remains the case in the EU), but a greater regional cooperation in these areas would be a major step forward towards the Caring & Sharing Community which ASEAN aspires to be
- Thirdly, I would mention an idea which is close to my own heart – and one which I've discussed with Ambassador Manalo on a number of occasions. This is the question of ASEAN solidarity – not in relation to foreign policy, where ASEAN has been very effective, but in relation to fighting poverty, and promoting competivity. The ASEAN Charter makes no reference whatever to any form of ASEAN financial resources (other than for the operational costs of the Secretariat). I would never suggest that the EU model, with a little over 1% of GDP going to EU activities, is appropriate for ASEAN. But to evade entirely the question of how to pay for ASEAN actions, how to contribute, within ASEAN and as ASEAN, to addressing the major challenges of the coming decades, to me was a major missed opportunity

5) In conclusion, Mr. Chairman, I do not want to end by focusing only on challenges and problems. Instead, I would like to conclude my remarks by confirming that just as I believe that the future of Europe lies with the further evolution of the EU, so also the future of South East Asia lies with ASEAN. And, in the broader view, our shared futures, in a context of globalisation, are intrinsically bound up with one another

Ambassador Manalo's presentation set out very clearly both the achievements of ASEAN and some of the issues which remain to be addressed, and it was a privilege to hear such an insider's view of ASEAN and its institutions.

CLOSING REMARKS

By Chief Justice Reynato S. Puno
Supreme Court of the Philippines

In behalf of our Supreme Court, let me thank our former Ambassador, her Excellency, Rosario Manalo for her most enlightening discourse on the ASEAN Charter. I wish also to express our gratitude to our Resource Speakers, Mr. Jeffrey Chan Teck, Deputy Solicitor General of Singapore and His Excellency, Allistair Bell McDonald of the European Commission for adding meaningful dimensions on the future of the ASEAN Charter. Likewise, I like to manifest our thanks to all who attended this Distinguished Lecture Series of our Supreme Court, especially our distinguished guests from the ASEAN Law Association.

It has been predicted that in this millennium, the attention of the world will shift to Southeast Asia. Certainly, the imperatives of geopolitics will drive this new attention. By rough estimate, some 560 million people inhabit the Southeast Asian region. Its population alone is proof of its potential for good or for ill, not only to the region but to the entire mankind. Likewise, the geographical location of some of its member-states is critical to the world's peace and prosperity. Some security experts opine that control of the Southeast Asian region is a key factor in the incessant struggle for political and economic hegemony of the superpowers today. And without further bloating the obvious, the rich natural resources scattered in the region make them objects to be coveted.

For these reasons, the formation and development of the ASEAN has been subjected to intense examination. Its birth in 1967, when Indonesia, Malaysia, Singapore, Thailand, and the Philippines signed the ASEAN Declaration in Bangkok, was hailed as the dawn of a new age in the underdeveloped region. ASEAN further raised the bar of expectations when Brunei Darussalam, Vietnam, Laos, Burma, and Cambodia joined its fold.

Several decades after its establishment, ASEAN is getting mixed reviews from the pundits. The turtle pace of its progress towards integration has strained the necks of its watchers. Unforgiving comments are made with it is compared with its counterparts in Europe, the Americas and even Africa. Typical of these comments is that which ridiculed the ASEAN as a mouth with a tongue but without teeth. All bark but no bite, so the critics denounce ASEAN.

It is not difficult, however, to understand ASEAN's slow motion march towards integration. Arguably, the reason holding ASEAN from sprinting to its objective is its guiding philosophy. It chose to be guided by what they call as the ASEAN Way to achieve its goal, and the ASEAN way is the way of consultation, compromise and consensus. To the impatient, the ASEAN Way, with its half steps and its pauses, will take the region an eternity to reach its destiny. I like to believe, however, that the member-states adopted this approach as a dictation of necessity.

Consider the distinct history of most of its member-states. These states have long histories of colonial exploitation by Western countries. These long years of exploitation have left scars in their subconscious which affect their trust level with foreigners. They will always greet other states with question marks, always with the suspicion that the plots to subjugate them politically or economically have not completely stopped. It is for this reason that these member-states protect their sovereignty with extraordinary jealousy and protect them not only against the super powers but even against each other. They protect their sovereignty against assaults coming not only from other states but assaults coming from transnational corporations, especially those controlled by their former colonialists. They resist the slightest diminution of the policy of self-determination and non-interference in their internal affairs and this still resistance inevitably slows down all efforts to integrate the socio-economic-political policies in the region.

Another factor that slows down the velocity of integration in ASEAN is the ethnic, cultural and religious heterogeneity in the region. This lack of homogeneity spawns irreconcilable viewpoints on human rights – their treatment of civil and political rights, as well as economic, social and cultural rights, in the hierarchy of human rights. Some states in the region want first to enhance economic, social and cultural rights as a condition for the realization of other rights. They emphasize the right to food, to education, to shelter and deemphasize the political rights of their people. Concomitantly, they give higher value to and security of the State, without which they believe, there can be no economic progress, no political stability. Again, the human right issue is preventing the quicker integration of the member-states within the ASEAN region. It is the most contentious issue in the ongoing debate about the efficacy of the ASEAN Charter. As well observed, the ASEAN Charter on human rights lacks an enforcement mechanism as it concerns itself more with the promotion and less with the protection of individual rights.

Even then, ASEAN has reasons to be celebratory. ASEAN has overcome its birth pains. ASEAN is no longer an informal arrangement. ASEAN has now a Charter. ASEAN is now endowed with a legal personality. The ASEAN is now a full-fledged legal construct; the principles of the ASEAN Charter are no longer mere political soundbytes. The challenge to ASEAN is how the principles so eloquently expressed in its Charter can be put into practice by its member-states. ASEAN is past the time of non-stop visioning; its time is over for borderless argument. The need of the time is for compliance, the demand of the present is for the earliest enforcement of the commitments of its member-states.

The ASEAN Charter which is a blueprint of our destination gives us hope where we have none before. For as accurately observed, the Charter is moving from discretion-based to rules-based. More importantly, the Charter is now, more people oriented. For the first time, it has set out norms of behaviour for member-states to follow in dealing with their citizens. In any language, that will strengthen the universal right to human dignity of some ½ billion people in the region. I have no doubt that in the fullness of time, the concept of UN Secretary General, Kofi Annam, of human rights as one and indivisible will come to pass. I quote him:

> "there is no one set of European rights, and another of African rights. Human rights assert the dignity of each and every individual human being and the inviolability of the individual's rights. They belong inherently to each person, each individual and are not conferred by, or subject to, any governmental authority. There is no one law for one continent and one for another. And there should be only one single standard – a universal standard for judging human rights violations."

The ASEAN Charter may not be a perfect charter but its imperfection is no excuse for us not to move forward. Our challenge is to make it work and it will work in accordance with our wish, depending on our will.

A pleasant day to all.

DISPUTE SETTLEMENT MECHANISMS IN THE ASEAN CHARTER*

By Prof. Gwen Grecia-de Vera [1]

One purpose for the establishment of the Association of Southeast Asian Nations or ASEAN is to maintain and enhance peace, security, stability and peace-oriented values in the region.[2] The Roadmap for an ASEAN Community (2009-2015) states that ASEAN's cooperation in political development aims to strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN, so as to ultimately create a Rules-based Community of shared values and norms. In the shaping and sharing of norms, ASEAN aims to achieve a standard of common adherence to those of good conduct among Member States of the ASEAN Community; consolidating and strengthening ASEAN's solidarity, cohesiveness and harmony; and contributing to the building of a peaceful, democratic, tolerant, participatory and transparent community in Southeast Asia. Viewed in this context, a viable mechanism for settling disputes and ameliorating conflicts within the ASEAN community is essential to achieving regional integration and creating a Rules-based community.

The ASEAN Charter, which only recently came into force,[3] highlights the centrality of conflict management towards regional integration by providing for dispute settlement under Article 25. Indeed, it is worthwhile to review the Report on the Eminent Persons Group ("EPG") on the Charter. The EPG stated –

> ASEAN must establish a culture of honoring and implementing its decisions and agreements and carrying them out on time....As ASEAN steps up its integration efforts, appropriate monitoring, compliance

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* *Lecture given at the Korea-Philippines Policy Seminar and Academic Conference for Economic Cooperation 2009 on Ways of Trade Promotion and Dispute Settlement among Korea, Philippines and the ASEAN Nations, 9 July 2009, Manila, Philippines. This material has been updated for publication.*

[1] *Assistant Professor, University of the Philippines College of Law, Director of the Institute of International Legal Studies, University of the Philippines Law Center from 2008 to 2011, and Member, Board of Trustees, Philippine Dispute Resolution Center, Inc.*

[2] *ASEAN Charter, Article 1, paragraph 1.*

[3] *The ASEAN Charter came into force on 15 December 2008.*

> and dispute settlement mechanisms should be established....
>
> The EPG, therefore, recommends that Dispute Settlement Mechanisms be established in all fields of ASEAN cooperation, which should include compliance monitoring, advisory, consultations as well as enforcement mechanisms.

To understand the role of DSM in ASEAN, however, and the DSM as understood in the Charter, it is important to note that many different mechanisms for conflict management[4] have developed in the ASEAN even before the Charter came into force. In the course of a study conducted by the Institute of International Legal Studies[5] on the ASEAN DSM one reference material accurately observed that the very formation of ASEAN institutionalized a framework for Member States to manage their disputes. As the ASEAN progressed, its institutionalization generated different dispute resolution mechanisms, which may be broadly classified into formal and informal (or normative) mechanisms. Notable of the formal mechanisms are: (1) the institutionalized framework of discussions and consultations on matters of mutual interest, and (2) legal instruments, which I will discuss at length later.

In this brief lecture then, we will only make mention of some of the informal methods of conflict management in the ASEAN, but focus specifically on dispute settlement mechanisms within the context of the pertinent ASEAN Charter provisions as provided in legal instruments that are meant to prevent and manage disputes. Why mention the informal methods of conflict management in the ASEAN? While formal dispute resolution structures, including arbitration and court adjudication, may gain importance as ASEAN establishes itself as a viable Rules-based regional organization under the Charter, it has been observed that since the formal methods, specifically the legal mechanisms that can presently be found in the ASEAN, have not only allowed for flexibility but have yet to be tested, perhaps there still is a preference for the "ASEAN way" of managing disputes "outside the parameters of formal structures and institutions of conflict resolution."[6] Much has been written of the "ASEAN way" and its place in Rules-based organization.

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[4] Mechanisms of conflict management may be defined as such processes, methods, devices, techniques and strategies employed to resolve or manage conflict, including anything employed in the whole complicated process of resolving or managing conflicts (see ***C.R. Mitchell, THE STRUCTURE OF INTERNATIONAL CONFLICT*** [St. Martin's Press, 1981].

[5] *One of four research institutes at the University of the Philippines Law Center.*

[6] Mely Caballero-Anthony, *"ASEAN's Mechanisms of Conflict Management Revisiting the ASEAN Way," in Regional Security in* ***Southeast Asia: Beyond the ASEAN Way*** *(Singapore: Institute of Southeast Asia Studies, 2005).*

At least one author has noted that "[c]ritics object that the ASEAN Way's emphasis on consultation, consensus, and non-interference forces the organization to adopt only those policies which satisfy the 'lowest common denominator.' These critics are correct that decision-making by consensus requires members to see eye to eye before ASEAN can move forward on an issue, but these principles emerged to ensure stability in a historically tumultuous region. Still, the diversity of the organization's membership does make coordinated progress towards any goal extremely difficult."[7] Writing in 2008, Simon Tay described the "ASEAN way" as having taken the norm of non-intervention in the affairs of member States as a cardinal precept.[8]

For purposes of our discussion, allow me to highlight only the elements of the "ASEAN way" and identify some of the modes of conflict management that fall within this category.

The elements of the ASEAN way may be summarized as:

(a) Adherence to ground rules enshrined in ASEAN's diverse declaration and communiqués;
(b) Emphasis on self-restraint; and
(c) Acceptance of the practices of *musyawarah* and *muafakat* (consultation and consensus), using third-party mediation to settle disputes, and agreeing to disagree while shelving the settlement of conflicts.

Writing in 2001, Amitav Acharya conceived of the ASEAN way as a "process of identity-building which relies upon the conventional modern principles of inter-state relations as well as traditional and culture-specific modes of socialization and decision-making that is prevalent in Southeast Asia." Despite the differences in describing what is called the "ASEAN way," the common observation is that it has thus far been useful in managing regional conflict. Permit me to provide some examples of these informal modes.

One is "diplomacy of accommodation," which entails a pattern of give and take among certain members, and involves restraint, respect and responsibility, or the 3Rs. Some authors suggest this method was used in two major disputes, namely the Malaysia-

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[7] Lee Leviter, *The ASEAN Charter: ASEAN Failure or Member Failure, 43 N.Y.U. J. Int'l L. & Pol. 159, 161-162.*

[8] Simon S.C. Tay, *The ASEAN Charter: Between National Sovereignty and the Region's Constitutional Moment,"* **12 SYBIL 151 (2008).**

Philippines dispute over Sabah and the Indonesia-Singapore crisis.

Another informal mechanism is the practice of *musyawarah*[9] and *muafakat*, which are concededly the ASEAN brand of conflict resolution. This has been described as a slow, step-by-step incremental process where decisions are arrived at only after several rounds of behind-the-scene bargaining. While the process may appear long-drawn and exhausting, one Filipino diplomat explained that before an issue is brought up for consideration by any ASEAN member "a lot of groundwork, that is, consultation, would have already been put in place by the initiating state." This is a practice that is resorted to today and whose importance has been noted –

> ...One of its values as a dispute management mechanism is that it provides a way for a minority state to affirm its position without having to be dominated by the views of the majority. It is also valuable when one recognizes the fact that each member state has an equal voice, regardless of its size and economic power. According to the view of one Indonesian academic, 'it is of great psychological value to have the biggest state in the group, Indonesia, to play ball with the rest of the group and for the smallest state, Brunei to have its own voice heard.'[10]

I should like to add, though, that with the ASEAN Charter and the move towards a Rules-based community, the idea of consensus-building in decision-making and dispute resolution is being re-examined.

And, of particularly interest perhaps to this group, is another method – third party mediation. Third-party mediation was not really officially adopted by ASEAN as a form of dispute management. Yet, with some modifications and indigenous adaptation, this mechanism has become more acceptable to some ASEAN members to settle long, drawn-out disputes particularly those pertaining to territory.

What I shared with you does not exhaust all informal modes, however, for the rest

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[9] *See however* Allan Collins, ***THE SECURITY DILEMMAS OF SOUTHEAST ASIA*** *(Hampshire, London & N.Y.: Macmillan/St. Martin's Press in association with Institute of Southeast Asian Studies – Singapore, 2000),* for view that expansion of ASEAN to include all ten states of Southeast Asia poses a challenge to musyawarah, since more members will make consensus decision-making harder to achieve.

[10] *Ibid., at 73.*

of this presentation, we will be looking at the following formal mechanisms:

(a) Dialogue, consultation and negotiation;
(b) Specific DSMs –

(i) Treaty of Amity and Cooperation in South East Asia
(ii) ASEAN Protocol on Enhanced Dispute Settlement Mechanisms

(c) Role of the ASEAN Summit.

The ASEAN Charter

Allow me to identify very quickly the provisions of the ASEAN Charter which have to do with dispute resolution. They are -

Chapter I

a. Article 2, Paragraph 2(d): Peaceful settlement of disputes
b. Article 2, Paragraph 2(e): Non-interference in internal affairs
c. Article 2, Paragraph 2(f): National existence free from internal interference, subversion and coercion
d. Article 2, Paragraph 2(g): Enhanced consultations
e. Article 2, Paragraph 2(j): Upholding UN Charter and international law;

Chapter III, Article 5, Paragraph 3: Serious breach of the Charter referred to in Article 20;

Chapter IV, Article 7, Paragraph 2(e): ASEAN Summit to decide on matters under Chapters VII and VIII;

Chapter VII: Decision-Making;

Chapter VIII: Settlement of Disputes; and

Chapter XIII, Article 51: Interpretation of the Charter; Disputes arising from interpretation

With these provisions, particularly the articles under Chapter VIII on Settlement of Disputes, the ASEAN Charter sets a framework for understanding dispute settlement mechanisms for its member States. For instruments with specific dispute settlement provisions, disputes arising under such an instrument shall be resolved applying the specific process it prescribes. Article 24 (3) of the Charter states that "where not otherwise specifically provided, disputes which concern the interpretation or enforcement of ASEAN economic agreements shall be settled in accordance with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism also known as the Ventiane Protocol. In the case of disputes of involving an ASEAN instrument, the modes of dispute settlement prescribed in the Treaty of Amity and Cooperation in Southeast Asia ("TAC") and its rules of procedures shall apply. The Treaty is also understood as applying principally to political and security related disputes.

Some instruments do not provide for DSM because the parties prefer to settle their differences amicably through negotiation and consultation.

Dialogue, Consultation and Negotiation

The ASEAN Ministers Meeting, ASEAN Post-Ministerial Conference and the various senior officials meeting have been characterized as institutionalized consultative mechanisms. The foundations for this type of mechanism were formulated as early as 1967, in the Bangkok Declaration, and whose importance was subsequently affirmed in the ASEAN Concord. The institutionalized framework of frequent consultations and regular meetings as provided in the ASEAN Concord have been used primarily in discussing regional and international issues, particularly political and security concerns. It has been noted that these meetings have been utilized in resolving contentious issues. ASEAN has been able to adopt common positions in regional affairs through these meetings.[11]

[11] Mely Caballero-Anthony, *"ASEAN's Mechanisms of Conflict Management Revisiting the ASEAN Way," in* ***Regional Security in Southeast Asia: Beyond the ASEAN Way*** *(Singapore: Institute of Souteast Asia Studies, 2005). The author gives as an example ASEAN's role in the political settlement of the Cambodian conflict since its start in 1978 up to the culmination of the internationally supervised elections held in 1993.*

Treaty of Amity and Cooperation in South East Asia

Before the ASEAN Charter, it would seem the TAC, promulgated in February 1976, was the only attempt by ASEAN to provide the arrangement and legal instrument for member States to order their relations according to explicitly prescribed, universally accepted principles and provide for the peaceful settlement of disputes. The TAC's statement of principles is a reiteration of the ASEAN's vision, some of which may even be found in the ASEAN Charter. TAC is significant, though, in its introduction of a specific mechanism for the peaceful settlement of disputes.

Chapter IV of the TAC, aptly entitled "Pacific Dispute Settlement" has five articles providing for the establishment of regional processes for settling disputes and managing conflicts. In broad strokes, the TAC provides a framework of such processes – (i) the parties and their obligations, (ii) what disputes come within the jurisdiction of the mechanism and (iii) the dispute settlement mechanism itself.

What disputes then fall within TAC's Chapter IV? Articles 13, 14 and 15 of the TAC identify the types of disputes that may be settled under the TAC. Article 13 speaks of disputes directly affecting the contracting parties, especially those that are likely to affect regional peace and harmony. Article 15, which pertains to the role of the High Council in the event no solution is reached through direct negotiations, uses the broad term "situation."[12]

The TAC provides for the creation of a formal mechanism to settle disputes through regional processes and directs the high contracting parties to constitute a High Council, as a continuing body. The High Council, under Article 15, is to take cognizance of the dispute or situation only in the event that no solution is reached through direct negotiations and, when deemed necessary, shall recommend appropriate measures for the prevention of a deterioration of the dispute or situation. In the exercise of the mandate under Article 15, the High Council may: (i) make a recommendation to the disputing parties of the appropriate means of settlement, such as good offices, mediation, inquiry or conciliation, (ii) offer its good offices, or (iii) constitute itself into a committee of mediation, inquiry or conciliation.

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[12] *TAC, Article 15. See* Dr. Purificacion Quisumbing, *"An ASEAN Perspective on the Legal and Institutional Aspects of the Community ' Emerging Legal Framework of ASEAN,'" pp. 69-88, at p.81.*

I hasten to add that there are two prerequisites to the High Council taking action under Article 15. For one, it must be shown that direct negotiation had been attempted, and that no solution was reached. Even then, the provisions on settlement with High Council intervention cannot apply "unless all parties to the dispute agree to their application to the dispute."[13] The High Council is not precluded, however, from offering all possible assistance to settle the dispute. The TAC advises "[p]arties to the dispute should be well disposed towards such offers of assistance."[14]

What if regional processes fail? The TAC, in Article 17, states that [n]othing in this Treaty shall preclude recourse to the modes of peaceful settlement contained in Article 33 (1) of the Charter of the United Nations," indicating the availability of extra-regional recourse. The high contracting parties which are parties to a dispute should be encouraged to take initiatives to solve it by friendly negotiations before resorting to the other procedures provided for in the Charter of the United Nations.[15]

The limitations of the TAC have not gone unnoticed. The "caveats" to the TAC mechanism have been criticized. Mely Caballero-Anthony identifies the major limitations of the TAC as its emphasis on voluntarism and the exercise of choice. She is quick to point out, however, that "...it is precisely because of this flexible procedure – allowing for freedom to choose which course of action to take – that appears to work in ASEAN's advantage. Flexibility was a deliberate choice over rigid, well-defined procedures, and in its experience this has made the exercise of conflict management a more manageable task for ASEAN."[16] Dr. Purificacion Valera-Quisumbing had occasion to note on the TAC –

> ASEAN, on the other hand, has no Court. The ASEAN Treaty of Amity and Cooperation however, provides for a High Council to conciliate, mediate, and otherwise offer its good offices, when disputes arise among the States Parties. Yet even [18] years after the Treaty took effect, the High Council has yet to be constituted. The treaty provisions are significant in that they reflect what appears to be Southeast Asian legal cultures'

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[13] *TAC, Article 16.*

[14] *Ibid*

[15] *TAC, Article 17.*

[16] Mely Caballero-Anthony, *"ASEAN's Mechanisms of Conflict Management Revisiting the ASEAN Way," in* ***Regional Security in Southeast Asia: Beyond the ASEAN Way*** *(Singapore: Institute of Souteast Asia Studies, 2005).*

> preference for the non-adversary, non-formal, methods of disputes settlements of conflict management.[17]

Despite these apparent limitations, the TAC is notable for its emphasis on the peaceful settlement of disputes, the preference for "friendly" negotiations and regional resolution, whether bilateral or otherwise, avoiding interference from outside the region. The preference for the TAC as providing the mode by which political and security disputes may be resolved can be seen even in the Roadmap for an ASEAN Community (2009-2015)

> Convinced that the settlement of differences or disputes should be regulated by rational, effective and sufficiently flexible procedures, avoiding negative attitudes, which might endanger or hinder cooperation, ASEAN promotes the TAC, which seeks to preserve regional peace and harmony and prescribes that Member States refrain from threat or use of force. The TAC gives provision for pacific settlement of disputes at all times through friendly negotiations and for refraining from the threat or use of force to settle disputes. The strategies for conflict resolution shall be an integral part of a comprehensive approach. The purpose of these strategies shall be to prevent disputes and conflicts from arising between ASEAN Member States that could potentially pose a threat to regional peace and stability. ASEAN, the United Nations and other organisations have held a number of cooperation activities in the effort to promote peace and stability. More efforts are needed in strengthening the existing modes of pacific settlement of disputes to avoid or settle future disputes; and undertaking conflict management and conflict resolution research studies. Under the ASEAN Charter, ASEAN may also establish appropriate dispute settlement mechanisms.

ASEAN Protocol on Enhanced Dispute Resolution Mechanisms

Under the Second Declaration of ASEAN Concord, the High Level Task Force on ASEAN Economic Integration recommended that, by end-2004, ASEAN should establish an effective system to ensure proper implementation of all economic agreements and

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[17] Dr. Purificacion Valera-Quisumbing, *"ASEAN Legal Cooperation: Quest and Challenge," delivered as the Third General Carlos P. Romulo Lecture on ASEAN Comparative Law on December 14, 1984, at the University of the Philippines College of Law, and printed in* ***Vital ASEAN Documents*** *(ASEAN Regional Law Series, vol. 1, Quezon City, Academy of ASEAN Law and Jurisprudence).*

expeditious resolution of any disputes. The new system provides advisory, consultative, and adjudicatory mechanisms as part of an Enhanced Dispute Settlement Mechanism ("Enhanced DSM") and the formation of a dedicated "Agreements and Compliance Unit" ("ACU") within the ASEAN Secretariat. The ACU was established in May 2004 and it deals primarily with legal issues related to trade and investment.

The ASEAN Protocol on Enhanced Dispute Resolution Mechanisms is generally understood to extend to ASEAN economic agreements. As mentioned earlier, the dispute settlement system under the Vientiane Protocol comprises advisory, consultative and adjudicatory mechanisms and arrangements. It is innovative and holds much promise for the purposes it is designed to serve. The Enhanced DSM requires the ACU to provide advice and legal opinions to concerned Member States, typically in the form of information papers prepared by the ACU at the request of the Senior Economic Officials Meeting ("SEOM"). Thereafter, bilateral consultations may be held between the parties in private sessions, followed by mediation, if requested, by the Secretary General of ASEAN. Where, after a period of time, no agreement has been found, the parties may ask the ASEAN Economic Ministers (AEM) to approve referral of the dispute to the ASEAN Compliance Body (ACB) for a non-binding recommendation, or to a full DSM Panel proceeding and, possibly, even a DSM Appellate Body review for formal adjudication.

In summary, Article 5 of the Ventiane Protocol provides for the establishment of a panel to look into the dispute and make findings to assist the SEOM to come to a decision. SEOM shall adopt the panel's report, unless it decides by consensus not to, or if one of the parties signals its intention to appeal.[18] There is an appellate body to hear appeals from panel cases.[19] Parties to the dispute are obliged to comply with the findings of the panel and appellate body, adopted by the SEOM.[20]

When it was adopted in 2004, the Vientiane Protocol covered forty-six (46) ASEAN legal instruments of economic nature. As of September 2008, there are forty-seven (47) instruments that could fall within the purview of this particular DSM. To date, however, most components of this system and, by implication, the capabilities and readiness of the ASEAN Secretariat ("ASEC") to provide the mandated administrative and technical support

[18] Ventiane Protocol, Article 9.
[19] *Id.*, Article 12.
[20] *Id.*, Article 15.

for the system, have not been tested. Nevertheless, certain deficiencies of the DSM have been identified, including: (i) lack of guidelines in its interpretation, (ii) lack of immediate availability to high-quality legal services which may be called upon under the DSM, and (iii) capacity-building for the ACU.

To date, disputes have been addressed and resolved through political channels.[21] No case has been raised under the Enhanced DSM. However, formal DSM proceedings have been considered on a number of occasions. The ACU needs to be able to support this process, and it is regularly called upon to provide information papers interpreting existing ASEAN Agreements, Protocols and legal instruments, primarily with respect to trade in goods and commodities (i.e., AFTA and the CEPT), but also on a range of other legal issues, some of which extend beyond trade and investment.

Certainly, not all ASEAN instruments contain dispute settlement mechanisms. Nor do all disputes relate only to political and security concerns. Indeed there are a number of economic agreements that require full ratification by all ASEAN member states as a condition for their entry into force, but have already been fully implemented. ASEAN does not have a process for these problematic agreements. There is a need, therefore, to establish DSM to cover other disputes. This is the reason for Article 25 of the Charter, which provides that "appropriate dispute settlement mechanisms, including arbitration, shall be established for disputes which concern the interpretation or application of this Charter and other ASEAN instruments." The DSM under this Article has yet to be established. The Report of the EPG gives us an idea of what structure may come under consideration. In its Report the EPG recommended that the DSM under Article 25 ought to be similar to the Vientiane Protocol. There was some discussion on establishing a regional judicial body, as well as an arbitration body. It was decided, with respect to the regional court, that the ASEAN was not quite ready for a formal court.[22]

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[21] See Footnote 193 of "The ASEAN Charter: ASEAN Failure or Member Failure," where Leviter notes "[m]ember states remain reluctant to utilize ASEAN dispute resolution mechanisms. The 2000s have seen a number of territorial disputes among ASEAN states, all of which have been resolved using the ASEAN Way or by resort to the International Court of Justice...."

[22] But see ***Dennis Hew (ed.), ROADMAP TO AN ASEAN ECONOMIC COMMUNITY*** (Singapore: Institute of Southeast Asian Studies, 2005), with opinion on need for supranational ASEAN Court. Narongchai Akrasanee and Jutamas Arunanondchai stated that a "centralized judicial body has the ability to organize a concerted effort to impose a more severe penalty on the country that is found guilty of failing to fulfil its commitment...."

Role of the ASEAN Summit

Should a dispute remain unresolved following the application of the appropriate DSM, the Charter, in Article 26, provides that the dispute shall be referred to the ASEAN Summit for its decision. The ASEAN Summit is the supreme policy-making body of ASEAN and shall comprise the Heads of State or Government of the Member States.[23] The Charter, however, does not spell out the procedure for the ASEAN Summit, when the body acts in this capacity. As the Summit is not a judicial body, it is important to further determine how it shall arrive at its "decision."

Once the Summit has rendered a decision, the Secretary-General is entrusted with the task of monitoring compliance. He has to submit a report to the Summit. A member State affected by non-compliance with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism may refer the matter to the Summit for decision. It will be for the Summit to prescribe what measures should be taken to ensure respect for the decision. A refusal to comply may be taken as a serious breach of the obligations of an ASEAN Member-State. I make this point here to emphasize that DSM in the ASEAN, indeed under the ASEAN Charter, must account also for effective monitoring, compliance and enforcement.

Conclusion

Allow me to end here and to stress that what I have covered does not exhaust all that can and must be said about DSM in the ASEAN. The development of DSM in the ASEAN continues to unfold and at present, a High Level Legal Experts Group ("HLEG) was convened to look into legal issues arising under the ASEAN Charter.[24] The HLEG has been tasked to discuss the legal personality of the ASEAN, immunities and privileges, and the DSM under the ASEAN Charter. Part of their work will include an examination of the various DSMs and to propose DSM appropriate for, among others, the situation or dispute referred to in Article 25 of the ASEAN Charter. [The HLEG is set to conclude its work this July 2009. It would be interesting to find out the result of the HLEG's work with regard to DSM under the ASEAN Charter.]

A further note on the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms

After this lecture was delivered, the Foreign Ministers of ASEAN signed on 8 April 2010, the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms. The Statement of the ASEAN Chair on the signing of the Protocol stresses the "determination of ASEAN in transforming ASEAN into a

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[23] ASEAN Charter, Article 7.

[24] A High Level Legal Experts Group (HLEG), appointed at the 41st AMM in Singapore, consisting of 10 senior legal experts, one each from every Member State, looked into all legal issues arising from the Charter. HLEG is chaired by H.E. Vasin Teeravechyan, former Ambassador of Thailand to the Republic of Korea, and former Director-General of the Treaty and Legal Affairs Department, Ministry of Foreign Affairs of Thailand. HLEG addressed three key issue areas: (1) legal personality of ASEAN (2) dispute settlement, and (3) privileges and immunities.

rules-based organisation,"[25] with the Protocol adopted and signed along with the Agreement on the Privileges and Immunities of ASEAN.

The Statement of the ASEAN Chair also underscored the following common understanding:

> 1. The Foreign Minister of ASEAN reaffirmed the commitment to finalise the three other instruments, namely: (i) the rules for references to the ASEAN Summit; (ii) the procedures for authorisation under internal law and domestic law, and (iii) the rules of procedure for requesting the ASEAN Secretariat to interpret the ASEAN Charter, of which the first one shall become an integral part of the Protocol.
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> ...
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> 3. In this regard, the Foreign Ministers agreed that the Protocol would be subjected to te respective internal procedures of the Member States after the adoption and inclusion of the rules of reference to the ASEAN Summit in the Protocol.[26]

Consistent with paragraph 2 of Article 22 and Article 25 of the ASEAN Charter, the Protocol refers to disputes concerning the interpretation or application of the ASEAN Charter, other ASEAN instruments (unless specific means of settling such disputes have already been provided for) and other ASEAN instruments which expressly provide that the Protocol or part of the Protocol shall apply.

Dr. Diane A. Desierto observed that "[w]hile the Protocol is still pending ratification by the ASEAN Member States, it should be pointed out that the Protocol promisingly provides for a full range of dispute settlement procedures, including consultation, good offices, mediation and conciliation, and arbitration."[27]

The Protocol shall enter into force on the day following the date of deposit of the tenth instrument of ratification with the Secretary General of the ASEAN.[28]

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[25] *http://www.asean.org/24506.htm.*

[26] *Ibid.*

[27] In an article entitled *ASEAN's Constitutionalization of International Law: Challenges to the Evolution Under the New ASEAN Charter 49 Colum. J. Transnat'l L. 268,* Dr. Desierto points out, however, that problems concerning incorporation and lack of direct effect should be addressed in order to enhance the authoritativeness and binding effect of ASEAN Charter interpretation.

[28] 2010 Protocol to the ASEAN Charter on Dispute Settlement Mechanisms, Article 19, Section 4.

THE ASEAN WAY TO INTEGRATION

By Senator Edgardo J. Angara

When we founded the ASEAN Law Association 30 years ago, our primary object was to promote closer relations, cooperation, and mutual understanding among lawyers in the five founding ASEAN countries.

By studying the laws of the ASEAN countries through the ALA mechanism, we sought to provide the organizational framework for legal cooperation in Southeast Asia.

Our goal was to harmonize national laws and so facilitate social and economic development among the ASEAN states. Our hope was that ALA would also become the instrument in disseminating information on the laws, legal systems, and legal development in the ASEAN countries.

A Region – and a World – Transformed

Thirty years later, we find ourselves in a world that has been transformed into one global village. ASEAN-5 has become ASEAN-10. And regionalism has become a necessary adjunct of globalism.

If we are to integrate successfully into the global economy, we must first complement globalization with strong regional integration. Integration is the way to advance common interests within a given region. Integration is the mechanism through which we can achieve our collective goals through coordination and international cooperation.

Admittedly, Asia is a latecomer in regional integration, compared with Europe or even with Latin America and Africa.

Not only are Asia's peoples and cultures vastly heterogeneous. Our home continent also experienced a long period of rule by European colonialists – and these historical artifacts have stood in the way of a common Asia identity.

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* *Keynote speech delivered before the ALA 30th Anniversary & Governing Council Meeting, February 20, 2010.*

Over the last ten years, however, economic integration has speeded up. Over that period, the ASEAN states have concluded 24 trade agreements, and they are negotiating another 34. The burst of activity has raised optimism for the rebirth of regionalism – in both our home region and in the larger East Asia – after decades of discord, and the ravages of the 1997 financial crisis, which turned many Asian countries inward.
Today there seems much larger scope for boosting intra-regional trade and investment. Already trade flows within Southeast Asia have risen to 42% of the region's total trade in 2008, up from 32% two decades ago. At their October 2009 Summit, the ASEAN leaders expressed a desire to build an EU-style single market of over 500 million people. The first phase of a free-trade zone is due to become a reality this year with the AFTA – the ASEAN Free-Trade Area = becoming fully effective on New Year's Day.

Already ASEAN's six older members have removed all tariffs on manufactured goods – though not on agricultural produce. ASEAN has also signed free-trade pacts with Asian powerhouses such as China and India. These wider linkages could make Southeast Asia the dynamic core of a pan-Asian bloc.

ASEAN Charter Ratified

Forty years after ASEAN's establishment, the Parliaments of all its 10 member states have all ratified the ASEAN Charter. The Charter calls for closer cooperation to achieve full ASEAN integration.

The target date it has set is 2015: by then, ASEAN will have realized its vision of one Southeast Asian 'community' with a legal and institutional identity. Note, however, the key word: ASEAN is inter-governmental, not supra-national; a community, and not a union, as is the European model. This crucial difference is stressed by the Eminent Persons Group that drafted the Charter.

A Problem of Cohesion and Credibility

An even deeper problem for ASEAN is its cohesion and its credibility. Though the Association finally has a legal charter, it still is bound by a strict policy of non-interference in each national unit's internal affairs. This limitation prevents ASEAN from replicating Europe's pooled sovereignty.

National sovereignty is, in fact, the foundation on which ASEAN is built: sovereignty enjoys the highest rank in ASEAN's "hierarchy of norms." Not only are ASEAN member-states protective of their individual sovereignty. They are also careful not to act against the perceived sovereign interests of other member-states.

Integration in ASEAN takes the form of socialization and informality – and not of strict, binding institutions. This has caused many observers to conclude that full integration will never take place in Southeast Asia – because full integration would entail giving up aspects of state sovereignty.

Organizations Founded on Kinship

Our own regional organization – ALA – is founded on professional kinship and not on institutions. But I myself believe that socialization and fellowship – instead of being obstacles to integration – are actually what makes ALA successful.

ALA's strength lies in its uniqueness as an organization. It has built bridges of friendship and promotes legal cooperation where there has been none. Its professional and social networks encompass judiciaries, bar societies, and legal academies.

ALA promotes camaraderie through its multifarious activities. It engages its members in scholarly pursuits – such as its law journal – as avidly as it does in its highly successful golf tournaments, or in amateur musical extravaganzas – such as those that will enliven tonight's 'Farewell Dinner' – that always draw enthusiastic participation from performers and audiences alike.

These spill-over effects from the formal Conference rooms bridge whatever cultural divide may separate us; and promote a unique fellowship that embraces all ALA members as organic parts of one extended ALA family.

ALA a Model for ASEAN Integration

In this way, ALA is a model – and a leader – in the ASEAN way toward integration. ALA exemplifies the kind of coherence and cooperation we strive for. ALA shows us how consensus works – notwithstanding differences in culture. The relationships that ALA forms are genuine – they are unforced and sustained. We do not come together to attend a sterile conference of pettifoggers and legalists. We come together for an honest and lively exchange of ideas.

The ASEAN Vehicle for Dispute Settlement

To give substance to its accords, ASEAN aims to "develop a culture of commitment to honor and implement decisions, agreements and timelines." For this purpose, the Charter establishes mechanisms for settling disputes and for monitoring compliance with agreements – referring serious breaches and non-compliance to the ASEAN Summit for decision.

We envision ALA as helping realize these specific objectives of the ASEAN Charter – by serving as ASEAN's consultative arm on legal matters. ALA can certainly help ASEAN find legal means within each country to facilitate regional integration.

At the ALA General Assembly last November, ASEAN Secretary General Surin Pitsuwan encouraged ALA to do just that – help ASEAN establish its legal mechanisms for settling disputes between member-states and for monitoring compliance with regional agreements. And ALA has responded by creating a high-level Task Force for the purpose.

The "Distinguished Lecture" we hard at the Supreme Court yesterday is a good first step. And the General Council's work this morning – which centered on resolutions appropriate to its principal agenda, which is the Charter – will do just that: it will help the ASEAN Secretariat to implement the Charter.

Conclusion and Closing Message

In closing, I call on ALA to strengthen and solidify its role as the ASEAN organization that advocates legal coordination, in the spirit of integration in the ASEAN way.

And this we can do through activities that promote legal development; legal and judicial reforms; supervision of law implementation; consultancy, and legal aid. We must raise the social consciousness and expertise of all ASEAN lawyers and teach them first, to think regionally – and, then, to think globally.

Cooperation, interdependence, and mutual assistance – these are the principal aims of the ASEAN Charter. I believe that ASEAN lawyers, in the spirit of friendship and openness, can become instrumental in our home region – Southeast Asia – achieving this goal.

Thank you.

Resolution of Issues under the Asean Charter
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RESOLVING PRESENT LEGAL ISSUES UNDER THE ASEAN CHARTER —The Brunei Perspective

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ASEAN today was not what it was when it was first established over 40 years ago. With the rise of neighbouring economies and now., other non traditional security threats like e.g. diseases, cross border criminal transactions, ASEAN needs to be able to face these challenges. The entry into force of the ASEAN Charter on 15th December 2008 is a significant milestone for ASEAN and it is hoped that this would help ASEAN to face such challenges.

The topic for this session is on resolving present legal issues under the ASEAN Charter. This paper will set out what the writer perceives as a legal issue under the ASEAN Charter. The writer has also put forward proposals that ASEAN Law Association can do to help resolve such issue. This paper would not attempt to address all legal issues related to the ASEAN Charter but instead would cover one very important element under the Charter and also propose ways of how the ASEAN Law Association can assist ASEAN this issue, i.e. that of integration. In the Chairman's Statement of the 14th ASEAN Summit "ASEAN Charter for ASEAN Peoples", amongst other matters he stated about the Charter, "The Charter provides the legal and institutional framework for ASEAN to be a more rules based, effective and people centred organisation paving the way for realising an ASEAN Community by 2015....."

The Preamble of the Charter provides that the "Peoples of the Member States of ASEAN" are amongst other matters "committed to intensifying community building through enhanced regional cooperation and integration, in particular by establishing an ASEAN Community, comprising the ASEAN Security Community, the ASEAN Economic Community and the ASEAN Socio Cultural Community...."

The Declaration of ASEAN Concord II (Bali Concord II), sought to bring the ASEAN Vision

2020 into reality by setting the goal of building an ASEAN Community by 2020 comprising three pillars, namely political-security community, economic community and socio-cultural community, all of which are closely intertwined and mutually reinforcing for the purpose of ensuring durable peace, stability and shared prosperity in the region. By the 12th ASEAN Summit in Cebu Philippines in 2007, Heads of Government agreed to accelerate the establishment of the ASEAN Community by 2015. Now that is only about 6 years away.

In order to establish the three pillars that comprise the ASEAN Community, blueprints were established. The ASEAN Economic Community Blueprint which was adopted at the 13th ASEAN Summit in Singapore in 2007, the ASEAN Political Security Community Blueprint and the ASEAN Socio Cultural Community Blueprint which was adopted at the 14th ASEAN Summit in Thailand in February this year. The above instruments demonstrate how committed our leaders are in developing an ASEAN Community. However ASEAN Member States are diverse in culture, language history and even legal system so how can we as an association help in this process. Article 16 of the Charter provides that ASEAN can engage with entities which support the ASEAN Charter, in particular its purposes and principles. Among the entities listed under Annex II of the Charter is the ASEAN Law Association (ALA). From the 3 pillars, the ASEAN political-security community pillar (APSC) and the ASEAN economic community pillar (AEC) would be relevant for us.

The ASEAN Political Security Community Blueprint provides a roadmap and timetable to establish the APSC by 2015. The activities and programmes under the APSC blueprint should also be able to continue beyond 2015. The APSC blueprint provides for the establishment of programmes for mutual support and assistance among AMS to strengthen the rule of law and judiciary systems and legal infrastructure. Among the necessary actions is for the ASEAN Law Ministers Meeting in cooperation with sectoral bodies and entities which includes ASEAN Law Association to develop cooperation programmes to strengthen the rule of law, judicial systems and legal infrastructure. Other actions are to undertake studies for lawmakers or the promulgation of laws and regulations develop a university curriculum under the ASEAN University Network, and another is to enhance cooperation between the ALAWMM and ALA and other Track II organisations through seminars, workshops and research on international law including ASEAN Agreements. Membership of ALA is comprised of lawyers, judges and legal academics. With such a good combination of legal expertise in all areas of the law, it is submitted that ALA can play an important role by helping ASEAN in realising an ASEAN Political Security Community. The last ASEAN Law

Ministers Meeting (ALAWMM) was held in Brunei Darussalam on 20th October 2009. Unfortunately, as the APSC was still in the progress of being developed, there was no discussion on this very important subject matter. However it is proposed that ALA should try and come up with proposals before the next ALAWMM.

Such proposals could include matters related to how laws can be harmonised among ASEAN Member States, proposals on developing university curriculum and other ways that would not only enhance cooperation between ALAWMM but also assist ASEAN in realising an ASEAN Community. It is also proposed that in order to ensure that ALA can work together with ALAWMM and ASEAN Senior Law Officials Meeting (ASLOM) is by participating in the meetings where discussions related to this very important topic are being held.

Another pillar related to an ASEAN Community is the AEC pillar. The roadmap leading to realisation of an economic community is the ASEAN Economic Community Blueprint. At the ASEAN Summit in 1997, leaders had decided to transform ASEAN into "a stable, prosperous, and highly competitive region with equitable economic development, and reduced poverty and socio-economic disparities". At that time the timeline was to be realised by 2020. By August 2006, the ASEAN Economic Ministers Meeting (AEM) held in Kuala Lumpur, Malaysia, agreed to develop "a single and coherent blueprint for advancing the AEC by identifying the characteristics and elements of the AEC by 2015 with clear targets and timelines for implementation of various measures as well as pre-agreed flexibilities to accommodate the interests of all ASEAN Member Countries." At the 12th ASEAN Summit in January 2007, the ASEAN Leaders affirmed their strong commitment to accelerate the establishment of an ASEAN Community by 2015 and signed the Cebu Declaration on the Acceleration of the Establishment of an ASEAN Community by 2015.

In particular, the Leaders agreed to hasten the establishment of the ASEAN Economic Community by 2015 and to transform ASEAN into a region with free movement of goods, services, investment, skilled labour, and freer flow of capital.

It is envisaged that the AEC will establish ASEAN as a single market and production base, making ASEAN more dynamic and competitive with new mechanisms and measures to strengthen the implementation of its existing economic initiatives; accelerating regional integration in the priority sectors; facilitating movement of business persons, skilled labour and talents; and strengthening the institutional mechanisms of ASEAN.

The key characteristics under the AEC are as follows: (a) a single market and production base, (b) a highly competitive economic region, (c) a region of equitable economic development, and (d) a region fully integrated into the global economy. These characteristics are inter-related and mutually reinforcing. Incorporating the required elements of each characteristic in one blueprint shall ensure the consistency and coherence of these elements as well as their implementation and proper coordination among relevant stakeholders.

Such characteristics are consistent with the objectives of the ASEAN Charter under Article 1 which provides amongst other matters:

> "...to create a single market and production base which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is free flow of goods, services and investment; facilitated movement of business persons, professionals, talents and labour; and freer flow of capital",

Based on the above objective in order to achieve economic integration, a key element would be the free flow of services i.e. a need for liberalisation of the services sector. Economic integration may not be as difficult as some might perceive, as ASEAN has put in place mechanism that would help to achieve it, such as AFTA, and the ASEAN Framework Agreement on Services (AFAS).

After taking into account the above, in particular, political statements related to economic integration, it would seem that the legal services sector, not only for being a professional services sector but also for being a sector that plays a key role in helping maintain a harmonious flow in trade, would also be expected to liberalise itself prior to 2015.

The legal profession is often considered as being a sensitive sector by some, however liberalisation should not be considered negatively especially by the local practitioners. Among potential advantages to the legal profession are:

i. **Increase in Competitive Edge:** Local law firms may risk getting complacent and not feel the urge to improve themselves if there is no outside pressure or threat. Lawyers are always expected to update themselves with the speedy development of the law internationally and there is fear that without their "boat

being rocked", local law firms may maintain status quo in their practices as their status is not being compromised. With the introduction of foreign law firms coming in and sharing their turf, this may actually encourage them to improve their services so they will not lose their clients to the newer law firms coming in.

ii. **Transfer of knowledge:** Along with more employment opportunities, especially for fresh law graduates, having prominent foreign law firms who have experience in a wide range of legal issues would be beneficial for the local lawyers to learn from.

iii. **Infiltration of local lawyers to practise abroad:** Not only will our lawyers be able to practise anywhere within ASEAN (which will of course help facilitate the free flow of services and establishment within ASEAN), there is possibility of ASEAN lawyers to practise in the territories of dialogue partners if the governments of ASEAN Member States decide to make legal services commitments in free trade agreement negotiations with them.

iv. **More transparency:** There are actual cases where member countries do allow foreign lawyers or consultants to enter and practise on a temporary basis.

v. **Joint Ventures:** joint ventures between a local law firm and foreign law firm which may enable the lawyers from the foreign law firm to advise clients on host country law.

vi. **Increased FDI:** The establishment of the foreign law firm, especially a prominent one can also be seen as type of investment made which will increase foreign direct investment into the host country.

With advantages, there are some disadvantages that come with it too, some possible examples are:

i. **Overcoming differences:** ASEAN consists of a diverse mix of legal systems and legal practices and with the sensitivities of the legal services sector, it is difficult for countries to recognise each others' legal qualifications given such differences. Nevertheless, this should not be accepted as a justification to never liberalise

because the European Union, with its own diversity and differences have been able to set up the Council of Bars and Law Societies of Europe and have issued a number of directives that has permitted free movement of European lawyers within the region.

ii. **Need to establish a stronger and effective regulatory regime:** With such a liberal movement of lawyers across the region, it would be difficult for a national Law Society to regulate the conduct of its national lawyers who are practising in other member countries. It is therefore imperative that something like an Intra-ASEAN regulatory regime be established first. Such a mechanism need to be set out and there also needs to be implementers; both of these will most definitely require more resources which may be an added burden for some member countries.

iii. **Fear from local lawyers:** The disadvantage most expressed is the idea that the local lawyers may lose out or be badly affected from the hordes of foreign lawyers coming in especially when they are of Multinational Corporation's status.

iv. **Need to amend laws or constitutions:** There is also the issue that some countries just are not able to overcome their national sensitivities in permitting a foreign lawyer to practice in their territory and there may be a need to amend laws or even the Constitution for this change to happen.

While liberalisation is something for the governments of the respective ASEAN Members States to decide on, however as an entity recognised under the ASEAN Charter, ALA can still make it easier for our governments to achieve this objective. We do not have to start from scratch. We can build on the cooperation we have and increase awareness of the various areas that are of concern amongst members e.g. recognition and enforcement of commercial judgements, familiarisation of legal systems of each member.

This can be through the exchange of information, sharing of experiences, undertaking transparency exercises in legal systems, legal traditions and legal practices would all be very valuable to have amongst members to enable us to have a clearer understanding

of what needs to be done for liberalisation and in turn we would be prepared for any eventuality once liberalisation does happen by 2015.

In conclusion, the entry into force of the ASEAN Charter is the beginning of a new era for ASEAN. Realisation of an ASEAN Community is only but a few years away. We have to prepare ourselves for integration and this can be done through effective coordination and cooperation with the relevant ASEAN Sectoral bodies in particular the ASEAN Law Ministers Meeting and the ASEAN Senior Law Officials Meeting. We should also try to promote activities which are consistent with the objectives of the ALA Constitution in particular to cooperate with international, regional, national and other organisations in the furtherance of its objectives.

Resources:

1. The ASEAN Charter
2. Framing the ASEAN Charter, ISEAS Perspective
3. Report of the Eminent Persons Group on the ASEAN Charter
4. Roadmap for an ASEAN Community (2009-2015)

RESOLVING PRESENT LEGAL ISSUES UNDER THE ASEAN CHARTER —The Indonesian Perspective

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CHAPTER I: OVERVIEW

The Association of South-East Asian Nations ("ASEAN") nowadays plays a pivotal role as part of the international community. Not only does it function as a solid economic block of South-East Asia, but it has also widened the cooperation between the 10 Member States to encompass non-economic aspects as well, such as culture, politics, education, technology, human development, and even security. After the promulgation of the ASEAN Charter in 2007 as a response to the growing needs of the Member States in the new millennium, which was subsequently ratified by all of the Member States in 2008, ASEAN is no longer a mere association of nations. It is now an international organization equipped with international legal personality, consequently rendering it vested with international legal rights and obligations. This signifies that ASEAN is now standing equal to other international organizations such as the United Nations, European Communities, Organization of American States, and World Trade Organization.

This is indeed an admirable reality, since ASEAN can now emphasize its existence in the international community and at the same time, contribute to the development and betterment of the international legal order as a whole. With a stronger cooperation and intensified interaction between the Member States in so many aspects nowadays, justice and rule of law are evidently elements that are much sought by the people of ASEAN. This is particularly because the ASEAN Charter itself, in numerous provisions which it contains, has mandated that rule of law, justice, democracy, good governance, and human rights must be upheld and enforced at all times.

In its 42 years of establishment, ASEAN is now looking at contemporary legal issues which challenge its continuation and sustainability as an international organization. Those issues range from labors, terrorism, and traffic in drugs and human trafficking, to claim of sovereignty and alleged violations of human rights. Many of those issues most of the times occur between the Member States themselves, and therefore, the potential for

them to resort to open conflicts is likely to be high. If these matters continue without an effective monitoring and control by the ASEAN itself, they will be likely to emerge into military conflicts and will persist with no feasible solution. We surely still remember the armed clash between Thai and Cambodian troops in both countries' border in October 2008. Such conflict arose from each State's claim of sovereignty over the land surrounding the Temple of Preah Vihear.

Evidently ASEAN plays a significant role in taking all the preventive measures possible to ensure that States will refrain forever from resorting to the same armed conflict, particularly because one of the foundations on which ASEAN is established and for which ASEAN Member States have vowed to uphold at all times is the principle of the non-use of force. In realizing its goals and purposes as enshrined under the Charter and other related documents, ASEAN should be able to effectuate its role as a dispute settlement forum and thereby taking any measure necessary to maintain peace and security in the region.

The matter described above is only one of the challenges that ASEAN is facing nowadays. Other issues also exist and serve as a learning tool for ASEAN: how can the organization stand the test of time and still prove its existence and qualities to the international community, despite all the problems impeding its road? For the purpose of framing this paper into a clear scope of discussion, I will only limit the scope of this paper into 3 (three) legal issues that I perceive as currently being the most vital legal issues in ASEAN and may endanger the legal order of ASEAN should they go unresolved: issues concerning laborers and migrants, terrorism, and human rights. This paper will describe to what extent they have affected the Member States of ASEAN nowadays and what solution may be offered to put an end to those problems.

CHAPTER II: ISSUES REGARDING LABORERS AND MIGRANTS IN ASEAN

Issues on the rights and duties of laborers and migrants have arisen in several ASEAN Member States. These issues are mostly obvious in Member States with high per capita income employing nationals of Member States with lower per capita income. On one hand, with the growing need of industries to produce a significant load of work in a limited period of time, laborers are indispensable to the survival of industrialized and capital-based States. It is often the case that, since such States have a limited number of population, particularly those who are willing to be employed as heavy workers, they start receiving and employing migrant workers from other States. However, on the other hand, the large amount of foreign laborers in those States has given birth to new socio-economic

problems: laborers who do not possess adequate skills of work are eventually abandoned, unemployed, and they become either illegal immigrants or involved in crimes; whereas those who are well-skilled are often overworked, underpaid, and deprived of several fundamental basic labor rights. This is not to mention physical and mental abuse which some employers are proven to have committed against their employees. We can take examples of the following States to demonstrate those issues:

1. Malaysia

According to the Minister for Manpower and Transmigration of Indonesia, Erman Suparno, up to 2006 there were 1,75 million Indonesian laborers working in Malaysia. This number does not include Indonesian illegal laborers who can account for twice as much as the said amount.[1] Indonesians are the most numerous foreign workers in Malaysia, who represent 60% of the total amount of foreign workers in that State. They work as, among other things, baby sitters, house maids, drivers, and workers in plantations. With this significant amount, Indonesian laborers are prone to social, economic, and legal problems in Malaysia.

Throughout the history of both countries, Indonesia and Malaysia have witnessed various violations of the fundamental rights of Indonesian laborers. Ill-treatment by employers, rape, deprivation of freedom, murder, confiscation of administrative and immigration documents by employers, and employers not paying the laborers' salary are among the problems which cast a shadow upon the bilateral relations of both States.

One of the major cases which did not only shock both States, but also drew the attention of the international community occurred in May 2004. Nirmala Bonat, an Indonesian worker from East Nusa Tenggara was known to have suffered severe physical abuse committed by her Malaysian employer for 5 (five) months. Nirmala suffered severe bruises and burns all over her body.[2] During the abuse, she was kept inside her employer's house with firmly locked doors and windows so that her neighbors could not know of the abuse. During her period of work, Nirmala was also never given a room; she was always sleeping on the floor.

Previously in 2002, Malaysia's policy to expel foreign illegal migrant workers had resulted in nearly 25,000 Indonesian workers being stranded on the frontier island of Nunukan, where they were waiting until further notice concerning their status was delivered by the

[1] *http://www.tempointeraktif.com/hg/ekbis/2006/01/12/brk,20060112-72167,id.html*
[2] *http://news.bbc.co.uk/2/hi/asia-pacific/3732241.stm*

government of Malaysia. As they were lacking food, water, and hygiene, some of them died from hypertension, asthma, diarrhea, and fever.[3]

Indonesia is not the only State which has uneasy relationship with Malaysia in respect of Malaysia's policy concerning foreign laborers and migrants. Upon expelling foreign migrant workers from its territory in August 2002, Malaysia received a formal complaint by the Government of the Philippines citing that the treatment of Malaysia against Filipino laborers was "unduly harsh".[4] Officials also confirmed that three Filipino children have died while in the process of being deported, one at a Malaysian detention centre on Saturday, one on board a navy ship prior to departing Malaysia, and a third on Monday after returning to the Philippines.[5]

In response to these issues, the Malaysian government has of course taken measures to accord a better protection of labor rights to foreign migrant workers residing in its territory. On May 13, 2006 in Nusa Dua, Bali, the Minister of Manpower and Transmigration of Indonesia, Erman Suparno and the Minister of Internal Affairs of Malaysia, Radzi Sheikh Ahmad signed a Memorandum of Understanding ("MoU") on Indonesian migrant workers in Malaysia. The MoU in essence covers 4 (four) issues: placement of informal Indonesian laborers in Malaysia, misuse of visa for social visit purposes by Indonesians when they undertake employment in Malaysia, education for the children of Indonesian laborers, and training on Malaysian culture for Indonesian laborers. Similar MoU have also been concluded with Thailand,[6] Vietnam,[7] India,[8] and Nepal.[9]

2. Thailand

From January to February 2009, Thailand was placed under international spotlight and scrutiny when allegations that its government had mistreated thousands of Burmese and Bangladeshi migrants were made public. These migrants were said to have sailed all the way from their countries to Thailand in search of work, and were lacking food, water, and sanitation.[10] Instead of welcoming them, Thailand was reported to have pushed them out

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[3] *http://www.thejakartapost.com/news/2002/08/15/more-migrant-workers-die-nunukan-camps.html*

[4] *http://news.bbc.co.uk/2/hi/asia-pacific/2219016.stm*

[5] *Ibid.*

[6] *http://nntworld.prd.go.th/previewnews.php?news_id=254610100023&news_headline=Thailand%2 0and%20Malaysia%20Sign%20 Labor%20MoU&return=ok*

[7] *http://www.jil.go.jp/foreign/event_r/event/documents/2006sopemi/keynotereport1.pdf*

[8] *http://www.aseanaffairs.com/page/ties/employment%20india,%20malaysia%20to%20sign%20mou%20on%20labour%20protection*

[9] *http://www.kantipuronline.com/kolnews.php?&nid=114931*

[10] *http://news.bbc.co.uk/2/hi/south_asia/7830710.stm*

to the sea and left them to die.[11] Others claimed to have been detained and beaten by Thai authorities.[12] They were refused entry into Thailand for not possessing legal documents required, and they were eventually stranded in the neighboring territories of Thailand, including in Idi, Province of Nangroe Aceh Darussalam, Indonesia. Among these migrants were Ronghiya Moslems refugees, an ethnic minority from Myanmar whom many perceived to often face persecution in their country.[13]

Although Thai authorities previously denied these allegations,[14] Prime Minister Abhisit Vejjajiva eventually admitted that these practices had taken place, and at the same time stressed that the government was working on rectifying the problem and that if evidence has pointed to those who did it, they will certainly be brought to account.[15]

The precedent shown above once again reaffirms that laborers and migrants are very vulnerable to be subjected to abuse and other violations of their fundamental rights. The fact that this issue has arisen within ASEAN should draw the attention of all the Member States to focus on taking effective measures to resolve it and ensure that it will never be repeated anymore.

3. Myanmar

Labor issues within ASEAN may not only occur between interstate boundaries, but they may also happen domestically, as it is the case with Myanmar. Myanmar has been subject to international community's attention over the past 13 years for its policies which many believe to be in breach of international labor rights. In 1996, Burmese military began forced relocation upon 200,000 to 300,000 members of Karenni ethnic minority in the State of Kayah of Eastern Myanmar. They were relocated from their villages to certain locations where there was no sufficient food, water, medicine, and sanitary facilities to fulfill their basic daily needs. Those who managed to escape to Thailand in 1998 and 1999 mentioned in an interview with Amnesty International that the military had ordered them to perform forced labor. The military was said to have also committed arbitrary detention,

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[11] *http://www.telegraph.co.uk/news/worldnews/asia/thailand/4269504/Thai-military-accused-ofpushing-Burmese-boat-people-out-to-sea-to-die.html*

[12] *http://english.aljazeera.net/news/asia-pacific/2009/01/20091244723199894.html*

[13] *http://www.telegraph.co.uk/news/worldnews/asia/thailand/4269504/Thai-military-accused-ofpushing-Burmese-boat-people-out-to-sea-to-die.html*

[14] *http://www.voanews.com/english/archive/2009-01/2009-01-28-voa11.cfm?CFID=215561270&CFTOKEN=60187407&jsessionid=003032567c18fb3de0ff705141671015484a*

[15] *http://edition.cnn.com/2009/WORLD/asiapcf/02/12/thailand.refugees.admission/index.html*

torture, and murder of the civilians who were forced to become laborers.[16]

This policy of forced labor was imposed by Myanmar not only on the Karenni ethnic group, but also on other ethnic minorities residing in Myanmar's eastern parts, such as Shan, Karen, and Southern Kachin. The forced labor which they performed include: plantation of forests, paving roads, constructing military barracks, and transporting heavy ammunitions and other supplies for the Burmese military. All these were instructed by the military to help them win the war against insurgency initiated by members of the said ethnic groups. In performing the forced labor, civilians were not given adequate food, water, shelter, and salary, or they might not get paid at all. Children were also reported to have been involved in the forced labor.[17]

The issue of forced labor in Myanmar has been brought to serious attention of the International Labor Organization ("ILO"), particularly because Myanmar is bound by ILO Convention No. 29 Concerning Forced or Compulsory Labor which it ratified on March 4, 1955.[18] At its 291st Session in November 2004 in Geneva, ILO decided to dispatch a high level mission to Myanmar to investigate the allegations of forced labor. In November 2007, ILO also specifically asked Myanmar to make a statement that any form of forced labor should be abolished. ILO has also threatened Myanmar that it would request for an Advisory Opinion by the International Court of Justice in the Hague, the Netherlands to ban Myanmar from continuing its forced labor policy.[19] However, it was only in the beginning of 2007 that Myanmar began cooperating with ILO. On February 26, 2007, Myanmar signed a Supplementary Understanding with ILO to establish a mechanism where individuals claiming to be victims of forced labor may seek compensation. At the 298th Session of ILO in March 2007, Myanmar also consented to open its territory for scrutiny by ILO delegation to investigate the alleged forced labor.[20]

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[16] *http://myanmarnews.wordpress.com/2006/11/16/tenaga-kerja-paksa-di-burma-didiskusikanilo/; http://www.un.org/apps/news/story.asp?NewsID=12613&Cr=myanmar&Cr1=; http://www.reuters.com/article/asiaCrisis/idUSL14863912; http://news.bbc.co.uk/2/hi/asia-pacific/4224720.stm; http://www.labour.gov.za/media/statement.jsp?statementdisplay_id=11979; http://www.amnesty.org/en/library/asset/ASA16/009/1999/en/dom-ASA160091999en.pdf; http://www.amnesty.org/en/library/asset/ASA16/014/1999/en/dom-ASA160141999en.pdf*

[17] *Ibid.*

[18] *http://www.ilo.org/ilolex/cgi-lex/convde.pl?C029*

[19] *http://www.labour.gov.za/media/statement.jsp?statementdisplay_id=11979*

[20] *http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_085128.pdf*

Finally at the 301st Session of ILO in March 2008, ILO adopted the Conclusion of the Governing Body No. GB. 301/6 which covered the issues concerning laborers in Myanmar, the essence of which can be described as follows:[21]

1) Governing Body welcomes the extension of probation period of 12 (twelve) months for the application of the Supplementary Understanding ("SU") by Myanmar;

2) Governing Body strongly calls upon Myanmar once again to make public statements, disseminated clearly in local languages, to reconfirm the prohibition of all forms of forced labor and Myanmar's commitment to implement such policy, including through the application of the SU;

3) Governing Body regrets the continuing reports of harassment against individuals who are in support of the SU;

4) Governing Body underlines the Conclusion of the Committee on Freedom of Association in the Case No. 2591 on freedom of association and the rights of all trade unions; and

5) Governing Body calls upon the government of Myanmar to strengthen its cooperation with ILO to ensure the effective application of the SU and effectuate its compliance with ILO Convention No. 29 which prohibits forced labor and recruitment of children into the military.

The subsequent policies of Myanmar regarding its laborers in responding to the measures laid down by ILO remains to be seen in the future.

[21] *http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_091579.pdf*

CHAPTER III: TERRORISM IN ASEAN

South-East Asia is a new focus of the world war against terrorism post-the attack against World Trade Center of the United States in September 11, 2001. A series of terrorist attacks in several ASEAN Member States have not only drawn the attention of the affected States, but also the international community which expressed its condemnations through *inter alia*, various resolutions of the United Nations General Assembly and Security Council. The impact of terrorism in ASEAN Member States can be described as follows:

1. Indonesia

Indonesia is mostly affected by terrorism as compared to the other ASEAN Member States. On October 12, 2002 a series of terrorist bombings occurred in night clubs in Bali, killing 202 and injuring more than 300 people, many of whom were foreign tourists.[22] On August 5, 2003 a high explosive bomb was blasted outside of J.W. Marriott Hotel, Jakarta, killing 12 and injuring nearly 150.[23] In September 9, 2004 a car containing bomb exploded in front of the Australian Embassy in Jakarta, killing 9 and severely injuring more than 180.[24] Another series of explosions took place again in different locations in Bali on October 1, 2005, in which 19 people were murdered and 132 were wounded.[25]

The gravity of terrorism in Indonesia has been brought to the attention of the United Nations Security Council which adopted Resolution 1438 in 2002 in which the Council expressed its strongest condemnation to the terrorist attacks in Bali and called upon all States to cooperate and give support and assistance to the government of Indonesia in trying the perpetrators, planners, and sponsors of those terrorist attacks.[26] Other Resolutions were also adopted to expressly oblige States, including Indonesia, to take measures required to combat terrorism.[27]

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[22] *"Bali Bombings: Horror in Paradise," <http://edition.cnn.com/SPECIALS/2002/bali/>.*

[23] *"Marriott Blast Suspects Named", <http://edition.cnn.com/2003/WORLD/asiapcf/southeast/08/19/indonesia.arrests.names/>.*

[24] *"Text Warned of Jakarta Bomb," <http://edition.cnn.com/2004/WORLD/asiapcf/09/10/indonesia.blast/index.html?iref=newssearch>.*

[25] *"Security Tightened after Bali Suicide Bombings," <http://edition.cnn.com/2005/WORLD/asiapcf/10/02/bali.blasts/>.*

[26] *United Nations Security Council Resolution 1438 (2002), S/Res/1438, adopted by the Security Council at its 4624th meeting, on 14 October 2002, par. 1 & 3.*

[27] *Security Council Resolution 1373 (2001), S/Res/1373, 28 September 2001; Security Council Resolution 1535 (2004), S/Res/1535, 26 March 2004; Security Council Resolution 1624 (2005), S/Res/1624, 14 September 2005.*

2. Philippines

The Philippines is a strong political, economic and military ally of the United States and a close partner in the global war on terrorism. With the spread of Al Qaeda across the globe and the growth of the Al Qaeda-linked South East Asian terrorist network Jemaah Islamiyah, the stability and security of the Philippines and U.S.-Philippines counterterrorism efforts take on a new urgency.[28]

There are four major terrorist groups active in the Philippines today: The Moro National Liberation Front, the Moro Islamic Liberation Front, Abu Sayyaf, and the New People's Army. The first three are Islamic groups that operate primarily in the south of the nation, where most of the country's Muslim minority live. The Communist New People's Army operates in the northern Philippines.[29] The impact of terrorism in the Philippines has made the government pass a new legislation against terrorism which provides improved measures to combat terrorism in the country.[30]

3. Thailand

Thailand is also one of the victims of terrorism in South-East Asia. In the 2007 New Year's Eve celebration, a series of 8 (eight) bombing exploded all over Bangkok, killing 3 and injuring 38.[31] This occurrence only shows that terrorism is indeed a grave problem in ASEAN, bearing in mind that terrorists operate on the basis of "*dépersonalisation de la victime*": terrorists do not target their victims based on any particular link of nationality, asset, gender, social status, sex, age, etc.[32] Terrorists commit their attacks indiscriminately and hence, making it possible for anyone to be a victim of terrorism whenever and wherever. This is what makes terrorism so heinous by nature and thus, its prevention and suppression in ASEAN requires a strong cooperation between all of the Member States.

CHAPTER IV: HUMAN RIGHTS IN ASEAN

Kishore Mahbubani, a well-known Singaporean diplomat once stated that: "culture haunts the search for a system of human rights that can truly be universal".[33] This citation is

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[28] *http://www.adl.org/Terror/tu/tu_0404_philippines.asp*

[29] *Ibid.*

[30] *http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-224693*

[31] *"Thai Blast Tourist Undeterred," <http://news.bbc.co.uk/2/hi/uk_news/england/southern_counties/6222545.stm>.*

[32] *M. Delmas-Marty, "Les Crimes Internationaux Peuvent-ils Contribuer au Débat entre Universalisme et Relativisme des Valeurs?" in Cassese and Delmas-Marty (eds), Crimes Internationaux, at 67.*

[33] *Kishore Mahbubani, "Can Asians Think?" in the National Interest, 52 Summer 1998, p. 35.*

indeed true bearing in mind that the principles of human rights have now not only been acknowledged and protected under the national legal system of each State, but also under international legal system. This is proven by the inception of numerous international legal instruments governing human rights, such as: the Universal Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1966), American Convention on Human Rights (1969) and European Convention on Human Rights (1950).

However, one can always ask whether, with the increasing awareness of human rights everywhere around the globe, have human rights in the ASEAN region been sufficiently protected? This question may be answered by looking at various violations of human rights in the ASEAN Member States which can be described below.

1. Indonesia

Human rights in Indonesia are rather problematic. Members of international organizations, non-governmental organizations, and governmental institutions have expressed their concern on Indonesia's ability to protect human rights in its territory. Many have also questioned Indonesia's policy which may have been contradictory to international human rights standards.

We can take a look at several issues related to the protection of human rights in Indonesia:

a) Freedom of Expression

Broadly-worded laws limiting freedom of expression are still used by authorities to target outspoken critics. In October 2006 an Indonesian student was convicted of insulting President Susilo Bambang Yudhoyono during a protest and sentenced to three months and 23 days in prison by the South Jakarta District Court.[34]

Journalists and editors who publish controversial materials face intimidation. A prominent case in 2006 concerned **Playboy Indonesia**, the first edition of which went on sale in early April without any nude photos. The new magazine was greeted by protests and violent attacks on its Jakarta editorial offices. In a welcome decision in September 2006 judges at the South Jakarta Court dismissed blasphemy charges against an editor of the online edition of Rakyat Merdeka for re-publishing the offensive Danish cartoons of the Prophet Muhammad.[35]

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[34] *http://www.hrw.org/legacy/englishwr2k7/docs/2007/01/11/indone14869.htm*

[35] *Ibid.*

Recently, the Tangerang District Court began a trial against Prita Mulyasari, a housewife indicted for writing a complaint about the service of a public hospital which maltreated her, which she sent to her relatives by e-mail. This e-mail was later forwarded by those who had received it to various internet blog providers. The hospital, upset about the e-mail reported Prita to the police for a defamation and tort. The civil lawsuit has been decided where Prita was found to be guilty for tort and was obliged to pay nearly US$ 25,000 to compensate the hospital. The criminal case is still ongoing and the Prosecutor has indicted her by invoking Bill No. 11 (2008) on Information and Electronic Transactions to establish her criminal liability.

This case occurred because the Bill itself opens loopholes for someone to be held accountable for a crime even when he/she merely exercises his/her freedom of expression, whereas such freedom has been guaranteed under the Constitution. This demonstrates how Indonesian legal products may be contradictory and may overlap with each other, which may stem from the lack of competent and skilled legislators in the Parliament.

b) Freedom of Religion

Instances of religious intolerance appeared to be on the rise in 2006 with attacks on Ahmadiyah places of worship and Christian churches. Joint Decree No. 1/2006 on the establishment of places of worship, issued by the Religious Affairs Ministry and the Home Ministry in March 2006, requires a 90-member minimum congregation prior to the issuance of permits for a place of worship. The decree provoked a string of protests from minority religious groups, and prompted the forcible and sometimes violent closure of several Christian churches across Indonesia by vigilante groups. In June 2006 the Central Jakarta District Court convicted Lia Aminuddin, the leader of a minority religious sect, the Kingdom of Eden, for blasphemy against Islam and sentenced her to two years imprisonment.[36]

The Ahmadiyah religious minority continued to face discrimination, intimidation and violence. At an interfaith rally in June 2008, Ahmadiyah demonstrators were attacked by sections of the Front Pembela Islam (FPI). Police who were monitoring the rally did not intervene. In response, the Indonesian government announced a joint ministerial decree "freezing" the activities of Ahmadiyah, effectively outlawing its followers. In October 2008,

[36] *http://www.hrw.org/legacy/englishwr2k7/docs/2007/01/11/indone14869.htm*

Munarman, a commander of the Islamic Defender Squad, and Rizieq Shihab, leader of the Islamic Defenders' Front, were jailed for 18 months for inciting violence at the rally.[37]

Attacks on Christian leaders and the closure of church buildings in Papua have also continued. In August 2008, three unknown assailants beat unconscious Catholic priest and human rights defender Father Benny Susetyo in South Jakarta.[38]

c) Forced Evictions

Disputes over land and forced evictions continue to be a frequent source of conflict. Security forces often demolish homes and destroy personal property without notice, due process, or compensation, and residents often are ill-treated. Women, children, and rural migrants typically suffer particularly severe long-term consequences, including impairment ability to earn a livelihood or to attend school.[39] The eviction usually happens when powerful business enterprises, upon approval by the government, set up a seat of business in the area which happens to have been illegally resided by beggars, street vendors, and other individuals from a low economic class. In such a case, the poor residents are unlikely to succeed in the dispute against the enterprises.

2. Myanmar

Myanmar has been under international scrutiny due to its national policies which do not appear to be compatible with the governing international human rights laws. In February 2009, the government of Myanmar announced to suspend a referendum that would be held later in the year on a draft constitution, followed by elections in 2010. In May 2008, only a week before the scheduled day for the referendum, Cyclone Nargis devastated parts of southern Myanmar, affecting approximately 2.4 million people. More than 84,500 people died and more than 19,000 were injured, while nearly 54,000 remained unaccounted for. In its aftermath the government delayed or placed conditions on aid delivery, and refused international donors permission to provide humanitarian assistance.

Following a visit by the UN Secretary-General in late May, access improved, but the government continued to obstruct aid and forcibly evict survivors from shelters.[40]

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[37] *http://thereport.amnesty.org/en/regions/asia-pacific/indonesia*

[38] *Ibid.*

[39] *http://www.hrw.org/legacy/englishwr2k7/docs/2007/01/11/indone14869.htm*

[40] *http://thereport.amnesty.org/en/regions/asia-pacific/myanmar*

Also in May 2009 the government extended the house arrest of Daw Aung San Suu Kyi, General Secretary of the National League for Democracy (NLD), the main opposition party, who has been under detention since 1989. By the end of the year there were more than 2,100 other political prisoners. Many were given sentences relating to the 2007 mass demonstrations after unfair trials. In eastern Myanmar, a military offensive targeting ethnic Karen civilians, amounting to crimes against humanity, continued into its fourth year. The government's development of oil, natural gas and hydropower projects in partnership with private and state-owned firms led to a range of human rights abuses.[41]

CHAPTER V: ILLEGAL FISHING

Illegal fishing has been a major threat to ASEAN's maritime industries and has been impeding the economic growth of its Member States for many years.[42] In Indonesia, the Director-General of Supervision and Control of Maritime Resources and Fishing (P2SDKP), Aji Sularso cited that although the country is the biggest in South-East Asia, Indonesia is mostly affected by illegal fishing compared to the other neighboring countries.

Some areas which are prone to illegal fishing are: Arafura Sea, Natuna Sea, and South Sulawesi Sea, whereas most of the offenders belonged to Chinese, Thai, Vietnamese, and Filipino vessels.[43]

In 2007, 184 out of 2,207 vessels in Indonesia were found to be illegal, 89 of which sailed with foreign countries' flags flown.[44] The Ministry of Marine Affairs and Fisheries in 2003 stated that 85% of modern fishing vessels weighing over 50 gross tons which operated in Indonesia were falsified; they had Indonesian flags on, but they actually belonged to foreign shipping companies.[45] It is further estimated that every year, approximately 1,000 vessels commit illegal fishing in Indonesia,[46] with a total economic loss from which Indonesia annually suffers amounts to $ 2 billion.[47]

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[41] *Ibid.*

[42] *Lukita Grahadyarini, "Ruwetnya Menangani Penangkapan Ikan Ilegal", Kompas, March 5, 2008, available at: <http://cetak.kompas.com/read/xml/2008/03/05/01585680>.*

[43] *Ibid.*

[44] *Ibid.*

[45] *"Atasi Penangkapan Ikan Ilegal di KTI, Libatkan Tiga Negara", Kompas, June 9, 2003, available at: <http://www2.kompas.com/kompas-cetak/0306/09/iptek/358940.htm>.*

[46] *Grahadyarini, loc. cit.*

The Manager of Northern International Fisheries Department of Agriculture, Fisheries, and Forestry of Australia, Peter Cassells stated that one of the major troubles faced by Indonesia in combating illegal fishing is the fact that most of the offenders operate big vessels with modern equipments, rather than employing traditional methods.[48]

This is the reason why member states of ASEAN have cooperated with Australia, Papua New Guinea, and Timor Leste to adopt a Regional Plan of Action (RPOA) to eradicate illegal fishing on a regional level and promote a responsible fishing. RPOA authorizes a collective action to monitor waters and prevent illegal fishing, which is put under the clause of "monitoring control and surveillance" (MSC).[49]

Through RPOA, the countries involved have also consented to contribute in implementing the MSC by way of exchanging: information on illegal ships, data, and technological support among them. Additionally, MSC on the regional level is further enhanced through bilateral and sub-regional cooperation. Nonetheless, critics started to convey their concerns on the program.[50]

At the 4th Meeting on the implementation of RPOA in Nusa Dua, Bali on March 4, 2008, several countries admitted the difficulties they had in implementing the MSC. The Cambodian Representative for Fisheries Administration, Pich Sereywath stated that his government still found it difficult to better the administration of fisheries because people have not come to realize the importance of having a better management of fisheries. They also found it difficult to conduct internal monitoring upon illegal fishing because it requires a high cost. Additionally, bureaucracy and lack of access to data from other countries were also cited as other reasons why Sereywath viewed that the full implementation of RPOA remains unforeseeable at the time being.[51] Nowadays, illegal fishing has not only significantly affected Indonesia's marine resources, but it has also passed inter-state boundaries and affected transnational interests, particularly those of Asia-Pacific countries.

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[47] *David Weber, "Illegal fishing costs Indonesia $2-billion a year: expert", The World Today, May 12, 2006, available at:<http://www.abc.net.au/worldtoday/content/2006/s1637120.htm>.*

[48] *Grahadyarini, loc. cit.*

[49] *Ibid.*

[50] *Ibid.*

[51] *Ibid.*

CHAPTER VI: LEGAL ANALYSIS

With regards to the issues provided in the previous chapters, below is the legal analysis upon those issues based on international legal context.

1. In Respect of the Issues concerning Laborers and Migrants

States which are mentioned in Chapter II, if proven that they have committed the practice described therein, can be held accountable for breaching international law.

Malaysia can be held accountable for breaching the prohibition of torture embodied under customary international law. This is because the prohibition of torture has arisen into a *jus cogens* norm, a norm from which no derogation is permitted at any time.[52] In a 1980 case, a United States Court has pronounced that:

> "...the torturer has become, like the pirate or slave trader before him, *hostis humani generis*, an enemy of all mankind".[53]

Thailand may also be held accountable if proven to have committed the practice described under Chapter II. Thailand has then breached various provisions under the International Covenant on Civil and Political Rights (1966) which it has adhered to in January 29, 1997,[54] namely: Article 7 on the prohibition of torture or cruel, inhuman or degrading treatment or punishment; Article 9 par. (1) on the prohibition of arbitrary arrest or detention; and Article 10 par. (1) on the obligation to treat every detainee with humanity and respect for dignity.

Myanmar can be held accountable for violating ILO Convention No. 29 concerning Forced Labor (1930) which it has ratified.[55] However, the legal issue arising is that Myanmar may argue that the form of "forced labor" instructed by the military does not fall within the definition "forced labor" stipulated under ILO Convention No. 29. According to Article 2 (b) of the Convention, forced labor does not include:

> "any work or service which forms part of the normal civic obligations of the citizens of a fully self-governing country."

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52 Steven R. Ratner & Jason S. Abrams, Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy (Oxford: Clarendon Press, 1997), p. 110; see Siderman de Blake v. Argentina, 965 F.2d 699, 714-718 (9th Cir. 1992).

53 Filartiga v. Peña-Irala, United States Court of Appeals, Second Circuit (June 30, 1980), at 980.

54 http://www.unhchr.ch/pdf/report.pdf

55 http://www.ilo.org/ilolex/english/convdisp1.htm

Myanmar may argue that since the labor ordered by the government is part of the war against rebel groups, it falls within "normal civic obligation of the citizens of a fully selfgoverning country", which is therefore excluded from the definition of forced labor.

This raises a concern that there might be loopholes open for abuse of law because the term "normal civic obligations" are not properly defined or elaborated under the Convention. It is understandable that the drafters of the Convention did not wish to define or elaborate the term for the purpose of not limiting the discretion of a State to determine what is best for its own government and its own people. This problem can still be resolved by having recourse to the principle of interpretation.

Under Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties which have now been crystallized as part of the general principles of law, there exist several means of interpreting a treaty when a provision under a treaty, by its natural and ordinary meaning does not shed a light upon the substance it aims to govern. The parties to the treaty can observe the *travaux préparatoires* of the Convention: the discussions and drafted documents made prior to the conclusion of the treaty. This aims to find what was originally intended by the parties to the treaty upon including a provision under the treaty.

The parties can also observe the object and purpose of the treaty. Object and purpose are some of the trickiest parts under the principles of interpretation, as it is not easy to find the genuine object and purpose of a treaty. They can be found under the Preamble of the treaty, under any other provision in the treaty which relates to or elucidates the provision whose meaning needs to be interpreted, and one may as well believe that the object and purpose of the treaty can be found after he/she reads all of the provisions under the Convention as a whole and try to fetch the holistic essence of what a certain provision aims to govern.

Moreover, the allegation of forced labor in Myanmar, if proven to be true, also constitutes a violation of Article 11 of ILO Convention No. 29, since this Article only permits adults to be laborers, and therefore, recruitment of children to perform heavy works is illegal. This Article governs that:

"Article 11

1. Only adult able-bodied males who are of an apparent age of not less than 18 and not more than 45 years may be called upon for forced or compulsory labour.

Except in respect of the kinds of labour provided for in Article 10 of this Convention,the following limitations and conditions shall apply:

(a) whenever possible prior determination by a medical officer appointed by the administration that the persons concerned are not suffering from any infectious or contagious disease and that they are physically fit for the work required and for the conditions under which it is to be carried out;

(b) exemption of school teachers and pupils and officials of the administration in general;

(c) the maintenance in each community of the number of adult able-bodied men indispensable for family and social life;

(d) respect for conjugal and family ties.

2. For the purposes of subparagraph (c) of the preceding paragraph, the regulations provided for in Article 23 of this Convention shall fix the proportion of the resident adult able-bodied males who may be taken at any one time for forced or compulsory labour, provided always that this proportion shall in no case exceed 25 per cent. In fixing this proportion the competent authority shall take account of the density of the population, of its social and physical development, of the seasons, and of the work which must be done by the persons concerned on their own behalf in their locality, and, generally, shall have regard to the economic and social necessities of the normal life of the community concerned."

In the context of ASEAN, forced labor, forced labor employing children, torture or ill-treatment against labors, and arbitrary arrest against migrants are strictly prohibited. This is because every ASEAN Member State has consented to uphold the rule of law at all times upon ratifying the ASEAN Charter. The provisions on the rule of law under the Charter are governed as follows:

Preamble, Paragraph 8:

"ADHERING to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms".

Article 1, Paragraph 7:

"To strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN".

Article 2, Paragraph 2, Subparagraph (h):

"Adherence to the rule of law, good governance, the principles of democracy and constitutional government".

2. In Respect of Terrorism

Terrorism is indeed a crime which must be prohibited, criminalized, prevented and suppressed in the ASEAN region. This is because most of the Member States have adhered to the two most prominent international conventions on terrorism today, namely the International Convention for the Suppression of Terrorist Bombings (1997) and International Convention for the Suppression of the Financing of Terrorism (1999). Various resolutions of the United Nations General Assembly and Security Council were also adopted to address that terrorism is one of the most atrocious crimes and that all measures necessary must be taken by the international community.[56]

ASEAN Leaders, at their 7th Summit on 5 November 2001 in Brunei Darussalam, adopted the 2001 ASEAN Declaration on Joint Action to Counter Terrorism. The ASEAN Leaders viewed terrorism as a profound threat to international peace and security and "a direct challenge to the attainment of peace, progress and prosperity of ASEAN and the realization of ASEAN Vision 2020". They expressed commitment to combat terrorism in accordance with the Charter of the United Nations, other international laws and relevant UN resolutions. They also underlined that "cooperative efforts in this regard should consider joint practical counter-terrorism measures in line with specific circumstances in the region and in each member country".[57]

They also identified specific measures for ASEAN to implement the Declaration, namely:[58]

- Review and strengthen national mechanisms to combat terrorism;
- Call for the early signing/ratification of or accession to all relevant anti-terrorist

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[56] *Security Council Resolution 1373 (2001), S/Res/1373, 28 September 2001; Security Council Resolution 1535 (2004), S/Res/1535, 26 March 2004; Security Council Resolution 1624 (2005), S/Res/1624, 14 September 2005.*

[57] *http://www.aseansec.org/14396.htm*

[58] *Ibid*

conventions including the International Convention for the Suppression of the Financing of Terrorism;

- Deepen cooperation among ASEAN's front-line law enforcement agencies in combating terrorism and sharing "best practices";
- Study relevant international conventions on terrorism with the view to integrating them with ASEAN mechanisms on combating international terrorism;
- Enhance information/intelligence exchange to facilitate the flow of information, in particular, on terrorists and terrorist organisations, their movement and funding, and any other information needed to protect lives, property and the security of all modes of travel;
- Strengthen existing cooperation and coordination between the ASEAN Ministerial Meeting on Transnational Crime (AMMTC) and other relevant ASEAN bodies in countering, preventing and suppressing all forms of terrorist acts. Particular attention would be paid to finding ways to combat terrorist organisations, support infrastructure and funding and bringing the perpetrators to justice;
- Develop regional capacity building programmes to enhance existing capabilities of ASEAN member countries to investigate, detect, monitor and report on terrorist acts;
- Discuss and explore practical ideas and initiatives to increase ASEAN's role in and involvement with the international community including extra-regional partners within existing frameworks such as the ASEAN + 3, the ASEAN Dialogue Partners and the ASEAN Regional Forum (ARF), to make the fight against terrorism a truly regional and global endeavour;
- Strengthen cooperation at the bilateral, regional and international levels in combating terrorism in a comprehensive manner and affirm that at the international level the United Nations should play a major role in this regard.
- The specific measures outlined in the Declaration have been incorporated in the Terrorism component of the Work Programme to Implement the ASEAN Plan of Action to Combat Transnational Crime adopted in May 2002. The Work Programme is based along 6 strategic thrust namely: information exchange; cooperation in legal matters; cooperation in law enforcement matters; institutional capacity building; training; and extra-regional cooperation.

In addition, ASEAN has also produced the ASEAN Convention on Counter Terrorism in 2007 which remains to enter into force after the 30th day following the deposit of the 6th

instrument ratification by Member States. All these facts show ASEAN's commitment to stress the importance of abolishing all forms of terrorism from the region.

3. In Respect of Human Rights

Human rights are of a paramount importance under the ASEAN Charter. This can be shown by various provisions on human rights under the Charter as well as the establishment of ASEAN Human Rights Body. The provisions on human rights under the Charter can be found as follows:

1. Preamble paragraph 8:

"ADHERING to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms".

2. Article 1 paragraph (7):

"To strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of ASEAN".

3. Article 2 paragraph (2) (h):

"Adherence to the rule of law, good governance, the principles of democracy and constitutional government".

4. Article 2 paragraph (2) (i):

"Respect for fundamental freedoms, the promotion and protection of humanrights, and the promotion of social justice".

5. Article 14:

"1. In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body.

2. This ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN Foreign Ministers Meeting."

With the increasing global awareness of human rights, mechanisms of complaint for human rights violations are now provided significantly on the international plane. Nationals of

States which adhere to the International Covenant on Civil and Political Rights (1966) can file complaints on human rights violations that they suffer to the Human Rights Council against their States. Human Rights Council then will act as a quasi-judicial body which will render its decision on whether or not a violation occurs. The similar mechanism for individual complaint claiming that there are human rights violations is also provided under the European Convention on Human Rights for EU citizens and American Convention on Human Rights for nationals of the Organization of American States ("OAS"). However, ASEAN has not acquired the privilege of having such mechanism as there currently exists no regional human rights convention in ASEAN. It is hoped that this is a gap where ASEAN Human Rights Body can fit in, and therefore the discussions to lay down precise measures to render the role of the Body effective must be intensified by all the Member States, for there to arise a new ASEAN with better human rights protection.

4. In Respect of Illegal Fishing

Illegal fishing is often considered as involving professionally organized criminal activity to 'launder' its illegal catch. The conduct of illegal fishing is induced by the solid fact that illegal fish would always have a demand and protection in the market.

The incumbent Minister of Marine Affairs and Fisheries of Indonesia, Freddy Numberi opines that illegal fishing is no different from money laundering: the illegal fish caught in Indonesian waters can become legal when entering, exported to, or sold in neighboring countries. This is a worrying reality, bearing in mind that money laundering itself has been a serious crime under Article 6 of the UN Transnational Organized Crime Convention. This Article defines money laundering as:

> *"1. (a) (i)...The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property...*
> *(ii) The concealment or disguise of the true nature, source, location, disposition, movement, or ownership of or rights with respect to property, knowing that such property is the proceeds of crime..."*

Fish "laundering" like this must not happen within ASEAN, as all of the ASEAN Member States have consented to uphold the principles of the rule of law, democracy, and good governance, as enumerated under Preamble paragraph (8), Article 1 paragraph (7), and Article 2 paragraph (2) sub-paragraph (h) of the ASEAN Charter.

CHAPTER VII: PROPOSED SOLUTIONS

In resolving the current legal issues in ASEAN, the Author recommends the following solutions to be taken into consideration:

1. ASEAN should stress and enhance its existence and functions as an international organization. Mechanism for dispute settlement should not be merely in form of issuing non-binding recommendations and it should not act merely as a "mediator" between the disputing States; it should be able to render binding decisions which must be enforced and executed by all parties in good faith;
2. If ASEAN is concerned that this measure may infringe States' sovereignty in breach of the ASEAN Charter and the principle of non-intervention under the United Nations Charter, then such concern is not based upon adequate legal grounds. Many international organizations provide for an establishment of a judicial body whose decisions are final and binding, such as: the International Court of Justice established by the United Nations, the Dispute Settlement of expropriation and nationalization shows that it is possible to render binding decisions under international law.

Such binding power of a judicial forum is always possible under international law insofar as a clause providing for such is put under the constituent instrument of the international organization and must be agreed upon by the Member States. As such, Member States are deemed to have rendered part of their sovereignty to the international organization and are therefore bound by the decisions of the judicial forum established by the organization;

3. Member States of ASEAN must intensify the existing negotiations and consultations in order to produce better legal framework to respond to the issues mentioned above. These negotiations are particularly important to address:

   (i) terrorism, since there can arise so many issues concerning a terrorist suspect who may have committed his crime in the territory of one State but is found to be within the territory of another State, and for that reason Member States should conclude treaties between them on extradition and mutual legal assistance to detain and prosecute terrorist suspects; and
   (ii) the issues of human rights, bearing in mind that Asia-Pacific is the only region which does not possess a regional human rights convention, left behind America which has produced the American Convention on Human Rights (1969), Europe

which produced the European Convention on Human Rights (1950), and Africa which has the African Charter on Human and Peoples' Rights (1981). Human rights have today become a universal value which must be well-safeguarded in ASEAN, and therefore, the measures to effectuate the ASEAN Human Rights Body, including by equipping it with a constituent treaty are therefore vital to be taken by the Member States, in order to create a better ASEAN with improved human rights record.

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RESOLVING LEGAL ISSUES UNDER THE ASEAN CHARTER —The Malaysian Perspective

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Ladies and gentlemen,
It is my great pleasure to address you today on the topic of resolving legal issues under the ASEAN Charter.
The ASEAN Charter is a constitution for the Association of South East Asian Nations (ASEAN). It was adopted at the 13th ASEAN Summit in November 2007.

The intention to draft the constitution had been formally tabled at the 11th ASEAN Summit held in December 2005 inKuala Lumpur, Malaysia. Ten ASEAN leaders, one each from each member state, called the ASEAN Eminent Persons Group who were assigned to produce recommendations of the drafting of the charter.

In the 12th ASEAN Summit held in January 2007 in Cebu, the Philippines. Several basic proposals were made public. The ASEAN Leaders, therefore, agreed during the Summit to set up a "high level task force on the drafting of the ASEAN Charter" composed of 10 high level government officials from ten member countries.

The task force held 13 meetings during 2007. Some of the proposals were the removal of non-interference policy that is central to the regional group since its formation in the 1960s, and to set up a human rights body.

1. The ASEAN Charter is to become a foundational instrument of the Association of South East Asian nations (ASEAN). Since its establishment on the 8th of August, 1967, ASEAN has grown in maturity but yet full potential still has to be realized.

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2. With this in mind, the 40th Anniversary of ASEAN held in Singapore on 20th of November, 2007 was marked by the adoption of the ASEAN Charter.

3. The preamble to the charter states that the Heads of States and Governments were:

"Mindful of the existence of mutual interest and inter dependence among the people and member States of ASEAN which are bound by Geography, common objectives and shared destiny."

INSPIRED by and united under One Vision, One Identity and One Caring and Sharing Community.

UNITED by a common desire and collective will to live in a region of lasting peace, security and stability, sustained economic growth, shared prosperity and social progress, and to promote our vital interests, ideals and aspirations.

RESPECTING the fundamental importance of amity and cooperation, and the principles of sovereignty, equality, territorial integrity, non-interference, consensus and unity in diversity.

ADHERING to the principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamental freedoms.

By virtue of Article 47 the charter was to enter into force following the deposit of the tenth instrument of ratification with the Secretary General of ASEAN.

The ratification of the ASEAN Charter is as follows :-

Member State	**Government Ratification**	**Deposit of Instrument of Ratification**	**Signed by**
Singapore	December 18, 2007	January 7, 2008	Prime Minister
Brunei Darussalam	January 31, 2008	February 15, 2008	Sultan
Lao People's Democratic Republic	February 14, 2008	February 20, 2008	Prime Minister
Malaysia	February 14, 2008	February 20, 2008	Foreign Minister
The Socialist Republic of Vietnam	March 14, 2008	March 19, 2008	Minister of Foreign Affairs

Member State	Government Ratification	Deposit of Instrument of Ratification	Signed by
The Kingdom of Cambodia	February 25, 2008	April 18, 2008	National Assembly
The Union of Myanmar	July 21, 2008	July 21, 2008	Foreign Minister
The Republic of the Philippines	October 7, 2008	November 12, 2008	Senate
Republic of Indonesia	October 21, 2008	November 13, 2008	The House of Representatives
The Kingdom of Thailand	September 16, 2008	November 14, 2008	Parliament

4. From the outset – it was envisaged that this Charter would be a living instrument intended to grow and adopt according to new developments so as to respond to the challenges of the time. Not only in order to achieve political, economical peace security and stability so as to secure the rights of each individual within the ASEAN Borders, but also to establish through this Charter the legal and institutional framework for ASEAN.

5. Article 50 provides that the charter may be reviewed 5 years after it enters into force OR as otherwise determined by the ASEAN Summit.

6. While Article 52 makes it clear that ("All treaties, conventions, agreements, concords, declarations, protocols and other ASEAN instruments which have been in effect before the entry into force of this Charter shall continue to be valid), it is plain that the Charter is intended to be the supreme legal instrument governing all ASEAN affairs.

7. Article 52(2) expressly provides in case of inconsistency between the rights and obligations of ASEAN member states under such instruments and this Charter, the Charter shall prevail.

8. The scope, ambit and intended purpose of the Charter is both ambitious profound.

Every member of the ASEAN Law Association must become not only familiar with the provisions of the Charter but also acquire an intimate knowledge of its potential scope of operation.

9. Whilst the subject matter of this talk is "Resolving legal issues under the ASEAN Charter". I will take the liberty of discussing some legal issues in the Charter itself. As far as resolving disputes within the Charter, as a matter of treaty law, there is not much to be said. The Principles enumerated in the Vienna Convention on the Law of Treaties will apply as its principles are applicable as a matter of customary International Law. In addition , Article 5(3) of the Charter provides that in case of non – compliance of serious breach of the Charter the matter shall be referred to Article 20.

   What Article 20 states, in essence is that basic decision making must be consensus and in case of serious breach of the Charter of non-compliance the matter shall be referred to the ASEAN Summit. Article 25 envisages the establishment of appropriate dispute settlement mechanisms including arbitration.

10. The Charter is generally couched in broad terms for example, Article 2 details various principles that shall govern the operation of both ASEAN and each of its member states.

    Article 2(ii)c – speaks of "renunciation of aggression under the threats or use of force or other actions in any manner inconsistent with international law".
    Article 2(ii)d requires "reliance in peaceful settlement of disputes".
    Article 2(ii)h also stipulates that ASEAN and its Member States must act with "adherence to the rule of law, good governance, the principles of democracy and constitutional government."
    Article 2(ii) i requires "respect for fundamental freedoms, promotion and protection of human rights, and the promotion of social justice".
    Article 2(ii)j mandates that ASEAN member states uphold "The United Nations Charter and international law, including international humanitarian law subscribed to by ASEAN Member States. "

11. These principles are, at first blush, exceptionally general. They appear to be unobjectionable and it may even be said that they add little to the obligation of ASEAN member states under the current state of public international law prior to the promulgation of the ASEAN Charter.

12. This is evidenced for e.g. by the reference in Article 2(ii) J to uphold the United Nations Charter. The same provision makes reference to the obligation to comply with the International Humanitarian law. However, these obligations are limited.

    The obligation is limited to ASEAN member states complying with and otherwise upholding only that part of international law, including International Humanitarian Law ALREADY binding upon ASEAN member States. Arguably, it adds nothing new.

13. A potential consequence of all this is that, as between ASEAN Member States there may be a gap in standards. "Country A" may sign and ratify numerous international conventions, whilst "Country B" may not. The ASEAN Motto "One Vision, One Identity , One Community" may give rise to the danger of double vision", and the risk of headaches!!

    The question therefore be asked is whether or not the ASEAN Charter is effectively redundant as far as certain CORE provisions are concerned.

14. Article 28 makes it crystal clear that "unless otherwise provided for in this Charter, Member States have the right of recourse to the modes of peaceful Settlement contained in Article 33 (l) of the Charter of the United Nations or any other international legal instruments to which the disputing member states are parties".

15. Once again, we see a theme of the ASEAN Charter that ASEAN member States remain at liberty to have recourse to any and all international instruments that apply to them individually. Like all political documents and most international legal conventions or treaties the ASEAN Charter is a creature of compromise. That this is so is unremarkable.

    This realty is borne out by the fact that as matter stands, there is no obligation on ASEAN member states collectively to ratify any specific international conventions so as to give teeth to the general obligation to promote "adherence to the Rule of Law"

[Article 2(ii)(h) or "the promotion and protection of human rights and promotion of Social Justice".(Article 2 (ii)(i)]

The supporting nature of the ASEAN Charter, and its effect to leave largely undisturbed the current international law landscape, is perhaps as stated in Article 28 "Unless otherwise provided for in this Charter, Member states have the right of recourse to the modes of peaceful settlement contained in Article 33(1) of the Charter of the United Nations or any other international legal instruments to which the disputing Member States are parties"

There appears to be no provision in the ASEAN Charter that displaces Member States ability to have recourse to the modes of peaceful settlement contained in Article 33(1) of the United Nations Charter. The "unless provided for" qualification therefore appears redundant. Similarly, it is not presently clear whether, how, or in what way the ASEAN Charter would displace any existing international convention that any ASEAN member state may currently be a party to.

16. There does not appear to be any express provision in the ASEAN Charter which unequivocally, or explicitly states a particular Article takes precedence over any specified pre-existing international convention or obligation. Similarly, it is not clear to me, as matters stand, on which issue it is can be said an "ASEAN Charter obligation" takes precedence over another pre-existing international obligation.

That's the bad news!! But all is not doom and gloom. The Charter does have purpose and an important role to play. Progress must start somewhere. It is my firm conviction for all its FLAWS and inadequacies the ASEAN Charter constitutes progress.

17. Any foundational document must, by necessity, be couched in somewhat general terms. This is exactly the case, and the criticism of that most important document the United Nations Universal Declaration of Human Rights.

18. The language of a document such as the ASEAN Charter is important. The spirit underlying the language is critical.

19. The soul of the ASEAN Charter is solidarity, unity and cooperation.

20. If I raise my eyes for a moment and look to the future I see on the distant horizon an ASEAN Court of Human Rights that may rise from the provisions of Article 14 of the Charter and an ASEAN Court of Justice given by virtue of Article 25 of the Charter. This will lend specificity to the somewhat spartan and general provision that we have described. It will fall on ASEAN Member States to nurture the Charter, and give effect to it by additional conventions and legal instruments that must, by necessity, branch off from the main trunk of this Charter. However, it falls to all those believing in a stronger, more united, more peaceful and ever closer associations amongst and between the ASEAN Member States and ASEAN citizens to actively strive together for the realization of what the PREAMBLE to the Charter describes as the "Common objectives and Shared destiny" of us all.

21. All Civil society groups and citizens are tasked and challenged to assist ASEAN Member States achieve these objectives, to motivate for change and make it happen.

    a. Annex 2 of the Charter is entitled "Entities Associated with ASEAN". It includes *inter alia*. "Parliamentarians, "business organisations", "think tanks" and at Part IV "accredited Civil Society Organisations". The ASEAN LAW ASSOCIATION (ALA) is accredited to ASEAN so let us work together and breathe life into what must always be a living document capable of effecting real change.

    b. ASEAN Charter should include increasing participation of women in Member States and ratify international Conventions that protects women's Rights and improve their status.

    c. There is a necessity through the ASEAN Charter for a campaign to promote moral development and provide moral education to children in schools.

    Trustworthiness and honesty are the foundation for stability and progress, service to humanity will guide to respect the rights of others and accelerate to study borders, frontiers and islands of the ASEAN countries which claims continue to be a source of conflict.

23. ASEAN must propose the appointment of a Commission to start a careful study on the matter of a common language and the adoption of a common script. The language and script to be taught in the ASEAN countries as a supplement to the language of the country whereby it will enable better communication among the ASEAN people.

As a conclusion I would like to add a quotation by Shoghi Effendi on the goal of World Unity which reads as follows :-

"Unification of the whole of mankind is the hall-mark of the stage which human society is now approaching. Unity of family, of tribe, of city-state, and nation have been successively attempted and fully established. World unity is the goal towards which a harassed humanity is striving. Nation-building has come to an end. The anarchy inherent in state sovereignty is moving towards a climax. A world, growing to maturity, must abandon this fetish, recognize the oneness and wholeness of human relationships, and establish once for all the machinery that can best incarnate this fundamental principle of its life."

THE ASEAN CHARTER DISPUTE SETTLEMENT MECHANISMS —The Singapore Perspective

By Professor Walter Woon
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Introduction

The idea of peaceful and formal settlement of international disputes is not something that conspicuously marks the history of mankind. Until quite recent times the dictum of Clausewitz that "war is the continuation of policy by other means" reflected the attitude of great powers towards the settlement of disputes with other peoples. All the members of ASEAN have had historical experience of gunboat diplomacy by external powers. It is not an experience that anyone would care to repeat in the 21st century.

ASEAN exists in order to "maintain and enhance peace, security and stability and further strengthen peace-oriented values in the region". This is clearly stated in Article 1(1) of the Charter. ASEAN is a community, not just a group of nations thrown together by geographical proximity. The ultimate goal is to create a sense that each of us belongs to a family of countries in Southeast Asia, interlinked economically, politically and culturally.

To achieve this, it is necessary that there should be some means of peacefully settling disputes amongst member states. In the absence of a formal dispute settlement mechanism, disagreements between members could fester for years or generations and get in the way of closer cooperation. Thus, for the sake of ASEAN's credibility, there has to be a way of resolving disagreements without being disagreeable.

How disputes are settled

Take the analogy of a quarrel between neighbours, as so often arises when people live close to one another. It may be over the siting of a fence on the boundary line between their properties, or perhaps about the smoke from one neighbour's bonfire when he burns leaves, or about how much each is to pay for shared services. If nothing is done, disagreement will turn into dispute and dispute into quarrel. The bad blood would prevent

them working together in harmony for the betterment of both. In extreme cases, there might be a spiral of provocation and counter-provocation that could ultimately lead to violence. No civilized society could countenance this. That is why every member of ASEAN – indeed, every civilized society – has a formal means of settling such domestic disputes before they get out of hand.

In domestic law, such a dispute might be settled in several ways. Firstly, the parties might attempt to talk matters over with a view to clearing up the disagreement. Alternatively, a relative or friend might offer to mediate. In some societies, the village headman or clan elder might be called in to arbitrate. Finally, the parties might decide that the quickest and most decisive way is to submit the matter to a court for a binding judgment.

This common sense approach to dispute settlement is mirrored in the ASEAN Charter. One starts with the general principle in Article 22(1) that "Member States shall endeavour to resolve peacefully all disputes in a timely manner through dialogue, consultation and negotiation". As part of this process, the disputing states may agree to resort to good offices, conciliation or mediation at any time. They may request the Chairman of ASEAN or the Secretary-General to provide such good offices, conciliation or mediation. This basically means that the Chairman or Secretary-General will offer to help bridge the differences between the parties.

There was some discussion among the High Level Task Force (HLTF) as to whether the Charter should empower the Chairman or Secretary-General to offer good offices, conciliation or mediation without being requested. In the end, it was decided that it would be better to let the parties make a request rather than have others attempt to get involved against the will of the disputants. To continue the analogy above, it does not usually help if interfering relatives try to butt into a dispute between neighbours. Such a course often exacerbates rather than ameliorates the dispute. Far better that well-intentioned relatives wait to be asked at a time when the parties are ready to be assisted.

Formal dispute resolution

It would be unrealistic to pretend that all disagreements can be resolved through dialogue, consultation and negotiation. The experience of other organisations, and of ASEAN itself, does not support the thesis that these are invariably effective. Something more is needed.

This is why Article 22(2) requires that "ASEAN shall maintain and establish dispute settlement mechanisms in all fields of ASEAN cooperation".

Where specific ASEAN instruments contain dispute settlement mechanisms, it is logical that disputes within the purview of the instrument should be settled in the manner stipulated. This is provided in Article 24(1) of the Charter. Thus, for instance, the Framework Agreement on Enhancing ASEAN Economic Cooperation 1992 provides in Article 9 that "any differences between Member States concerning the interpretation or application of this Agreement ... shall, as far as possible, be settled amicably between the parties. Where necessary, an appropriate body shall be designated for the settlement of disputes". This Article was significantly expanded by a Protocol on Dispute Settlement Mechanism in 1996, which was in turn superseded by the ASEAN Protocol on Enhanced Dispute Settlement Mechanism of 2004 (the "Vientiane Protocol"). The Vientiane Protocol is the most significant of the ASEAN dispute settlement mechanisms. It basically covers ASEAN economic agreements. Article 22(3) of the Charter reiterates this: "where not otherwise specifically provided, disputes which concern the interpretation or application of ASEAN economic agreements shall be settled in accordance with the ASEAN Protocol on Enhanced Dispute Settlement Mechanism". The heart of the Vientiane Protocol is the provision for the establishment of a panel to look into the dispute and make findings to assist the Senior Economic Officials Meeting (SEOM) to come to a decision. The panel basically has to consider the nature of the dispute between the parties and decide how it might best be resolved. The exact mechanics of this are beyond the scope of this chapter. The important thing to note is that in the case of economic agreements, there is a formal method for resolving disputes.

Paradoxically, the success of such a dispute settlement mechanism can be measured not by the number of disputes settled but rather by the scarcity of such cases. This is because where such a mechanism exists, the parties will often make that extra effort to come to terms rather than push the matter to adjudication. Continuing with the analogy of a domestic dispute between neighbours, the knowledge that either party can ultimately have recourse to the courts is a powerful incentive for the disputants to come to an amicable settlement rather than risk a penalty and possible loss of face should the case go for adjudication. This is a phenomenon well-known to lawyers; clients can often be persuaded to settle rather than incur the risk of litigation, with all its attendant uncertainties.

In the case of disputes not involving an ASEAN instrument, Article 24(2) of the Charter provides that the modes of dispute settlement prescribed in the Treaty of Amity and Cooperation in Southeast Asia (TAC) and its rules of procedure will be used. The TAC envisages that disputes threatening peace should be referred to a High Council consisting of representatives from each of the High Contracting Parties. However, this can only be done if the parties to the dispute agree. The alternative is for the parties to have recourse to the modes of peaceful settlement contained in Article 33(1) of the Charter of the United Nations. This of course includes reference to the International Court of Justice in the Hague. Settling disputes by reference to an international court is the civilized way of doing things. This is what Malaysia and Indonesia did in relation to their dispute over Sipadan/Ligatan. Similarly in the case of the dispute over Pedra Branca between Malaysia and Singapore the parties went to the International Court of Justice.

Not all ASEAN instruments contain dispute settlement mechanisms; hence the need to establish some sort of mechanism to cover such areas. Otherwise, there would be an obvious lacuna. Thus, Article 25 provides that "appropriate dispute settlement mechanisms, including arbitration, shall be established for disputes which concern the interpretation or application of this Charter and other ASEAN instruments". The exact form of the dispute settlement mechanism under this Article has yet to be determined. The Report of the Eminent Persons Group on the ASEAN Charter recommended that the mechanism should be similar to the Vientiane Protocol. There was some discussion by the HLTF on whether to provide for adjudication as well as arbitration. It was decided that, on balance, ASEAN is not quite ready yet for a formal court. Much remains to be done to build legal capacity among ASEAN states. At the present stage of development, something along the lines of the Vientiane Protocol is more appropriate. However, Article 25 allows ASEAN to create a court should that prove to be necessary in future.

It will be noted that the Charter itself does not set up any mechanism for resolution of disputes regarding interpretation of the Charter. This was deliberate. Many, if not most, of the queries regarding interpretation of the Charter will relate to practical problems of implementation rather than disputes between Member States. Where there is a question, Article 51(1) provides that the ASEAN Secretariat shall undertake the task of interpretation. The procedure for reference to the Secretariat is to be determined by the ASEAN Coordinating Council. It is only where a Member State disputes the interpretation

made by the Secretariat or proposed by another Member State that reference will be made to the dispute settlement mechanism established under Article 25. This will probably be the exception rather than the rule.

The role of the ASEAN Summit

If after application of the appropriate dispute settlement mechanisms the matter remains unresolved, Article 26 provides that it will have to be referred upwards to the highest organ of ASEAN, the ASEAN Summit. The procedure for this has yet to be determined. As the Summit is not a judicial body, presumably the most practical way to dispose of an unresolved dispute would be to have it referred to international arbitration or even to the International Court of Justice. In any case, Member States always have the right to use the modes of dispute settlement prescribed by Article 33 of the Charter of the United Nations. This is explicitly set out in Article 28 of the Charter.

Once a decision has been rendered in a dispute, the Secretary-General is entrusted with the task of monitoring compliance. He has to submit a report to the Summit. A Member State which is affected by non-compliance with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism may refer the matter to the Summit for decision. It will be for the Summit to prescribe what measures should be taken to ensure respect for the decision. Needless to say, refusal to comply would be an extremely serious breach of the obligations of an ASEAN Member State. It would undermine the whole concept of rule of law, which one of the key principles of ASEAN.

Conclusion

The question uppermost in everyone's mind is: will it work? One can take heart from the example of the European Union. At the beginning of the 20th Century, European powers were the most aggressive on the planet. The century began with British intervention in South Africa, a European expeditionary force in China and French, German and Italian adventures in Africa, until the assassination of the Austrian Archduke Franz Ferdinand in Sarajevo lit the European powderkeg. The resultant explosion set off a second Thirty Years' War (1914-1945) which devastated the Continent (and much of the rest of the world) more thoroughly than the first Thirty Years' War (1618-1648).

After dragging themselves out of the rubble and ashes, the Europeans forswore war as a continuation of policy by other means and consciously set out to build a system based on

peaceful resolution of disputes. In the last fifty years they have been conspicuously successful in this endeavour. The prospect of war between members of the European Union is unthinkable. If the Europeans, with their history of bellicosity and imperialism, can achieve this in the space of two generations, there is no reason why ASEAN cannot do the same. The key to this is the creation of a formal system for the peaceful settlement of disputes; and the cornerstone of the dispute settlement regime of ASEAN is the Charter.

ROLE OF ALA IN THE CURRENT LEGAL ISSUES UNDER THE ASEAN CHARTER —The Thai Perspective

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I. Introduction

When the Association of Southeast Asian Nations (ASEAN) was established at Bangkok on August 8, 1967, very few would hardly imagine that ASEAN would be "no longer just an association of neighboring counties".[1] At that time, the original Member countries, namely, Indonesia, Malaysia, the Philippines, Singapore and Thailand, were overwhelmed with political and security issues. Now that the ASEAN Charter came into force,[2] maintenance of peace, security and stability becomes the very first purpose of ASEAN.[3]

However, the purposes of ASEAN are translated to be people – oriented as it aims, *inter alia*, to "strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms ..."[4] To further translate this principle or concept into action, ASEAN undertakes to consider engaging with entities listed in Annex 2 to the Charter.[5] This Annex 2 contains the list of entities associated with ASEAN, one of which is the ASEAN Law Association (ALA) which is included as one of the accredited civil society organizations. In fact, respect for justice and the rule of law has become one of the guiding principle of all ASEAN Member countries since its establishment in 1967[6], and later reaffirmed under the Kuala Lumpur Declaration on the Establishment of the ASEAN Charter, 2005.

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1 *Philip Kotler, Hermawan Kartajaya and Hooi Den Huan, "Think ASEAN! Rethinking Marketing toward ASEAN Community 2015" (Singapore : McGraw Hill, 2007, P. vii*

2 *The ASEAN Charter was signed on November 20, 2007*

3 *Article 1(1) of the ASEAN Charter.*

4 *Article 1(7) of the ASEAN Charter.*

5 *Article 16 of the ASEAN Charter.*

6 *The ASEAN Declaration (Bangkok Declaration) signed at Bangkok on August 8, 1967)*

Since ASEAN is conferred legal personality[7] and comprises three ASEAN Community Councils,[8] as well as its Secretariat,[9] it has to function as a rules – based organization. Still, there remains legal issues to be resolved under the ASEAN Charter. To ensure that pacific settlement of dispute will be resorted, Chapters VII and VIII provide for modes of dispute settlement among ASEAN Member countries. In addition, ASEAN will continue entering into negotiations and conclusion of agreements. It means that there will be more agreements and international legal instruments to be concluded by ASEAN with other subjects of international law. Thus, there is a need for international lawyers to be more engaged in the discussions until the entry into force of agreements, including the implementation thereof. However, fragmentation of international law, where there are several judicial fora to hear cases, with or without different perspectives, coupled with the growing increase of specific areas of international law, has called for ASEAN to rise to such challenges.

This paper illustrate roles of international lawyers at various stages of activities and functions of ASEAN. It touches upon the feasibility of establishment of ASEAN court. In fact, it may be one of the visions ASEAN has to set as ASEAN is moving toward a peoples-oriented approach. This paper suggests that ASEAN proceeds gradually towards this aim, if and only if it is the common aim of ASEAN.

II. Need for International Lawyers and Ways Forward

First of all, as mentioned above, ASEAN has concluded a number of treaties or international agreements with many countries and international organizations. Moreover, ASEAN has issued many legal and political instruments in the form of joint declarations, joint statements, concords, etc.

Secondly, should ASEAN move forward on a rules-based approach, while promoting and strengthening the roles of the Secretary –General, ASEAN needs active participation of international lawyers.

Thirdly, upon the conclusion of many free trade agreements ASEAN has concluded with its partners, ASEAN will be pretty much involved with trade issues and cases. The

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[7] *Article 3 of the ASEAN Charter.*

[8] *Article 9 of the ASEAN Charter.*

[9] *Article 11 of the ASEAN Charter.*

ASEAN Secretariat is tasked with the duty to provide assistance to the dispute settlement mechanisms stimulated in such free trade agreements. This being the case, ASEAN member countries have to be associated with specific areas of international law, namely, international trade law, international investment law, international environmental law, and international arbitration. Such responsibility cannot be delivered without the competence of the ASEAN Secretariat. It purports that the Secretariat may consider setting up a treaty law division in order to serve and facilitate work of ASEAN as a whole.

Given the transitional period of being a full-fledged inter-governmental organization (IGO), the above-mentioned problems could be addressed in either way or both, as follows:

1) ASEAN may adopt the way the United Nations has adopted, which is the setting up of a legal committee (so-called "the Sixth Committee" established by the General Assembly) for the drafting of any legal instruments and making recommendations to the ASEAN Summit and other ASEAN bodies, as appropriate. The legal committee would be a forum for international lawyers of all ASEAN member countries to share views and to prepare texts of legal documents for the consideration and adoption by the respective ASEAN bodies. This committee may set up sub-committees or working groups, as necessary, to deal with any particular legal issues, for example, international trade and investment, international environment, or international sale of goods, etc. This approach would be described as part of a division of labor and expertise where the legal committee would help ensure consistency of wording and rights and obligations, especially when it comes to compliance and interpretation of any legal instruments. All in all, it is the legal drafting technique that counts and plays an important role in addition to policy consideration.

   However, it is better to avoid the duplication of work. It is construed that any legal issues which are not taken up by or fallen within the domain or responsibility of, any ASEAN body should primarily be considered by the legal committee. Then, work of the legal committee would not interfere with that of any ASEAN body.

2) The establishment of the International Law Commission by the United Nations is another option which has proven successful and its work has been given a lot of credentials. The Commission, referred to as the "ILC", comprises jurists of high legal qualifications. It has codified customary international law and made a lot of

contribution to the progressive development of international law. We note that there are a number of eminent international lawyers who are of ASEAN nationals. Therefore, the composition of qualified members to sit at the commission is not a problem.

At the same time, ASEAN should take into account ways and means to retain such qualified experts to work for ASEAN in a sustainable way. In that line of approach, an appropriate scale of remunerations must play an important role in securing the firm commitment of outstanding experts to remain with ASEAN in the long term. Under the current circumstances where the financial crisis is global in nature now, ASEAN member countries should be mindful of the cost-effective approach and have concerted efforts in moving towards the centrality of ASEAN.

Either option can be adopted right away and without causing major financial implications to the ASEAN Secretariat or member countries since ASEAN is used to designate a drafting group or working group of legal experts to deal with legal issues where the costs of which are borne by member countries. Nor would the formation of a legal commission composed of 10 jurists from all ASEAN member countries be a major problem for ASEAN.

III. Feasibility of Establishment of ASEAN Court of Justice

At this juncture, the Court of Justice of the European Communities could be an example ASEAN might want to compare before making a decision on the establishment of ASEAN Court of Justice. The Court of Justice of the European Communities, based in Luxambourg, is assigned to consider disputes between Member States of the European Union; between the European Union and Member States; between the institutions within the European Union; between individuals, or corporate bodies, and the European Union[10]. It may deliver opinions on international agreements and give preliminary rulings on cases referred by national courts.[11] Such preliminary rulings are of significance to ensure uniform application of Community law by all member States [12]. The Court is composed of one judge from each Member State. So, there are altogether 27 judges from all the national legal systems of the Communities.[13]

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[10] *ttp://europa.eu/institutions/inst/justice/index_en.htm(as of August 20, 2009)*

[11] *Ibid.*

[12] *Dick Leonard, "Pocket Guide to the European Community" (Oxford : Basil Blackwell Ltd. and The Economist Publications Ltd., 1988) : 47 – 49.*

[13] *See note 10 infra.*

No doubt that there are difficulties in practice while there are also advantages. It appears that the Court of Justice of the European Communities allows itself to be involved in the national caseload for the development of Community law.[14] It is then useful for the consistency of legal interpretation of Community law for national judges.[15] Against this backdrop, it seems as if "the national judiciary has no intelligent role to play in Community law."[16] To put it in another way, the Court of Justice plays "a very broad interpretative monopoly."[17] Such disadvantages may be resolved if mismanagement of the relationship between the Court of Justice and the national courts of Member States is not properly addressed.[18] It is observed that judges of the Court "realize that there power is ultimately contingent on the acquiescence of member states".[19]

To illustrate, ASEAN needs to consider further whether ASEAN is determined to promulgate the so-called "ASEAN law", as opposed to European Community (EC) law. If this is the case, ASEAN member countries have to come to terms that ASEAN would be a supranational organization as far as enactment of legislation is concerned. In any event, jurisdiction of ASEAN court of justice may differ from that of the Court of Justice. Then, the follow-up question to ASEAN is whether financial implications as a result of the establishment of the court is concerned. It gives rise to cross-border practice among ASEAN lawyers. In that case, ASEAN has to prepare appropriate ground work for lawyers to practice law in member countries. It would be illogical to have a court, but no legal counsels to represent their clients in litigations.

One of the problems ASEAN member countries may take up for consideration is the issue of sovereignty. We have to proceed with a clear mind and a common goal whether ASEAN court is feasible; and whether ASEAN court would be a supranational body. More importantly, ASEAN should examine whether ASEAN is prepared to adopt the idea of ASEAN judicial body. Lessons learnt from the experience of the European Court of justice will be of great value to determine the appropriate roadmap for this purpose.

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[14] *Gareth Davies, "Reforming the Relationship between National and European Courts", in International Institutional Reform. Proceedings of the Seventh Hague Joint Conference held in The Hague, The Netherlands. 30 June – 2 July 2005, edited by Agata Fijalkowski (The Hague : T.M.C. Asser Press, 2007) : 183*

[15] *Ibid.*

[16] *Ibid, p. 184*

[17] *Ibid.*

[18] *Ibid.*

[19] *Geoffrey Garrett, R. Daniel Kelemen, and Heiner Schulz, " The European Court of Justice, National Governments, and Legal Integration in the European Union" in Beth A. Simmons and Richard H. Steinberg, edited, "International Law and International Relations" (Cam bridge: Cambridge University Press, 2006)p. 487.*

In the spirit of ASEAN encompassing solidarity, cooperation and consensus, rather than "ASEAN Way", ASEAN has to nurture further so that related issues, for example, qualifications and admission to practice in ASEAN court, would be overcome. By the time ASEAN stands ready for the establishment of ASEAN court, any appealing model, like the Court of Justice of the European Communities, may be introduced for consideration and discussion. This paper does not rule out such possibility. Simply put, ASEAN has to make up its mind in which direction it wishes to proceed and to engage itself in the fast-changing environment at the global and regional levels.

IV. Contribution of the ASEAN law Association (ALA) to ASEAN

Even though ASEAN is approaching its 43 years in existence, ASEAN is in the era of opportunities and challenges, partly attributable by globalization and crisis, be they natural, political, or economic. ASEAN is in the process of adaptation to fit in the changing environment by making the best use of its resilience and solidarity which has been nurtured over the past years. As the foregoing parts of this paper illustrate that ASEAN may be in a better position to proceed cautiously by taking time to contemplate on the legal issues at hand. This does not prevent ALA from making contribution to the work of ASEAN.

Based on its 1979 Constitution, ALA has served its members well. Article II (d) provides an avenue for ALA to be assertive in the work of ASEAN. To implement it, studies and researches conducted by ALA should be officially shared with ASEAN in a timely manner. This would certainly raise the profile of ALA while strengthening the relationship with ASEAN and its member countries.

ALA might consider offering its expertise to ASEAN as it resources allow. Collaboration with ASEAN in the form of a joint organization of seminars or workshops on issues of common concern should be favorably considered. Sharing of resources and expertise would be a way to consolidate partnership between ASEAN, an intergovernmental organization, and ALA, a non-governmental organization, as envisaged in the ASEAN Charter.

In the overall perspectives, other than legal advice and recommendations ALA may be more than competent to make to ASEAN, as appropriate, it is advisable that capacity building is an area ALA should explore further to determine in which way and to what extent ALA may extend assistance for mutual benefit of the two bodies.

Capacity building is one of the issues the developing countries have called for, ALA still has a role to play in shaping attention of practitioners in the field of progressive development of international law underpinning the ASEAN Charter. ALA may also help design relevant training courses at different levels to meet the differing background of attendants, one of which could be implementation of international obligations under the ASEAN Charter in domestic laws of the respective Member countries. It should be noted that the future of international law lies within the capacity to respond to issues of international concern and to "harness national institutions in pursuit of global objectives".[20] Focus may be made on capacity building of national institutions in the respective ASEAN member countries. It could possibly entail to the revisit of legal norms and principles in some specific areas of international law, i.e., human rights, maritime security, alternative dispute resolution, etc.

V. Concluding Remarks

In the final analysis, ASEAN and ALA need each other. At the same time, each will contribute very much to work of the other. The concept of partnership should be forged a this stage which will lead to further collaborative engagement between the two prominent bodies. Any legal issues ASEAN might not be comfortable to deal with, due to the sensitivity of their nature or for whatever reasons, could be addressed by ALA. To translate the key objectives of ALA into action as far as ASEAN is concerned, nothing is insurmountable to overcome.

[20] *Ann-Marie Slaughter and William Burke-White, "The Future of International Law Is Domestic (or, The European Way of Law)" in Char lotte Ku and Paul F. Diehl, edited, "International Law. Classic and Contemporary Readings" (Boulder, Colorado: Lynne Reinner Publishers, Inc. ,2009), p. 466.*

Documents & Reports

CHARTER OF THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS

PREAMBLE

WE, THE PEOPLES of the Member States of the Association of Southeast Asian Nations (ASEAN), as represented by the Heads of State or Government of Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam:

NOTING with satisfaction the significant achievements and expansion of ASEAN since its establishment in Bangkok through the promulgation of The ASEAN Declaration;

RECALLING the decisions to establish an ASEAN Charter in the Vientiane Action Programme, the Kuala Lumpur Declaration on the Establishment of the ASEAN Charter and the Cebu Declaration on the Blueprint of the ASEAN Charter;

MINDFUL of the existence of mutual interests and interdependence among the peoples and Member States of ASEAN which are bound by geography, common objectives and shared destiny;

INSPIRED by and united under One Vision, One Identity and One Caring and Sharing Community;

UNITED by a common desire and collective will to live in a region of lasting peace, security and stability, sustained economic growth, shared prosperity and social progress, and to promote our vital interests, ideals and aspirations;

RESPECTING the fundamental importance of amity and cooperation, and the principles of sovereignty, equality, territorial integrity, non-interference, consensus and unity in diversity;

ADHERING to principles of democracy, the rule of law and good governance, respect for and protection of human rights and fundamentals freedoms;

RESOLVED to ensure sustainable development for the benefit of present and future generations and to place the well-being, livelihood and welfare of the peoples at the centre of the ASEAN community building process;

CONVINCED of the need to strengthen existing bonds of regional solidarity to realize an ASEAN community that is politically cohesive, economically integrated and socially responsible in order to effectively respond to current and future challenges and opportunities;

COMMITTED to intensifying community building through enhanced regional cooperation and integration, in particular by establishing an ASEAN Community comprising the ASEAN Security Community, the ASEAN Economic Community and the ASEAN Socio-Cultural Community, as provided for in the Bali declaration of ASEAN Concord II;

HEREBY DECIDE to establish, through this Charter, the legal and institutional framework for ASEAN,

AND TO THIS END, the Heads of State or Government of the Member States of ASEAN, assembled in Singapore on the historic occasion of the 40th anniversary of the founding of ASEAN, have agreed to this Charter.

CHAPTER 1
PURPOSES AND PRINCIPLES

ARTICLE 1
PURPOSES

The Purposes of ASEAN are:

1. To maintain and enhance peace, security and stability and further strengthen peace-oriented values in the region;

2. To enhance regional resilience by promoting greater political, security, economic and socio-cultural cooperation;

3. To preserve Southeast Asia as a Nuclear Weapon-Free Zone and free of all other weapons of mass destruction;

4. To ensure that the peoples and member States of ASEAN live in peace with the world at large in a just, democratic and harmonious environment;

5. To create a single market and production base which is stable, prosperous, highly competitive and economically integrated with effective facilitation for trade and investment in which there is free flow of goods, services and investment; facilitated movement of business persons, professionals, talents and labour; and free flow of capital;

6. To alleviate poverty and narrow the development gap within ASEAN through mutual assistance and cooperation;

7. To strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due regard to the rights and responsibilities of the Member States of the ASEAN;

8. To respond effectively, in accordance with the principle of comprehensive security, to all forms of threats, transnational crimes and transboundary challenges;

9. To promote sustainable development so as to ensure the protection of the region's environment, the sustainability for its natural resources, the preservation of its cultural heritage and the high quality of life of its peoples;

10. To develop human resources through closer cooperation in education and life-long learning, and in science and technology, for the empowerment of the peoples of ASEAN and for the strengthening of the ASEAN Community;

11. To enhance the well-being and livelihood of the people of ASEAN by providing them with equitable access to opportunities for human development, social welfare and justice;

12. To strengthen cooperation in building a safe, secure and drug-free environment for the peoples of ASEAN;

13. To promote a people-oriented ASEAN in which all sectors of society are encouraged to participate in, and benefit from, the process of ASEAN integration and community building;

14. To promote an ASEAN identity through the fostering of greater awareness of the diverse culture and heritage of the region; and

15. To maintain the centrality and proactive role of ASEAN as the primary driving force in its relations and cooperation with its external partners in a regional architectural that is open, transparent and inclusive.

ARTICLE 2
PRINCIPLES

1. In pursuit of the Purposes stated in Article 1, ASEAN and its Member States reaffirm and adhere to the fundamental principles contained in the declarations, agreements, conventions, concords, treaties and other instruments of ASEAN.

2. ASEAN and it Member States shall act in accordance with the following Principles:

   (a) Respect for the independence, sovereignty, equality, territorial integrity and national identity of all ASEAN Member States;

   (b) Shared commitment and collective responsibility in enhancing regional peace, security and prosperity;

   (c) Renunciation of aggression and of the threat or use of force or other actions in any manner inconsistent with international law;

   (d) Reliance on peaceful settlement of disputes;

   (e) Non-interference in the internal affairs of ASEAN Member States;

(f) respect for the right of every Member State to lead its national existence free from external interference, subversion and coercion;

(g) enhanced consultations on matters seriously affecting the common interest of ASEAN;

(h) adherence to the rule of law, good governance, the principles of democracy and constitutional government;

(i) respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice;

(j) upholding the United Nations Charter and international law, including international humanitarian law, subscribed to by ASEAN Member states;

(k) abstention from participation in any policy or activity, including the use of its territory, pursued by any ASEAN Member State or non-ASEAN State or any non-State actor, which threatens the sovereignty, territorial integrity or political and economic stability of ASEAN Member States;

(l) respect for the different cultures, languages and religions of the peoples of ASEAN, while emphasizing their common values in the spirit of unity in diversity;

(m) the centrality of ASEAN in external political, economic social and cultural relations while remaining actively engaged, outward-looking, inclusive and non-discriminatory; and

(n) Adherence to multilateral trade rules and ASEAN's rules-based regimes for effective implementation of economic commitments and progressive reduction towards elimination of all barriers to regional economic integration, in a market-driven economy.

CHAPTER II
LEGAL PERSONALITY

ARTICLE 3
LEGAL PERSONALITY OF ASEAN

ASEAN, an inter-government organization, is hereby conferred legal personality.

CHAPTER III
MEMBERSHIP

ARTICLE 4
MEMBER STATES

The Member States of ASEAN are Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, The Lao People's Democratic Republic, , Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam.

ARTICLE 5
RIGHTS AND OBLIGATIONS

1. Member States shall have equal rights and obligations under this Charter.

2. Member States shall take all necessary measures, including the enactment of appropriate domestic legislation, to effectively implement the provisions of this Charter and to comply with all obligations of membership.

3. In the case of a serious breach of the Charter or non-compliance, the matter shall be referred to Article 20.

ARTICLE 6
ADMISSION OF NEW MEMBERS

1. The procedure for application and admission to ASEAN Coordinating Council.

2. Admission shall be based on the following criteria:

   (a) location in the recognized geographical region of Southeast Asia;

   (b) recognition by all ASEAN Member States;

   (c) agreement to be bound and to be abide by the Charter; and

   (d) ability and willingness to carry about the obligations of Membership.

3. Admission shall be decided by consensus by the ASEAN Summit, upon the recommendation of the ASEAN Coordinating Council.

4. An applicant State shall be admitted to ASEAN upon signing an Instrument of Accession to the Charter.

CHAPTER IV
ORGANS

ARTICLE 7
ASEAN SUMMIT

1. The ASEAN Summit shall comprise the Heads of State or Government of the Member states.

2. The ASEAN shall:

   (a) be the supreme policy-making body of ASEAN;

(b) deliberate, provide policy guidance and take decisions on key issues pertaining to the realisation of the objectives of ASEAN, important matters of interest to Member States and all issues referred to it by the ASEAN Coordinating Councils and ASEAN Sectoral Ministerial Bodies;

(c) instruct the relevant Ministers in each of the Councils concerned to hold and ad hoc inter-Ministerial meetings, and address important issues concerning ASEAN that cut across the Community Councils. Rules of procedure for such meetings shall be adopted by the ASEAN Coordinating Council;

(d) address emergency situations affecting ASEAN by taking appropriate actions;

(e) decide on matters referred to it under Chapters VII and VIII;

(f) authorize the establishment and the dissolution of Sectoral Ministerial Bodies and other ASEAN institutions; and

(g) appoint the Secretary-General of ASEAN, with the rank and status of Minister, who will serve with the confidence and at the pleasure of the Heads of State or Government upon the recommendation of the ASEAN Foreign Ministers Meeting.

3. ASEAN Summit Meetings shall be:

(a) held twice annually, and be hosted by the Member State holding the ASEAN Chairmanship; and

(b) convened, whenever necessary, as special or ad hoc meetings to be chaired by the Member State holding the ASEAN Chairmanship, at venues to be agreed upon by ASEAN Member States.

ARTICLE 8
ASEAN COORDINATING COUNCIL

1. The ASEAN Coordinating Council shall comprise the ASEAN Foreign Ministers and meet at least twice a year.

2. The ASEAN Coordinating Council shall:

   (a) prepare the meetings of the ASEAN Summit;

   (b) coordinate the implementation of agreements and decisions of the ASEAN Summit;

   (c) coordinate with the ASEAN Community Councils to enhance policy coherence, efficiency and cooperation among them;

   (d) coordinate the reports of the ASEAN Community Councils to the ASEAN Summit;

   (e) consider the annual report of the Secretary-General on the work of ASEAN;

   (f) consider the report of the Secretary-General on the functions and operations of the ASEAN Secretariat and other relevant bodies;

   (g) approve the appointment and termination of the deputy Secretaries-General upon the recommendation of the Secretary-General; and

   (h) undertake other tasks provided for in this Charter or such other functions as may be assigned by the ASEAN Summit.

3. The ASEAN Coordinating Council shall be supported by the relevant senior officials.

ARTICLE 9
ASEAN COMMUNITY COUNCILS

1. The ASEAN Community councils shall comprise the ASEAN Political-Security Community Council, ASEAN Economic Community Council, and ASEAN Socio-Cultural Community Council.

2. Each ASEAN Community Council shall have under its purview. The relevant ASEAN Sectoral Ministerial Bodies.

3. Each Member State shall designate its national representation for each ASEAN Community Council meeting.

4. In order to realise the objectives of each of the three pillars of the ASEAN Community, each ASEAN Community Council shall:

   (a.) ensure the implementation of the relevant decisions of the ASEAN Summit.
   (b.) coordinate the work of the different sectors under its purview, and on issues which cut across the other Community Councils; and
   (c.) submit reports and recommendations to the ASEAN Summit on matter under its purview.

ARTICLE 10
ASIAN SECTORAL MINISTERIAL BODIES

1. ASEAN Sectoral Ministerial Bodies shall:

   (a) function in accordance with their respective established mandates;

   (b) implement the agreements and decisions of the ASEAN Summit under their respective purview;

   (c) strengthen cooperation in their respective fields in support of ASEAN integration and community building; and

(d) submits reports and recommendations to their respective Community Councils.

2. Each ASEAN Sectoral Ministerial Body may have under its purview the relevant senior officials and subsidiary bodies to undertake its functions as contained in Annex 1. The Annex may be updated by the Secretary-General of ASEAN upon the recommendation of the Committee of Permanent Representatives without recourse to the provision on Amendments under this Charter.

ARTICLE 11
SECRETARY-GENERAL OF ASEAN AND ASEAN SECRETARIAT

1. The Secretary-General of ASEAN shall be appointed by the ASEAN Summit for a non-renewable term of office of five years, selected from among nationals of the AAEAN Member States based on alphabetical rotation, with due consideration to integrity, capability and professional experience, and gender equality.

2. The Secretary-General shall:

(a) carry out the duties and responsibilities of this high office in accordance with the provisions of this Charter and relevant ASEAN instruments, protocols and established practices;

(b) facilitate and monitor progress in the implementation of ASEAN agreements and decisions, and submit an annual report on the work of ASEAN to the ASEAN Summit;

(c) participate in meetings of the ASEAN Summit, the ASEAN Community Councils, the ASEAN Coordinating Council, and ASEAN Sectoral Ministerial Bodies and other relevant ASEAN meetings;

(d) present the views of ASEAN and participate in meetings with external parties in accordance with approved policy guidelines and mandate given to the Secretary-General; and

(e) recommend the appointment and termination of Deputy Secretaries-General to the ASEAN Coordinating Council for approval.

3. The Secretary-General shall also be the Chief Administrative Officer of ASEAN.

4. The Secretary-General shall be assisted by four Deputy Secretaries-General with the rank and status of Deputy Ministers. The Deputy Secretaries-General shall be accountable to the Secretary-General in carrying out their functions.

5. The four Deputy Secretaries-General shall be of different nationalities from the Secretary-General and shall come from four different ASEAN Member States.

6. The four Deputy Secretaries-General shall comprise:

(a) two Deputy Secretaries-General who will serve a non-renewable term of three years, selected from among nationals of the ASEAN Member States based on alphabetical rotation, with due consideration to integrity, qualifications, competence, experience and gender equality; and

(b) two Deputy Secretaries-General who will serve a term of three years, which may be renewed for another three years. These two Deputy Secretaries-General shall be openly recruited based on merit.

7. The ASEAN Secretaries-General shall comprise the Secretaries-General and such staff as may be required.

8. The Secretary-General and staff shall:

(a) uphold the highest standards of integrity, efficiency, and competence in the performance of their duties;

(b) not seek or receive instructions from any government or external party outside of ASEAN; and

(c) refrain from any action which might reflect on their position as ASEAN Secretariat officials responsible only to ASEAN.

9. Each ASEAN Member State undertakes to respect the exclusively ASEAN character of the responsibilities of the Secretary-General and the staff, and not to seek to influence them in the discharge of their responsibilities.

ARTICLE 12
COMMITTEE OF PERMANENT REPRESENTATIVES TO ASEAN

1. Each ASEAN Member State shall appoint a Permanent Representatives to ASEAN with the rank of Ambassador based in Jakarta.

2. The Permanent Representatives collectively constitute a Committee of Permanent Representatives, which shall:

(a) support the work of the ASEAN Community Councils and ASEAN Sectoral Ministerial Bodies;

(b) coordinate with ASEAN National Secretariats and other ASEAN Sectoral Ministerial Bodies;

(c) liaise with the Secretary-General of ASEAN and the ASEAN Secretariat on all subjects relevant to its work;

(d) facilitate ASEAN cooperation with external partners; and

(e) perform such other functions as may be determined by the ASEAN Coordinating Council.

ARTICLE 13
ASEAN NATIONAL SECRETARIATS

Each ASEAN Member State shall establish an ASEAN National Secretariat which shall:

(a) serve as the national focal point;

(b) be the repository of information on all ASEAN matters at the national level;

(c) coordinate the implementation of ASEAN decisions at the national level;

(d) coordinate and support the national preparations of ASEAN meetings;

(e) promote ASEAN identity and awareness at the national level; and

(f) contribute to ASEAN community building.

ARTICLE 14
HUMAN RIGHTS BODY

1. In conformity with the purposes and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN human rights body.

2. This ASEAN human rights body shall operate in accordance with the terms of reference to be determined by the ASEAN foreign Ministers Meeting.

ARTICLE 15
ASEAN FOUNDATION

1. The ASEAN Foundation shall support the Secretary-General of ASEAN and collaborate with the relevant ASEAN bodies to support ASEAN community building by promoting greater awareness of the ASEAN identity, people –to-

people interaction, and close collaboration among the business sector, civil society, academia and other stakeholders in ASEAN.

2. The ASEAN Foundation shall be accountable to the Secretary-General of ASEAN, who shall submit its report to the ASEAN Summit through the ASEAN Coordinating Council.

CHAPTER V
ENTITIES ASSOCIATED WITH ASEAN

ARTICLE 16
ENTITIES ASSOCIATED WITH ASEAN

1. ASEAN may engage with entities which support the ASEAN Charter, in particular its purposes and principles. These associated entities are listed in Annex 2.

2. Rules of procedures and criteria for engagement shall be prescribed by the Committee of Permanent Representatives upon the recommendation of Secretary-General of ASEAN.

3. Annex 2 may be updated by the Secretary-General of ASEAN upon the recommendation of the Committee of Permanent Representatives without recource to the provision on Amendments under this Charter.

CHAPTER VI
IMMUNITIES AND PRIVILEGES

ARTICLE 17
IMMUNITIES AND PRIVILEGES OF ASEAN

1. ASEAN shall enjoy in the territories of the Member States such immunities and privileges as are necessary for the fulfillment of its purposes.

2. The immunities and privileges shall be laid down in separate agreements between ASEAN and the host Member State.

ARTICLE 18
IMMUNITIES AND PRIVILEGES OF THE SECRETARY-GENERAL OF ASEAN AND STAFF OF THE ASEAN SECRETARIAT

1. The Secretary-General of ASEAN and staff of the ASEAN Secretariat participating in official ASEAN activities or representing ASEAN in the Member States shall enjoy such immunities and privileges as are necessary for the independent exercise of their functions.

2. The immunities and privileges under this Article shall be laid down in a separate ASEAN agreement.

ARTICLE 19
IMMUNITIES AND PRIVILEGES OF THE PERMANENT REPRESENTATIVES AND OFFICIALS ON ASEAN DUTIES

1. The Permanent Representatives of the Member States to ASEAN and officials of the Member States participating in official ASEAN activities or representing ASEAN in the Member States shall enjoy such immunities and privileges as are necessary for the exercise of their functions.

2. The immunities and privileges of the Permanent Representatives and officials on ASEAN duties shall be governed by the 1961 Vienna Convention on Diplomatic Relations or in accordance with the national law of the ASEAN Member State concerned.

CHAPTER VII
DECISION-MAKING

ARTICLE 20
CONSULTATION AND CONSENSUS

1. As a basic principle, decision-making in ASEAN shall be based on consultation and consensus.

2. Where consensus cannot be achieved, the ASEAN Summit may decide how specific decision can be made.

3. Nothing in paragraphs 1 and 2 of this Article shall affect the modes of decision-making as contained in the relevant ASEAN legal instruments.

4. In the case of a serious breach of the Charter or non-compliance, the matter shall be referred to the ASEAN Summit for decision.

ARTICLE 21
IMPLEMENTATION AND PROCEDURE

1. Each ASEAN Community Council shall prescribe its own rules of procedures.

2. In the implementation of economic commitments, a formula for flexible participation, including the ASEAN Minus X formula, may be applied where there is consensus to do so.

CHAPTER VIII
SETTLEMENTS OF DISPUTES

ARTICLE 22
GENERAL PRINCIPLES

1. Member States shall be endeavour to resolve peacefully all disputes in a timely manner through dialogue, consultation and negotiation.

2. ASEAN shall maintain and establish dispute settlement mechanisms in all fields of ASEAN cooperation.

ARTICLE 23
GOOD OFFICES, CONCILIATION AND MEDIATION

1. Member State which are parties to a dispute may at anytime agree to resort to good offices, conciliation or mediation in order to resolve the dispute within an agreed time limit.

2. Parties to the dispute may request the Chairman of ASEAN or the Secretary-General of ASIAN, acting in an ex-officio capacity, to provide good offices, conciliation or mediation.

ARTICLE 24
DISPUTE SETTELEMENT MECHANISMS IN SPECIFIC INSTRUMENTS

1. Disputes relating to specific ASEAN instruments shall be settled through the mechanisms and procedures provided for in such instruments.

2. Disputes which do not concern the interpretation or application of any ASEAN instruments shall be resolved peacefully in accordance with the Treaty of Amity and Cooperation in Southeast Asia and its rules of procedures.

3. Where not otherwise specifically provided, disputes which concern the interpretation or application of ASEAN economic agreements shall be settled in accordance with ASEAN Protocol on Enhanced Dispute Settlement Mechanism.

ARTICLE 25
ESTABLISHMENT OF DISPUTE SETTLEMENT MECHANISMS

Where not otherwise specifically provided, appropriate dispute settlement mechanisms, including arbitration, shall be established for disputes which concern the interpretation or application of this Charter and other ASEAN instruments.

ARTICLE 26
UNRESOLVED DISPUTES

When a dispute remains unresolved, after the application of the preceding provisions of this Chapter, this dispute shall be referred to the ASEAN Summit, for its decision.

ARTICLE 27
COMPLIANCE

1. The Secretary-General of ASEAN, assisted by the ASEAN Secretariat or any other designated ASEAN body, shall monitor the compliance with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism, and submit a report to the ASEAN Summit.

2. Any member State affected by non-compliance with the findings, recommendations or decisions resulting from an ASEAN dispute settlement mechanism, may refer the matter to the ASEAN Summit for a decision.

ARTICLE 28
UNITED NATIONS CHARTER PROVISIONS AND OTHER RELEVANT INTERNATIONAL PROCEDURES

Unless otherwise provided for in this Charter, Member States have the right of recourse to the modes of peaceful settlement contained in Article 33 (1) of the Charter of the United Nations or any other international legal instruments to which the disputing member States are parties.

CHAPET IX
BUDGET AND FINANCE

ARTICLE 29
GENERAL PRINCIPLES

1. ASEAN shall establish financial rules and procedures in accordance with international standards.

2. ASEAN shall observe sound financial management policies and practices and budgetary discipline.

3. Financial accounts shall be subject to internal and external audits.

ARTICLE 30
OPERATIONAL BUDGET AND FINANCES OF THE ASEAN SECRETARIAT

1. The ASEAN Secretariat shall be provided with the necessary financial resources to perform its functions effectively.

2. The operational budget of the ASEAN Secretariat shall be met by ASEAN member States through equal annual contributions which shall be remitted in a timely manner.

3. The Secretary-General shall prepare the annual operational budget of the ASEAN Secretariat for approval by the ASEAN Coordinating Council upon the recommendation of the Committee of Permanent Representatives.

4. The ASEAN Secretariat shall operate in accordance with the financial rules and procedures determined by the ASEAN Coordinating Council upon the recommendation of the Committee of Permanent Representatives.

CHAPTER 10
ADMINISTRATION AND PROCEDURE

ARTICLE 31
CHAIRMAN OF ASEAN

1. The Chairmanship of ASEAN shall rotate annually, based on the alphabetical order of the English names of Member States.

2. ASEAN shall have, in a calendar year, a single Chairmanship by which the Member State assuming the Chairmanship shall chair:

   (a) the ASEAN Summit and related summits;

   (b) the ASEAN Coordinating Council;

   (c) the three ASEAN Community Councils;

   (d) where appropriate, the relevant ASEAN Sectoral Ministerial Bodies and senior officials; and

   (e) the Committee of Permanent Representatives.

ARTICLE 32
ROLE OF THE CHAIRMAN OF ASEAN

The Member State holding the Chairmanship of ASEAN shall:

(a) actively promote and enhance the interests and well-being of ASEAN, including efforts to build an ASEAN Community through policy initiatives, coordination, consensus and cooperation;

(b) ensure the centrality of ASEAN;

(c) ensure an effective and timely response to urgent issues or crisis situations affecting ASEAN, including providing its good offices and such other arrangement to immediately address these concerns;

(d) represent ASEAN in strengthening and promoting closer relations with externals partners; and

(e) carry out other tasks and functions as may be mandated.

ARTICLE 33
DIPLOMATIC PROTOCOL AND PRACTICES

ASEAN and its Member States shall adhere to existing diplomatic protocol and practices in the conduct of all activities relating to ASEAN. Any changes shall be approved by the ASEAN Coordinating Council upon the recommendation of the Committee of Permanent Representatives.

ARTICLE 34
WORKING LANGUAGE OF ASEAN

The working language of ASEAN shall be English.

CHAPTER XI
IDENTITY AND SYMBOLS

ARTICLE 35
ASEAN IDENTITY

ASEAN shall promote its common ASEAN identity and a sense of belonging among its peoples in order to achieve its shared destiny, goals and values.

ARTICLE 36
ASEAN MOTTO

The ASEAN motto shall be: "*One Vision, One Identity, One Community*".

ARTICLE 37
ASEAN FLAG

The ASEAN flag shall be as shown in Annex 3.

ARTICLE 38
ASEAN EMBLEM

The ASEAN emblem shall be as shown in Annex 4.

ARTICLE 39
ASEAN DAY

The eight of August shall be observed as ASEAN Day.

ARTICLE 40
ASEAN ANTHEM

ASEAN shall have an anthem.

CHAPTER XII
EXTERNAL RELATIONS

ARTICLE 41
CONDUCT OF EXTERNAL RELATIONS

1. ASEAN shall develop friendly relations and mutually beneficial dialogue, cooperation and partnerships with countries and sub-regional, regional and international organizations ans institutions.

2. The external relations of ASEAN shall adhere to the purposes and principles set forth in this Charter.

3. ASEAN shall be the primary driving force in regional arrangements that it initiates and maintain its centrality in regional cooperation and community building.

4. In the conduct of external relations of ASEAN, Member States shall, on the basis of unity and solidarity, coordinate and endeavour to develop common positions and pursue joint actions.

5. The strategic policy directions of ASEAN's external relations shall be set by the ASEAN Summit upon the recommendation of the ASEAN Foreign Ministers Meeting.

6. The ASEAN Foreign Ministers Meeting shall ensures consistency and coherence in the conduct of ASEAN's external relations.

7. ASEAN may conclude agreements with countries or sub-regional, regional and international organisations and institutions. The procedures for concluding such agreements shall be prescribed by the ASEAN Coordinating Council in consultation with the ASEAN Community Councils.

ARTICLE 42
DIALOGUE COORDINATOR

1. Member States. Acting as Country coordinators, shall take turns to take overall responsibility in coordinating and promoting the interests of ASEAN in its relations with the relevant Dialogue Partners, regional and international organisations and institutions.

2. In relations with the external partners, the Country Coordinators shall, inter alia:

   (a) represent ASEAN and enhance relations on the basis of mutual respect and equality, in conformity with ASEAN's principles;

   (b) co-chair relevant meeting between ASEAN and external partners; and

   (c) be supported by the relevant ASEAN Committees in Third Countries and International Organisations.

ARTICLE 43
ASEAN COMMITTEES IN THIRD COUNTRIES AND INTERNATIONAL ORGANISATIONS

1. ASEAN Committees in Third Countries may be established in non-ASEAN countries comprising heads of diplomatic mission of ASEAN Member States. Similar Committees may be established relating to international organizations. Such Committees shall promote ASEAN's interests and identity in the host countries and international organisations.

2. The ASEAN Foreign Ministers Meeting shall determine the rules of procedures of such Committees.

ARTICLE 44
STATUS OF EXTERNAL PARTIES

1. In conducting ASEAN'S external relations, the ASEAN Foreign Ministers Meeting may confer on an external party the formal status of Dialogue Partner, Sectoral Dialogue Partner, Development Partner, Special Observer, Guest, or other status that may be established henceforth.

2. External parties may be invited to ASEAN meetings or cooperative activities without being conferred any formal status, in accordance with the rules of procedure.

ARTICLE 45
RELATIONS WITH THE UNITED NATIONS SYSTEM AND OTHER INTERNATIONAL ORGANISATIONS AND INSTITUTIONS

1. ASEAN may seek an appropriate status with the United Nations systems as well as with other sub-regional, regional, international organisations and institutions.

2. The ASEAN Coordinating Council shall decide on the participation of ASEAN in other sub-regional, international organisation and institutions.

ARTICLE 46
ACCREDITATION OF NON-ASEAN MEMBER STATES TO ASEAN

Non-ASEAN Member States and relevant inter-governmental organisations may appoint and accredit Ambassadors to ASEAN. The ASEAN Foreign Ministers Meeting shall decide on such accreditation.

CHAPTER XIII
GENERAL AND FINAL PROVISIONS

ARTICLE 47
SIGNATURE, RATIFICATION, DEPOSITORY AND ENTRY INTO FORCE

1. This Charter shall be signed by all ASEAN Member States.

2. This Charter shall be subject to ratification by all ASEAN Member States in accordance with their respective internal procedures.

3. Instruments of ratification shall be deposited with the Secretary-General of ASEAN who shall promptly notify all Member States of each deposit.

4. This Charter shall enter into force on the thirtieth day following the date of deposit of the tenth instrument of ratification with the Secretary-General of ASEAN.

ARTICLE 48
AMENDMENTS

1. Any Member state may propose amendments to the Charter.

2. Proposed amendments to the Charter shall be submitted by the ASEAN Coordinating Council by consensus to the ASEAN Summit for its decision.

3. Amendments to the Charter agreed to by consensus by the ASEAN Summit shall be ratified by all Member States in accordance with Article 47.

4. An amendment shall enter into force on the thirtieth day following the date of deposit of the last instruments of ratification with the Secretary-General of ASEAN.

ARTICLE 49
TERMS OF REFERENCE AND RULES OF PROCEDURE

Unless otherwise provided for in this Charter, the ASEAN Coordinating Council shall determine the terms of reference and rules of procedure and shall ensure their consistency.

ARTICLE 50
REVIEW

This Charter may be reviewed five years after its entry into force or as otherwise determined by the ASEAN Summit.

ARTICLE 51
INTERPRETATION OF THE CHARTER

1. Upon the request of any Member State, the interpretation of the Charter shall be undertaken by the ASEAN Secretariat in accordance with the rules of procedures determined by the ASEAN Coordinating Council.

2. Any dispute arising from the interpretation of the Charter shall be settled in accordance with the relevant provisions in Chapter VIII.

3. Headings and titles used throughout the Charter shall only be for the purpose of reference.

ARTICLE 52
LEGAL CONTINUITY

1. All treaties, conventions, agreements, concords, declarations, protocols and other ASEAN instruments which have been in effect before the entry into force of this Charter shall continue to be valid.

2. In case of inconsistency between the rights and obligations of ASEAN Member States under such instruments and this Charter, the Charter shall prevail.

ARTICLE 53
ORIGINAL TEXT

The signed original text of this Charter in English shall be deposited with the Secretary-General of ASEAN, who shall provide a certified copy to each Member State.

ARTICLE 54
REGISTRATION OF THE ASEAN CHARTER

This Charter shall be registered by the Secretary-General of ASEAN with the Secretariat of the United Nations, pursuant to Article 102, paragraph 1 of the Charter of the United Nations.

ARTICLE 55
ASEAN ASSETS

The assets and funds of the Organisation shall be vested in the name of ASEAN.

Done in Singapore of the Twentieth Day of November in the Year Two Thousand and Seven, in a single original in the English language.

For Brunei Darussalam:
HAJI HASSANAL BOLKIAH
Sultan of Brunei Darussalam

For the Kingdom of Cambodia:
SAMDECH HUN SEN
Prime Minister

For the Republic of Indonesia:

DR. SUSILO BAMBANG YUDHOYONO

President

For the Lao People's Democratic Republic:

BOUASONE BOUPHAVANH

Prime Minister

For Malaysia:

DATO'SERI ABDULLAH AHMAD BADAWI

Prime Minister

For the Union of Myanmar:

GENERAL THEIN SEIN

Prime Minister

For the Republic of the Philippines:

GLORIA MACAPAGAL ARROYO

President

For the Republic of Singapore:

LEE HSIEN LOONG

Prime Minister

For the Kingdom of Thailand:

GENERAL SURAYUD CHULANONT (RET.)

Prime Minister

For the Socialist Republic of Viet Nam:

NGUYEN TAN DUNG

Prime Minister

ANNEX 1

ASEAN SECTORAL MINISTERIAL BODIES

1. ASEAN POLITICAL-SECURITY COMMUNITY

   1. ASEAN Foreign Ministers Meeting (AMM)
      ASEAN Senior Officials Meeting (ASEAN SOM)
      ASEAN Standing Committee (ASC)
      Senior Officials meeting on Development Planning (SOMDP)

2. Commission on the Southeast Asia Nuclear Weapon-Free Zone (SEANWFZ Commission)
   Executive Committee of the SEANWFZ Commission

3. ASEAN Defence Ministers Meeting (ADMM)
   ASEAN Defence Senior Officials Meeting (ADSOM)

4. ASEAN Law Ministers Meeting (ALAWMM)
   ASEAN Senior Law Officials Meeting (ASLOM)

5. ASEAN Ministerial Meeting on Transnational Crime (AMMTC)
   Senior Officials Meeting on Transnational Crime (SOMTC)
   ASEAN Senior Officials on Drugs Matters (ASOD)
   Directors-General of Immigration Departments and Heads of Consular Affairs Divisions of Ministries of Consular Affairs Division of Ministries of Foreign Affairs Meeting (DGICM)

6. ASEAN Regional Forum (ARF)
   ASEAN Regional Forum Senior Officials Meeting (ARF SOM)

II. ASEAN ECONOMIC COMMUNITY

1. ASEAN Economic Ministers Meeting (AEM)
   High Level Task Force on ASEAN economic Integration (HLTF-EI)
   Senior Economic Officials Meeting (SEOM)

2. ASEAN Free Trade Area (AFTA) Council

3. ASEAN Investment Area (AIA) Council

4. ASEAN Finance Ministers Meeting (AFMM)
   ASEAN Finance and Central Bank Deputies Meeting (AFDM)
   ASEAN Directors-General of Customs Meeting (Customs DG)

5. ASEAN Ministers Meeting on Agriculture and Forestry (AMAF)
   Senior Officials Meeting of the ASEAN Ministers on Agriculture and Forestry (SOM-AMAF)
   ASEAN Senior Officials on Forestry (ASOF)

6. ASEAN Ministers on Energy Meeting (AMEM)
   Senior Officials Meeting on Energy (SOME)

7. ASEAN Ministerial Meeting on Minerals (AMMin)
   ASEAN Senior Officials Meeting on Minerals (ASOMM)

8. ASEAN Ministerial Meeting on Science and Technology (AMMST)
   Committee on Science and technology (COST)

9. ASEAN Telecommunications and Information Technology Ministers Meeting (TELMIN)
   Telecommunications and Information Technology Senior Officials Meeting (TELMIN)
   ASEAN Telecommunication Regulator's Council (ATRC)

10. ASEAN Transport Ministers Meeting (ATM)
    Senior Transport Officials Meeting (STOM)

11. Meeting of the ASEAN Tourism Ministers (M-ATM)
    Meeting of the ASEAN National Tourism Organisations (ASEAN NTO's)

12. ASEAN Mekong Basin Development Cooperation (AMBDC)
    ASEAN Mekong Basin Development Cooperation Steering Committee (AMBDC SC)

13. ASEAN Centre of Energy

14. ASEAN-Japan Centre Tokyo

III. ASEAN SOCIO-CULTURAL COMMUNITY

1. ASEAN Ministers Responsible for Information (AMRI)
   Senior Officials Meeting Responsible for Information (SOMRI)

2. ASEAN Ministers Responsible for Culture and Arts (AMCA)
   Senior Officials Meeting for Culture and Arts (SOMCA)

3. ASEAN Education Ministers Meeting (ASED)
   Senior Officials Meeting on Education (SOM-ED)

4. ASEAN Ministerial Meeting on Disaster Management (AMMDM)
   ASEAN Committee on Disaster Management (ACDM)

5. ASEAN Ministerial Meeting on the Environment (AMME)
   ASEAN Senior Officials on the Environment (ASOEN)

6. Conference of the Parties to the ASEAN Agreement on Transboundary Haze Pollution (COP)
   Committee (COM) under the COP to the ASEAN Agreement on Transboundary Haze Pollution

7. ASEAN Health Ministers Meeting (AHMM)
   Senior Officials Meeting on Health Development (SOMHD)

8. ASEAN Labour Ministers meeting (ALMM)
   Senior Labour Officials meeting (SLOM)
   ASEAN Committee on the Implementation of the ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers

9. ASEAN Ministers on Rural Development and Poverty Eradication (AMRDPE)
   Senior Officials Meeting on Rural Development and Poverty Eradication (SOMRDPE)

10. ASEAN Ministerial Meeting on Youth (AMMY)
    Senior Officials Meeting on Social Welfare and Development (AMMSWD)

11. ASEAN Ministerial Meeting on Youth (AMMY)
    Senior Officials Meeting on Youth (SOMY)

12. ASEAN Conference on Civil Service Matters (ACCSM)

13. ASEAN Center for Biodiversity (ACB)

14. ASEAN Coordinating Centre for Humanitarian Assistance on Disaster Management (AHA Centre)

15. ASEAN Earthquakes Information Centre

16. ASEAN Specialised Meteorological Centre (ASMC)

17. ASEAN University Network (AUN)

ANNEX 2

ENTITIES ASSOCIATED WITH ASEAN

1. PARLIAMENTARIANS

ASEAN Inter-Parliamentary Assembly (AIPA)

II. BUSINESS ORGANISATIONS

ASEAN Airlines Meeting
ASEAN Alliance of Health Supplement Association (AAHSA)
ASEAN Automotive Federation (AAF)
ASEAN Bankers Association (ABA)
ASEAN Business Advisory Council (ASEAN-BAC)
ASEAN Business Forum (ABF)
ASEAN Chamber of Commerce and Industry (ASEAN-CCI)
ASEAN Chemical Industries Council
ASEAN Federation of Textiles Industries (AFTEX)
ASEAN Furniture Industries Council (AFIC)
ASEAN Insurance Council (AIC)
ASEAN Intellectual Property Association (ASEAN IPA)
ASEAN International Airports Association (AAA)
ASEAN Iron & Steel Industry Federation
ASEAN Pharmaceutical Club
ASEAN Tourism Association (ASEANTA)
Federation of ASEAN Economic Associations (FAEA)
Federation of ASEAN Shipper's Council
US-ASEAN Business Council

III. THINK TANKS AND ACADEMIC INSTITUTIONS

ASEAN-ISIS Network

IV. ACCREDITED CIVIL SOCIETY ORGANISATIONS

ASEAN Academics of Science, Engineering and technology (ASEAN CASE)
ASEAN Academy of Engineering and technology (AAET)
ASEAN Association for Clinical Laboratory Sciences (AACLS)
ASEAN Association for Planning and Housing (AAPH)
ASEAN Association of Radiologists (AAR)
ASEAN Chess Confederation (ACC)
ASEAN Confederation of Employers (ACE)
ASEAN Confederation of Women's Organisations (ACWO)
ASEAN Constructor Federation (ACF)
ASEAN Cosmetics Association (ACA)
ASEAN Council for Japan Alumni (ASCOJA)
ASEAN Council of Teachers (ACT)
ASEAN Federation for Psychiatric and Mental Health (AFPMH)
ASEAN Federation of Accountants (AFA)
ASEAN Federation of Electrical Engineering Contractors (AFEEC)
ASEAN Federation of Engineering Organization (AFEO)
ASIAN Federation of Flying Clubs (AFFC)
ASEAN Federation of Forwarders Association (AFFA)
ASEAN Federation of Heart Foundation (AFHI)
ASEAB Federation of Land Surveying and Geomatics (ASEAN FLAG)
ASEAN Federation of Mining Association (AFMA)
ASEAN Fisheries Federation (AFF)
ASEAN Football Federation (AFF)
ASEAN Forest Products Industry Club (AFPIC)
ASEAN Forestry Students Association (AFSA)
ASEAN Handicraft Promotion and Development Association (AHPADA)
ASEAN Kite Council (AKC)
ASEAN Law Association (ALA)

ASEAN Law Students Association (ALSA)
ASEAN Music Industry Association (AMIA)
ASEAN Neurosurgical Society (ANS)
ASEAN NGO Coalition on Ageing
ASEAN Non-Governmental Organizations for the Prevention of Drugs and Substance Abuse
ASEAN Oleochemical Manufactures Group (AOMG)
ASEAN Orthopaedic Association (AOA)
ASEAN Paediatric Federation (APF)
ASEAN Para Sports Federation (APSF)
ASEAN Ports Association (APA)
ASEAN Thalassaemia Society
ASEAN Valuers Association (AVA)
ASEAN Vegetable Oils Club (AVOC)
Asian Partnership for Development of Human Resources in Rural Asia (AsiaDHRRA)
Committee for ASEAN Youth Cooperation (CAYC)
Federation of ASEAN Consulting Engineers (FACE)
Federation of ASEAN Public Relations Organizations (FAPRO)
Federation of ASEAN Shipowners' Association (FASA)
Medical Association of Southeast Asian Nations
Committee (MASEAN)
Rheumatism Association of ASEAN (RAA)
Southeast Asia Regional Institute for Community and Education (SEARICE)
Southeast Asian Studies Regional Exchange Program (SEASREP)
Veterans Confederations of ASEAN Countries (VECONAC)

V. OTHER STAKEHOLDERS IN ASEAN

ASEANAPOL

Federation of Institutes of Food Science and technology in ASEAN (FIFSTA)
Southeast Asian Fisheries Development Centre (SEAFDEC)
Working Group for an ASEAN Human Rights Mechanism

ANNEX 3

ASEAN FLAG

The ASEAN Flag represents a stable, peaceful, united and dynamic ASEAN. The colours of the Flag – blue, red, white and yellow – represent the main colours of the flags of all the ASEAN Member States.

The blue represents peace and stability. Red depicts courage and dynamism. White shows purity and yellow symbolizes prosperity.

The Stalks of padi represents the dream of ASEAN's Founding Fathers for an ASEAN comprising all the countries in Southeast Asia bound together in friendship and solidarity. The Circle represents the unity of ASEAN.

The Specification of Pantone Colour adopted for the ASEAN Flag are:

Blue : Pantone 19-4053 TC
Red : Pantone 18-1655 TC
White : Pantone 11-4202 TC
Yellow : Pantone 13-0758 TC

For the printed version, the specifications of colours (except white) will follow those for the colours of the ASEAN Emblem, i.e.:

Blue : Pantone 286 or
Process Colour 100C 60M 0Y 6K
Red : Pantone Red 032 0r
Process Colour 0C 91M 87Y 0K

Yellow : Pantone Process Yellow or
Process Colour 0C 0M 100Y 0k

The ratio of the width to the length of the Flag is two to three, and the size specifications for the following Flags are:

Table Flag	: 10 cm x 15 cm
Room Flag	: 100 cm x 150 cm
Car Flag	: 10 cm x 30 cm
Field	: 200 cm x 300 cm

ANNEX 4

ASEAN EMBLEM

The ASEAN Emblem represents a stable, peaceful, united and dynamic ASEAN. The colours of the Emblem – blue, red, white and yellow – represent the main colours of the crest of all the ASEAN Member States.

The blue represents peace and stability. Red depicts courage and dyanamism. White shows purity and yellow symbolizes prosperity.

The stalks of padi represent the dream of ASEAN's Founding Fathers for an ASEAN comprising all the countries in Southeast Asia bound together in friendship and solidarity. The Circle represents the unity of ASEAN.

The Specification of Pantone Colour adopted for the colours of the ASEAN Emblem are:

Blue	: Pantone 286
Red	: pantone Red 032
Yellow	: Pantone Process Yellow

For four-color printing process, the specifications of colours will be:

Blue	: 100C M 0Y 6K (100C 60M 0Y 10K)
Red	: 0C 91M 87Y 0K (0C 90M 90Y 0K0
Yellow	: 0C 0M 100Y 0K

Specifications in brackets are ti be used when an arbitrary measurements of process colours is not possible.

In pantone Process Colour Simulator, the specifications equal to:

Blue : Pantone 204-1

Red : Pantone 60-1

Yellow : Pantone 1-3

The font used for the word "ASEAN" IN THE Emblem is lower-case Helvetica in bold.

AGREEMENT ON THE PRIVILEGES AND IMMUNITIES OF THE ASSOCIATION OF SOUTHEAST ASIAN NATIONS

The Governments of Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam, Member States of the Association of Southeast Asian Nations (ASEAN), hereinafter collectively referred to as "Member States" or individually as "Member State";

RECALLING as the ASEAN Charter signed in Singapore on 20 November 2007;

RECOGNISING that Article 3 of the ASEAN Charter confers on ASEAN, as an inter-governmental organization, legal personality; and

FURTHER RECOGNISING that the Article 17, 18 and 19 of the ASEAN Charter accord privileges and immunities to ASEAN in territories of its Member States as necessary for the fulfillment of its purposes; the Secretary-General of ASEAN and Staff of the ASEAN Secretariat as are necessary for the independent exercise of their functions; and the Permanent Representatives of the Member States and Officials on ASEAN duties as are necessary for the exercise of their functions, respectively,

HAVE AGREED AS FOLLOWS:

Article 1
Definitions

In this Agreement, the terms:

1. "Host Member State" means the Member State where the ASEAN Secretariat of other ASEAN Secretariat or other ASEAN institution or institutions are situated;

2. "Member of the administrative and technical staff" means members of the staff of the Permanent Mission employed in the administrative and technical service of the Permanent Mission

3. "Member of the service staff" means members of the staff of the Permanent Mission employed in the domestic service of the Permanent Mission".

4. "Officials of the Member States" means meetings, conferences and activities of the organs of ASEAN referred to in Chapter IV of the ASEAN Charter in the exercise of their tasks and functions;

5. "Officials of the Member States" means persons dully appointed by a Member State to act in an official capacity and who participate in official capacity and who participate in official ASEAN activities in that capacity on behalf of that Member State, or who are appointed by an appropriate organ of ASEAN referred to in Chapter IV of the ASEAN Charter as its representatives in the Member States, who are:
   (a) in possession of diplomatic or official passport; or

   (b) notified to the receiving Member State, either through diplomatic channels or to the agency prescribed by the receiving Member State, as persons to be accorded the privileges and immunities under this Agreement; which privileges and immunities may be denied by the receiving Member State, in accordance with the provisions of the ASEAN Charter and relevant principles of international law.

6. "Officials on ASEAN duties" means persons appointed by each Member State to be members of the Permanent Mission, having diplomatic rank, with duty of supporting the functions of the Permanent Representative;

7. "Permanent Mission" means the mission of a Member State to ASEAN based in Jakarta, headed by the Permanent Representative of that Member State;

8. "Permanent Representative" means the person appointed as Permanent Representative to ASEAN, with the rank of Ambassador, by each Member State to be based in Jakarta, with the duty of acting in that capacity;

9. "Premises of ASEAN" means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of ASEAN, including the residence of the Secretary-General of ASEAN;

10. "Premises of the Permanent Mission" means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the Permanent Mission, including the residence of the Permanent Representatives;

11. "Private Servants" means persons who are in the domestic service of any member of the Permanent Mission and who are not employees of the sending member State;

12. "Property and assets of ASEAN" means all property, whether immovable or movable, which belong to ASEAN, wherever located and by whomsoever held;

13. "Viena Convention" means the 1961 Vienna Convention on Diplomatic Relations.

Article 2
Legal Personality

1. As a legal person, ASEAN shall have the following capacities under domestic laws:

   (a) to enter into contracts;

   (b) to acquire and dispose of movable and immovable property; and

   (c) to institute and defend itself in legal proceedings.

In the exercise of these capacities, ASEAN shall be represented by the Secretary-General of ASEAN, Deputy Secretaries-General or any member of the staff of the ASEAN Secretariat authorised by the Secretary-General of ASEAN.

2. In exercising its capacities under international law, including the power to conclude agreements under Article 41 (7) of the ASEAN Charter, ASEAN shall act trough its representatives authorised by the Member States.

Article 3
ASEAN

1. ASEAN and the property and assets of ASEAN shall enjoy immunity from every form of legal process except insofar as in any particular case it has expressly waived its immunity. It is, however, understood that no waiver of immunity shall extend to any measure of execution.

2. The premises of ASEAN shall be inviolable. The property and assets of ASEAN shall be immune from search, requisition, confiscation, expropriation and any other form of interference, whether by executive, administrative, judicial or legislative action.

3. All forms of communications and the archives of ASEAN, and in general all documents wherever located, belonging to it or held by it, whether in electronic or any other form where the information contained therein can be retrieved for future reference, shall be inviolable.

4. Without being restricted by financial controls, regulations or moratoria of any kind, ASEAN:

   (a) may hold funds, gold currency of any kind and operate accounts in any currency; and

   (b) shall be free to transfer its funds, gold or currency from one country to another or within any country and to convert any currency held by it into any other currency.

5. Not withstanding Paragraph 4 of this article, ASEAN shall comply with the laws and regulations of the Member States relating to the reporting of funds and foreign exchange movements.

6. In exercising its rights in Paragraph 4 of this Article, ASEAN shall pay due regard to any representations made by the Government of any member State insofar as it is considered that effect can be given to such representations without detriment to the interests of ASEAN.

7. ASEAN and the property and assets of ASEAN shall be:

   (a) exempt from all direct taxes; it is understood, however, that the ASEAN will not claim exemption from taxes which are, in fact, no more than charges for public utility services;

   (b) exempt from customs duties and prohibitions and restrictions on imports and exports in respect of articles imported or exported by ASEAN for its official use. It is understood, however, that articles imported under such exemption will not be sold in the Member State into which they were imported except under conditions agreed with the Government of that Member State;

(c) exempt from customs duties and prohibitions and restrictions on imports and exports in respect of its publications.

8. While ASEAN will not, as a general rule, claim exemption from excise duties and from taxes on the sale of movable and immovable property which form part of the price to be paid, nevertheless when ASEAN is making important purchase for official use of property on which such duties and taxes have been charged or are chargeable, Member States will, whenever possible, make appropriate administrative arrangements for the remission or return of the amount of duty or tax.

9. The exemption from taxation and duties referred to in this Article shall not apply to such taxes and dues payable under the law of the Member States by persons contracting with ASEAN.

10. ASEAN shall enjoy in the territory of each Member State for its official communications treatment not les favourable than that accorded by the Government of that Member State to any other Government including its diplomatic mission in the matter priorities, rate and taxes on mails, cables, telegrams, radiograms, telephotos, telephones and other communications; and press rates for information to the press and radio. No censorship shall be applied to the official correspondence and other official communications of ASEAN.

11. ASEAN shall have the right to use codes and to dispatch and receives its correspondence by courier or in bags, which shall have the same privileges and immunities as diplomatic couriers and bags.

Article 4
Secretary-General of ASEAN and Staff of the ASEAN Secretariat

1. The Secretary-General of ASEAN, subject to the decision of the Committee of Permanent Representatives, shall specify the categories of staff of the ASEAN Secretariat to which the provisions of this Article apply. These categories shall

be communicated to the Governments of all Member States. The names of the persons included in these categories shall from time to time be made known to the Governments of Member States.

2. The staff of the ASEAN Secretariat who are entitled to privileges and immunities under this Agreement shall be provided with special Identification Cards issued by the Secretary-General of ASEAN or his or her authorised representatives that indentify them as such persons.

3. The Secretary-General of ASEAN and the staff of the ASEAN Secretariat referred to in Paragraph 1 of this Article shall, while in the performance of and for the independent exercise of their respective duties, functions and responsibilities:

(a) be immune from legal process in respect of words spoken or written and all acts performed by them in their official capacity;

(b) be exempt from taxation on the salaries and emoluments paid to them by ASEAN;

(c) be immune from national service obligations;

(d) be immune, together with tier spouses, dependent children, and minor children, from immigration restriction and alien registration;

(e) be accorded the same privileges in respect of exchange facilities as are accorded to the officials of comparable ranks forming part of diplomatic missions to the to the Government concerned;

(f) be given, together with their spouses, relatives and children, the same repatriation facilities in time of international crisis as diplomatic envoys;

(g) have the right to import free of duty their furniture and effects, including one motor vehicle, at the time of first taking up their post in the host Member State;

4. In addition to the privileges and immunities specified in Paragraph 3 of this Article, the Secretary –General of ASEAN and all Deputy Secretaries-General of ASEAN shall be accorded in respect of themselves, their spouses and minor children, the privileges and immunities, exemptions and facilities accorded to diplomatic envoys, in accordance with international law.

5. The privileges and immunities under this Article, except paragraph 3(a), shall not apply to persons referred to in Paragraph 1 of this Article, who are nationals of or permanently resident in granting Member State.

6. Privileges and immunities are granted to the Secretary-General of ASEAN and staff of the ASEAN Secretariat referred to in Paragraph 1 of this Article in the interest of ASEAN and not for the personal benefit of the individuals themselves. The Secretary-General of ASEAN shall have the right and the duty to waive the immunity of any member of the staff of the ASEAN Secretariat in any case where, in his or her opinion, the immunity would impede the course of justice and can be waived without prejudice to the interest of ASEAN. The immunity of the Secretary-General of ASEAN may be waived by the ASEAN Summit, or by whomsoever authorised by the ASEAN Summit.

7. The Secretary-General of ASEAN shall cooperate at all times with the appropriate authorities of member States to facilitate the proper administration of justice, secure the observance of police regulations and prevent the occurrence of any abuse in connection with privileges, immunities and facilities provided under this Article.

Article 5
Experts on Missions for ASEAN

1. Each Member State shall, where it considers appropriate, accord any or all of any or all of, but not limited to, the following privileges and immunities to experts on missions for ASEAN:

   (a) immunity from personal arrest or detention and from seizure of their personal baggage.

(b) in respect of words spoken or written and acts done by them in the course of the performance of their mission, immunity from legal process of every kind. This immunity from legal process shall continue to be accorded notwithstanding that the persons concerned are no longer employed on missions for ASEAN or participating on behalf of Member States in connection with official ASEAN activities;

(c) inviolability for all papers and documents;

(d) for the purpose of their communications with ASEAN, the right to use codes and to receive papers or correspondence by courier or in sealed bags;

(e) the same facilities in respect of currency or exchange restrictions as are accorded to representatives of foreign governments on temporary official missions;

(f) The same immunities and facilities in respect of their personal baggage as are accorded to diplomatic envoys.

2. Privileges and immunities are granted to experts in the interest of ASEAN and not for the personal benefit of the individuals themselves. The Secretary-General of ASEAN shall have the right and the duty to waive the immunity of expert in any case where, in his or her opinion, the immunity would impede the course of justice and it can be waived without prejudice to the interest of ASEAN.

3. Before the commencement of missions such experts on mission for ASEAN, Secretary-General of ASEAN shall:

(a) Send a notification to the ASEAN National Secretariat of the Member State concerned in which they are performing their mission, the names of the appointed experts on missions and the length of their stay; and

(b) issue documents of identification, if necessary, for such appointed experts on missions for ASEAN.

Article 6
Permanent Mission

The relevant provision on privileges and immunities relating to diplomatic missions in the Vienna Convention shall apply mutatis mutandis to the Permanent Mission.

Article 7
Permanent Representatives and officials on ASEAN Duties

1. The relevant provisions in the Vienna Convention relating to privileges and immunities for diplomatic agents and members of their families forming part of their households shall apply mutatis mutandis to the Permanent Representatives and officials on ASEAN duties and members of their families while they are in the host Member State.

2. The provision on privileges and immunities relating to the officials of the Member States under Article 9 of this Agreement shall apply mutatis mutandis to the Permanent Representatives and officials on ASEAN duties while they participate in official ASEAN activities or represent ASEAN in Member States, other that the host Member State.

3. Privileges and immunities are accorded to the Permanent Representatives and officials on ASEAN duties in order to safeguard the independent exercise of their functions in connection with ASEAN and not for the personal benefit of the individuals themselves. Consequently, a Member State not only has the right but is under a duty to waive the immunity of its Permanent Representatives and officials on ASEAN duties in any case where in the opinion of that Member State the immunity would impede the course of justice, and it can be waived without prejudice to the purposes for which the immunity is accorded.

Article 8
Staff of the Permanent Mission

1. The relevant provisions in the Vienna Convention relating the privileges and immunities for members of the administrative and technical staff of a diplomatic mission and members of their families forming part of their respective households shall apply mutatis mutandis to members of the administrative and technical staff of the Permanent Mission and members of their families.

2. The relevant provisions in the Vienna Convention relating to privileges and immunities for members of the service staff of a diplomatic mission shall apply mutatis mutandis to members of the service staff of the Permanent Mission.

Article 10
Cooperation and compliance

1. ASEAN, as an inter-governmental organization, shall, where possible, cooperate at all times with the appropriate authorities of Member States to facilitate the proper administration of justice, secure the observance of laws and regulations and prevent the occurrence of any abuse in connection with the persons entitled to the privileges and immunities under this Agreement.

2. Member States shall ensure that the persons whom they have appointed or employed who are accorded privileges and immunities under this Agreement, respect the laws and regulations of the Member State in whose territory they are in, in manner that is consistent with the privileges and immunities enjoyed by them.

Article 11
Settlement of Disputes

Disputes arising out of the interpretation or application of this Agreement shall be resolved amicably in accordance with Chapter VIII of the ASEAN Charter.

Article 12
Amendments

1. Amendments to this Agreement may be made at any time by consensus of all Member States and shall be ratified by them in accordance with their respective internal procedures.

2. An amendments shall enter into force on the thirtieth day following the date of deposit of the last instruments of ratification with the Secretary-General of ASEAN.

Article 13
Final Provision

1. This Agreement shall be signed by all Member States.

2. This Agreement shall be subject to ratification by all member States in accordance with their respective internal procedures.

3. Instruments of ratification shall be deposited with the Secretary-General of ASEAN who shall promptly notify all Member States of each deposit.

4. This Agreement shall enter into force on the thirtieth day following the date of deposit of the tenth instruments of ratification with the Secretary-General of ASEAN.

IN WITHNESS WHEREOF, the undersigned, being duly authorised thereto by their respective Governments, have signed this Agreement.

Done at Cha-am Huan Hin, Thailand, on the Twenty –fifth Day of October in the Year Two thousand and Nine, in a single copy in the English language.

For the Government of Brunei Darussalam:

For the Government of the Kingdom of Cambodia:

For the Government of the Republic of Indonesia:

For the Government of the Lao People's Democratic Republic:

For the Government of Malaysia:

For the Government of the Union of Myanmar:

For the Government of the Republic of the Philippines:

For the Government of the Republic of Singapore:

For the Government of the Kingdom of Thailand:

For the Government of the Socialist Republic of Viet Nam:

LAWYERING IN THE 21ST CENTURY: LIBERALIZING LEGAL SERVICES WITHIN THE FRAMEWORK OF GLOBALIZATION AND FREE TRADE

*By Chief Justice Renato C. Corona**

Introduction: Globalization

There is an amazing irony in globalization and it is that, as the world gets smaller, opportunities for growth and development become wider and better. Nowhere is this more clearly manifest than in the sphere of international trade and business relations where foreign market economies, domestic politics and diverse legal systems are linked to each other to create more advantages for the contracting states.

International Economic Law

The regulation of international trade and business falls under international economic law (IEL), probably the most pervasive and relevant branch of international law today. IEL is immensely significant and important because practically all trade agreements entered into by states fall, directly or indirectly, within its sphere.

Regional Trading Agreements

A plethora of remarkable developments has resulted from the rapid advances in science and technology, reduced costs of air and sea transportation, quantum leaps in information and communications technology and the instantaneous, world-wide reach of mass media. These developments have not only erased borders between states but have also fostered closer transnational and regional integration of sovereign nation-states. The end-result has been the creation and proliferation of regional trading agreements, a situation completely

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* *Keynote Speech delivered at the 5th China-ASEAN Forum on Legal Cooperation and Development, 9:00 A.M., 27 September 2011, Shangri-la Hotel, Kuala Lumpur, Malaysia.*

in sync with a globalized and competition-based world order. Indeed, the past decade has witnessed "an exponential growth in the formation of regional trade agreements ("RTAs") and the development of regional dispute settlement mechanisms ("DSMs")."[1]

ITO, GATT and WTO

To oversee and govern the expansion of international trade and to enhance international economic cooperation, international economic institutions were established. The 1944 Bretton Woods Conference gave birth to the creation of the World Bank (WB) and the International Monetary Fund (IMF). To complement these two institutions and to administer the trade aspect of international economic cooperation, a bid to establish the International Trade Organization (ITO), whose function would have been to promote a liberal trading system through the avoidance of archaic protectionist policies, was made in 1948 but it failed.[2] From this aborted attempt, the General Agreement on Tariffs and Trades (GATT) was established to regulate world trade, albeit as a provisional agreement and organization.[3] The GATT governed international trade practice for almost half a century, until new efforts to reinforce and strengthen multilateral trading were undertaken in the early 1990's. This led to the creation of its successor, the World Trade Organization (WTO).[4] The GATT and the WTO have been, without doubt, the most far-reaching agreements vis-à-vis international trade.

The General Agreement on Trade in Services (GATS)

From an initial focus on goods premised on agreed tariff levels and the Most Favoured Nation (MFN) clause, national treatment and tariffication principles, the Uruguay Round of negotiations in 1994 expanded international trade law to cover intellectual property, sanitary and physiosanitary measures, investment and, of particular interest to us, services.

Because global trade in services had become increasingly important[5] and global

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[1] Martin Lovell, Regional Trade Agreements and the WTO: An Analysis of the Efficacy of the ACFTA Forum Selection Clause in Resolving Jurisdictional Conflict. *Available at http//:ssm.com/abstract=1114770.*

[2] *http://www.wto.org.*

[3] *Ibid.*

[4] *Id.*

[5] Laurel S. Terry, *GATS' Applicability to Transnational Lawyering and its Potential Impact on U.S. State Regulation of Lawyers, 34* ***Vanderbilt J. of Transnational Law*** *989 (2001), as revised by 35* ***Vanderbilt J. of Transnational Law*** *1287 (2002), p. 994, citing* The Agreements: Services: Rules for Growth and Investment, *at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm5_e.htm.*

multijurisdictional practice had significantly expanded,[6] the General Agreement on Trade in Services (GATS) was drawn up in 1994 (under the set of agreements creating the WTO) during the Uruguay Round. It was the "first multilateral trade agreement that applied to services, rather than goods,"[7] and was designed as a counterpart of merchandise trade under the GATT and was thus based on the same GATT principles of "credible and reliable trade practices, non-discrimination, stimulation of economic activity through binding policies and progressive liberalization."[8]

The GATS applies to all service sectors except "services supplied in the exercise of governmental authority"[9] and "measures affecting air traffic rights and services directly related to the exercise of such rights."[10] In supplying services, the GATS recognizes four modes: (1) cross-border supply, (2) consumption abroad, (3) commercial presence and (4) presence of natural persons. Of these modes, it is the last one (presence of natural persons) which is the focus of our discussion on the liberalization of legal services within the framework of a bilateral trading agreement, specifically, the China-ASEAN Free Trade Agreement (CAFTA).

Regulating trade in services with respect to the movement of persons under the GATS focuses on persons of one member-state entering the territory of another member-state to supply a service, such as accountancy, medicine or education. However, the Annex on Movement of Natural Persons contained in the agreement specifies that WTO member-states are "free to operate measures regarding citizenship, residence or access to the employment market on a permanent basis."[12] This means that, under the fourth mode of service supply, what is contemplated is only the temporary movement of the service provider.[13]

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[6] *Ibid., p. 997,* citing ABA, Statement of the American Bar Association Section of International Law and Practice to the ABA Commission on Multijurisdictional Practice, *at http://www.abanet.org/crpr/mjp-comm_silp3.html.*

[7] *Id., p. 994, citing* The Agreements: Services: Rules for Growth and Investment, *at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm5_e.htm. (emphasis supplied)*

[8] *Supra at footnote 7. See the General Agreement on Trade and Services (GATS).*

[9] *Art. 1(3) of the GATS.*

[10] *Annex on Air Transport Services as contained in the GATS.*

[11] *Supra at footnote 7. See Art. 1(2) of the GATS.*

[12] *Ibid., at footnote 7. See discussion on the GATS available at the WTO website.*

[13] *Id. (Emphasis supplied.)*

[15] *Ibid.*

Law: A Noble Profession or a Business Service?

When we talk of "services" within the ambit of international trade agreements such as the GATS, we normally refer to conventional transnational service providers like accountants, engineers, architects, doctors and dentists, among others.[14] But in the WTO Sectoral Classification List, the first among the 12 service sectors enumerated is the category of "Business Services," with "Professional Services" as its first sub-category. Topping the list of professional services, in turn, are "Legal Services."[15] Thus, even if legal services are covered by the basic framework and structure of international trade agreements such as the GATS (despite the objection of some countries),[16] it is clear that, as a general rule, lawyering can be treated as a service provided by professionals and can therefore be the valid subject of global trade.

From their first day in law school, law students around the world are conceivably indoctrinated in the core mantras concerning the nature of the legal profession. Lawyering is not a profit-making venture. It is neither a business nor a commodity oriented towards maximization of material benefits. Nor is it measured by worldly success indicators. Rather, it is a time-honoured profession anchored on the dictates of truth, justice and equality, partaking of the nature of true and selfless public service for the betterment of society and of the nation. Lawyers are supposed to be champions of the common good and of the rule of law. And in the practice of law, the ultimate reward for one's efforts is not economic gain but the exhilarating sense of having contributed to the over-all well-being of the nation and the triumph of justice.

This traditional, intangible and value-laden perception of legal practice reflects the pre-eminent position we ascribe to the legal profession as being way above business-oriented service industries. But international economic law, as represented by concrete international agreements, has unwittingly triggered a paradigm shift towards treating law practice as "services" within the literal and economic meaning of the term. Under the GATS,

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[14] *See WTO Sectoral Classification List.*

[16] *Ibid., p. 999, citing the GATS. See footnote 27 of* Terry, *supra at footnote 12,* where it was stated that: "For example, the United States initially sought inclusion of legal services in the GATS and preferred a special annex addressing legal services. The annex approach was rejected and, by the conclusion of the GATS negotiations, many U.S. lawyers were unhappy that legal services had been included. *Karen Dillon, Unfair Trade?,* ***AM. LAW.****, Apr. 1994, at 54-57 [hereinafter* ***Dillon, Unfair Trade?****]. For a fuller discussion of the events that occurred at the conclusion of the U.S. negotiations, see infra notes 302-09 and accompanying text. See also Cone, supra note 16, at 1:19-20 and 2:2-13 (providing a detailed description of the evolution of legal services in the GATS, including the last minute developments regarding legal services); Orlando Flores, Prospects for Liberalizing the Regulation of Foreign Lawyers Under GATS and NAFTA, 5* ***MINN. J. GLOBAL TRADE*** *159, 178 nn.146, 164-66 (1996) (noting that France initially objected to inclusion of legal services in the GATS and summarizing the U.S. position)."*

for example, proponents of "trade in services," insofar as it covers "legal services," posit that the latter are "service providers" that can be the subject of cross-border movement between member-states. Although we may not be accustomed to thinking of the legal profession in these terms, it cannot be denied that legal services "are important not just to clients, society and lawyers, but are also part of the world services economy...." [17] Indeed, the legal profession has, to a large extent, been globalized by the world economy, consequently making discussions on cross-border or multijurisdictional law practice and the liberalization of legal services within the framework of bilateral, multilateral or regional trading agreements ripe and greatly relevant to the present times.

According to a study on the impact of treating the legal profession as among the "service providers" includible in the concept of free trade in services,[18] several significant events and developments in the global arena contributed to the introduction and strengthening of this emergent context of legal practice. Aside from the signing and ratification of the GATS by all WTO member countries,[19] other significant milestones in the advancement of the legal profession as a form of business service include:

1. The 1977 Adoption by the European Union of the Lawyers' Services Directive, which "grants EU lawyers the right to provide temporary legal services in another member-state without the need to obtain host jurisdictional licensure;"[20]
2. The North American Free Trade Agreement (NAFTA), "the first high-profile"[21] U.S. trade agreement to include services in recognition of "the important role of services in the U.S. economy and in foreign policy;"[22]
3. The professional services conferences sponsored by the Organization for Economic Cooperation and Development (OECD) which included as participants both government representatives and the different kinds of service providers, including lawyers, to discuss trade barriers;[23]
4. The 1998 Paris Forum on Transnational Practice for the Legal Profession to provide a venue for lawyers from all over the world "to discuss issues specific to

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[17] *Supra., at footnote 10, pp. 994-995.*

[18] Laurel Terry, *The Future of the Regulation of the Legal Profession: The Impact of Treating the Legal Profession as 'Service Providers,'" Available at http://www.ssrn.com.abstract=1304172.*

[19] Terry, *supra at footnote 25.*

[20] *Ibid., p. 190.*

[21] *Terry, supra at footnote 25, p. 190.*

[22] *Id., pp. 190-191.*

[23] *Id., p. 193.*

the legal profession with an ultimate goal of developing a consensus that could be conveyed to the WTO;"[24]

5. The 2004 WTO Workshop on Domestic Regulation which dealt with the "inclusion of the legal profession in the service providers paradigm"[25] and addressed "the issue of possible WTO 'disciplines' or regulations;"[26] and
6. The inclusion of legal services in certain bilateral free trade agreements (FTAs) such as the 2004 United States-Australia FTA; this resulted in the revision of Delaware state rules so as to allow Australian lawyers to practice within its jurisdiction.[27]

Indeed, the liberalization of legal services in the arena of FTA negotiations has opened the door to much discussion and debate. That being so, we must undertake a thorough analysis of domestic constitutional and statutory policies on the allowable practice of professions within one's sovereign jurisdiction.[28] Nationalistic policies and other considerations regarding the reservation of the exercise of professions within a state's jurisdiction only to citizens of such state may altogether impede or severely restrict the possibility of allowing the cross-border practice of law.

Next, the feasibility and mechanics of establishing an international or regional regulatory body to supervise the cross-border practice of law must be thoroughly studied,[29] as municipal rules, statutes and codes of conduct, and of professional responsibility, may apply only to citizens of a particular country licensed to practice law within that jurisdiction.

Furthermore, international and national commitments made by member-states such as hose contained in the GATT-WTO (which either coincide with or contradict the allowance of the practice of law within foreign jurisdictions in accordance with bilateral trading agreements[30]) must be carefully considered to ensure harmony and consistency in the international rights and obligations of a state.

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[24] Terry, *supra at footnote 25, p. 193.*
[25] *Id., p. 194.*
[26] *Id.*
[27] Terry, *supra at footnote 25, pp. 197-198.*
[28] *The Philippines, for instance adheres to the reservation of the practice of professions in the country only to Filipinos in Art. XII, Sec. 14 of the 1987 Philippine Constitution, which states: "... The practice of all professions in the Philippines shall be limited to Filipino citizens, save in cases prescribed by law."*
[29] Terry, *supra at footnote 21, pp. 205-208.*
[30] Terry, *supra at footnote 10, pp. 999-1000.*

Lastly, a set of uniform competency standards contained in a memorandum of agreement or similar document to that effect concerning the recognition of educational, citizenship and other requirements or qualifications already obtained in, and of licenses or certifications already issued by, one's home state by other members-states must be formulated to facilitate the free flow of legal services within the ASEAN region and other states with which it may enter into bilateral or multilateral trade agreements.

All this, along with other matters vital to possibly fashioning a cohesive regional and international policy on legal services, is essential to successfully meeting the multi-faceted and rapid changes the world is undergoing today. They must be accorded due and particular attention lest the legal profession become a marginalized sector in the emerging world order.

Conclusion

Opportunities like this forum on legal cooperation and development between China and the ASEAN are clearly worth our efforts to identify, address and ultimately resolve legal and jurisdictional issues on the subject of liberalizing legal services. Indeed, the world is constantly evolving and it is our duty as stakeholders in the administration of domestic and global justice to continuously strive to harness the various developments in the international arena to serve the future of man and humanity itself.

But wherever our discussions on the liberalization of legal services may lead us, it is time to rethink the way we perceive and characterize the legal profession in light of today's globalization and free trade. But definitely, it will also do us well to remember that, political, cultural, geographical, territorial, municipal and jurisdictional limits and considerations aside, the legal profession should always remain faithful to its basic and essential nature as a noble "profession" in the philosophical sense of the word. It is a calling to practice virtues universally honoured not only by lawyers and jurists everywhere but also by mankind as a whole: truth, justice, freedom, equality, peace, and love of country and fellowmen. Any effort to re-engineer the way we practice our vocation should always firmly abide by these universal values and moral norms. We can do no less.

Once again, I thank you for this opportunity to address you all today. A pleasant day to everyone.

REPORT OF THE ALA TASK FORCE

By TPB Menon, Chairman

(A) Introduction and Terms of Reference

At the 32nd Meeting of the Governing Council (GC) of the Asean Law Association (ALA) held in Manila on the 20th day of February 2010 two papers were tabled for discussion.

The papers were entitled as follows:

(a) The ASEAN Charter: Dispute Settlement Mechanism, and

(b) ASEAN Protocol on Enforcement of Arbitral Awards.

The GC after a consideration of the papers was of the view that as

First, the Dispute Settlement Mechanism had already been drafted within the ASEAN mechanism and was almost at the final stage, and

Secondary, the proposal on ASEAN Protocol on Enforcement of Arbitral Awards appeared not relevant to the ASEAN Charter.

The GC resolved that these two papers be submitted to a task Force "to deliberate more closely" and report back to the GC at its next meeting so that "ALA can move forward on a consensual basis." The Task Force was to be made up of two representatives from each member State.

**Report Submitted by Mr. TPB Menon, Chairman, Task force meeting held on 1 October 2011, Ho Chi Minh City, Vietnam.*

(B) Membership of the Task Force

The Task Force was eventually established. The Task Force was made up of the following representatives.

No.	Name	From
1	Zatil Aquilah DP Hj Metassan*	Brunei
2	Helyati Mahmud Saedon*	Brunei
3	Normin S. Pakpahan	Indonesia
4	Syamsul Maarif	Indonesia
5	Christopher Leong	Malaysia
6	Siti Naaishah Hamabali	Malaysia
7	Avelino V. Cruz	Philippines
8	Solomon M. Hermosura	Philippines
9	T P B Menon	Singapore
10	Francis Ng Yong Kiat	Singapore
11	Sorawit Limparangsi	Thailand
12	Tidarat Naringtarangkul Na Ayudhaya	Thailand
13	Tran Dai Hung	Vietnam
14	TPhan Duy Hao	Vietnam
15	Le Hong Hanh	Vietnam

**The representatives from Brunei did not attend the Task Force Meeting.*

T P B Menon of Singapore was nominated as Chairman of the Task Force.

A representative of the ASEAN Secretariat was invited to attend the Meeting of the Task Force. The ASEAN Secretariat was represented at the meeting by Un Sovannasm.

(C) Meeting of the Task Force

The Task Force met in the Conference Hall of Bao Son International Hotel in Hanoi, Vietnam on the morning of the 16th October 2010 at 9:00 a.m.. The Agenda for the Meeting which had been approved by all members of ALA was as follows:

(i) To consider the following papers submitted to the Governing Council at its meeting held in Manila on the 20th February 2010 namely:

(a) the ASEAN Charter: Dispute Settlement Mechanism, and
(b) Protocol in Enforcement of Arbitral Award

And report to the Governing Council at its next meeting on the steps to be taken (if any) to move forward on a consensual basis in keeping with Asean spirit.

(ii) To consider the request from the Head, Legal Services and Agreements Division, ASEAN Secretariat on how ALA can assist the Legal Division of the ASEAN Secretariat to develop guiding principles of law for the interpretation of provisions of Article 51 (1) of the ASEAN Charter with particular reference to

(a) guidelines on the legal methodologies, and

(b) guidelines on the legal principles applicable in the interpretation of International Agreements including the ASEAN Charter.

(iii) Discuss about seminar's topics at next meeting of General Assembly in Indonesia.

(iv) Any other Business."

Agenda Item (i)

The Chairman called the Meeting to order and welcomed all members of the Task Force to the Meeting. The Chairman then referred to item 10 of the Minutes of the GC and read the relevant paragraphs thereof. The Chairman then called upon Dr. Normin Pakpahan of Indonesia to address the meeting.

Dr. Pakpahan explained that based on the developments that had taken place between February 2010 and October 2010, there were three options open to the Task Force:

(a) submit the two papers to the GC to be retained "as record", or

(b) submit a note to the GC and request the GC to inform the ASEAN Secretariat

that ALA had already discussed the issues raised in these two papers which ALA considers "very important:, or

(c) submit new papers focusing on dispute settlement mechanism and enforcement of arbitral awards between private parties as ASEAN Protocol had already covered dispute settlement mechanisms between States.

After hearing the views of all other representatives it was resolved by consensus that the Task Force will submit a short paper (4 to 5 pages) on dispute resolution between private parties with focus or arbitration and other mechanisms such as mediation. Towards this end. Mr. Francis Ng of Singapore will examine those papers submitted at the last General Assembly Meeting held in Hanoi to assist him in generating the short paper. The short paper is to be made available by December 2010 for submission to the next Governing Council Meeting.

Agenda item (ii)

The Chairman Mr. Un Sovannasam to address the meeting on what had been requested by the ASEAN Secretariat.

Mr. Un addressed the meeting at some length. In summary he said that the ASEAN Secretariat was keen to co-operate with ALA and to share information so that the co-operation between the ASEAN Secretariat and ALA could be "close and effective". He then explained that the need for the ASEAN Foreign Ministers to understand "legal elements of the ASEAN Charter" to interpret the ASEAN Charter.

There was a general discussion when representatives of the different ASEAN states expressed their views. Some were of the view that there already in existence international conversations as to how documents like the ASEAN charter should be interpreted.

At the end of the discussion it was resolved by consensus that the request made by the ASEAN Secretariat was too general and the ASEAN Secretariat should be requested to elaborate and set out their request in more specific terms so that the GC could consider the matter further.

Mr. Un Sovannasan agreed and said that the ASEAN Secretariat will elaborate on their request and send it to ALA for consideration at the nest GC Meeting in Thailand.

** The short paper will be attached to this Report if it is available before the next GC Meeting.*

Agenda Item (iii)

The Chairman requested Mr. Normin Pakpahan to address the Meetong on Indonesian's proposal on the theme for the next ALA General Assembly and Conference.

Mr. Normin addressed the Meeting. He explained why the Indonesian National Committee had proposed the following theme for the Conference.

"Embracing the New Role of ALA after the ASEAN Charter".

He said that the view of ASEAN's ambitious implementation of "Vision 2010" and the objectives of the Asean Economic Community to achieve its objective by 2015, ALA should take a new role and be an active partner of ASEAN. It was in the light of this development that the Indonesian delegation had submitted the above theme.

Mr. Normin also emphasized that the following matters are likely to be achieved with "Vision 2020":

(i) Facilitate the free movement of Natural and professional persons;
(ii) Facilitate a free flow of capital;
(iii) Elimination of Economic barriers in Asean – both tariff and non-tariff.

He also suggested some possible specific topics that may be considered under the proposed theme:

(a) Dispute Settlement mechanisms;
(b) Juridical reform
(c) Legal aspects of the recovery from the global financial crisis;
(d) Trade and Investment mechanisms/laws.

All the representatives gave their views on the proposals made by Normin. The representative from Vietnam suggested five other topics for consideration namely (a) legal education, (b) legal awareness about implementation of the ASEAN Charter, (c) greater legal co-operation between ASEAN members of the ASEAN legal framework, (d) the role of ALA in public administration reform in each ALA member and (f) increasing the capacity of lawyer in ASEAN.

After a brief discussion it was resolved by consensus that the proposals made by the Indonesian representative be accepted. The Indonesian representative said that all the proposals that had been accepted will be summarised in a paper and will be submitted to the next GC meeting in Thailand for consideration and approval by the GC.

Agenda Item (iv)

(i) The Philippine representative Mr. Avelino Cruz referred to the short paper submitted by ALA Philippines on formation of sub-committee of the Task Force to consider various topics set out in the paper. The Chairman noted the proposal and said that Mr. Cruz's paper be referred to the GC so that the GC can set up a think tank if it considers this necessary.

(ii) The Indonesian representative Mr. Normin said that the ASEAN Secretariat should inform ALA periodically of developments so that ALA can support the ASEAN Secretariat in a more timely manner. The representatives of the other ASEAN countries proposed that the relationship between the ASEAN Secretariat and ALA should be put on more formal footing by inviting a representatives from the ASEAN Secretariat and ALA should be put on a more formal footing by inviting a representatives from the ASEAN Secretariat to ALA meetings so that there could be "clear lines of communication" between the ASEAN Secretariat and Ala. The meeting agreed by consensus that this proposal should be put to the GC for its consideration.

Conclusion

As there were no other matters for discussion, the Chairman thanked the President and Secretary-General of ALA for the kindness and generosity shown to all members of the Task Force and for the excellent facilities provided in hosting the Task Force meeting. The Chairman also thanked all members of the Task Force for their support and participation at the meeting.

The Meeting ended at 12:30p.m.

TPB Menon
Chairman
Task Force

SHORT PAPER BY THE ASEAN LAW ASSOCIATION TASK FORCE ON DISPUTE RESOLUTION BETWEEN PRIVATE PARTIES IN COMMERCIAL MATTERS

By Francis Ng

1. At the Meeting of the Task Force held in Hanoi, Vietnam, on October 2010, it was proposed that the Task Force submit a Short Paper to the Governing Council of the ASEAN Law Association ("ALA") on dispute resolution between private parties in commercial matters with a focus on arbitration and other mechanisms such as mediation. Towards this end, the Task Force appointed the writer to examine the relevant papers submitted at previous General Assemblies to assist the writer in generating the Short Paper.

2. Both arbitration and mediation as forms of alternative dispute resolution ("ADR") are not new to ALA Member States, though the degree of development of ADR, both as a whole and in terms of specific forms, varies greatly from State to State. The promotion of ADR can contribute towards freeing up judicial resources, clearing backlogs and reducing the waiting period for cases to be heard in court. In addition, it can be said that ADR is more suited to the cultural mores of ASEAN, and for those who would eschew an adversarial confrontation in the public glare of judicial proceedings. There is thus much to be said for the promotion and development of ADR between private parties in commercial matters within ALA Member States.

3. With the aforementioned background in mind, it should be noted that this Short Paper is not intended to be a comprehensive elucidation or even a summary of the state of ADR in each ALA Member State. Not only would this be beyond its scope, there already exists a wealth of knowledge that can be found in the various papers submitted by learned authors at past ALA General Assemblies.

4. Instead, in this Short Paper, the writer intends to consider dispute resolution mechanisms between private parties in commercial matters, with respect to arbitration and mediation, under the following heads:
    a. best practices for the enforcement of arbitral awards;
    b. mediation as a dispute resolution mechanism; and
    c. a suggested approach on how to move forward.

(a) Best practices for the enforcement of arbitral awards

5. A number of ALA Member States, namely Brunei Darussalam, Indonesia, Malaysia, the Philippines, Singapore, Thailand and Vietnam, are contracting states to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("the convention"). With a view to promoting the recognition and enforcement of arbitral awards made in commercial matters in keeping with the spirit of the Convention, judges and legal practitioners in ALA Member States may wish to consider adopting the best practices discussed in the following paragraphs.

6. First, for the purposes of Article II of the Convention, the requirement that an arbitration agreement be in writing should be deemed to be met by an electronic communication of the information contained therein is accessible so as to be usable for subsequent reference. In this regard, "electronic communication" may be defined as any communication that the parties make by means of data messages, while "data messages" may be defined as information generated, sent, received or stored by electronic, magnetic, optical or similar means, including but not limited to electronic data interchange, electronic mail, telegram, telex of telecopy.[1]

7. Secondly, there can be greater flexibility in recognizing arbitration agreements as being in writing. In this regard, an arbitration agreement should be recognized as being in writing if it is contained in an exchange of statements of claim and defence (or

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[1] *The New York Convention obliges enforcement courts to recognize only an arbitration agreement in writing and Article II (2) defines an "agreement writing" to "include an arbitral clause in a contract or arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams". The definition has been criticized by many as being too narrow and the language archaic, ignoring means of modern telecommunications. As amending the Convention was considered impractical and not realistically achievable, a change instead was introduced into the UNCITRAL Model Law for International Commercial Arbitration ("MAL") in December 2006. The MAL amendment provides for two options, a broadening of the definition of 'writing' to mean 'evidenced in writing' or the omission of writing. This best practice is not intended to do away with "writing" or interpret "writing" to mean "evidence in writing" but merely to clarify that writing includes the use of electronic communications. Doing so maintains symmetry with the Convention's requirements that the arbitration agreement must still be in writing no longer limited to letters and telegrams.*

equivalent documents) in which the existence of an agreement is alleged by one party and not denied by the other. In addition, the reference in a contract to any document containing an arbitration clause should be recognized as constituting an arbitration agreement in writing if the reference is such as to make that clause part of the contract.

8. Thirdly, an original award made within an ALA Member State that is duly authenticated by a competent authority of that ALA Member State, or a copy thereof that is duly certified by the said competent authority should be deemed to satisfy the requirement under Article IV (1) of the Convention for purposes of enforcement in another ALA Member State.[2] To this end, Secretariat can maintain, on the ALA website, a register of the competent authority or authorities in each ALA Member State responsible for authenticating original awards made within that ALA Member State or certifying copies thereof. The ALA National Committees of each ALA Member State shall notify the ALA Secretariat of the appointment or change of any competent authority or authorities.

9. Finally, the documentation for the recognition and enforcement of international arbitral awards should, where practicable, be in English or, if it is in a language other than English, be accompanied by a translation in English. [3]

10. Apart from what has been discussed above, other details may also be addressed and specifically provided for as best practices, for example:

    a. Obtaining copies of such arbitral awards;
    b. Registration of the arbitral awards to satisfy the requirements of the Convention; and
    c. Ensuring that enforcement of such arbitral awards shall not affect the validity of any bilateral or multi-lateral agreements entered into between ALA Member States.

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[2] *Article IV of the Convention requires that an award or agreement sought to be enforced in a Convention state must be "duly authenticated" or "duly certified". It does not however prescribe the method or standard of authentication required resulting in differing practices and requirements imposed by court of different states. This best practice seeks to establish a uniform approach within ASEAN that would make clear that where an agreement or award is certified or authenticated by a named institution or body of an ALA Member State, the document would comply with the enforcement court's requirement for authentication under the Convention.*

[3] *Agreements or awards made in different jurisdictions may involve use of different languages. Some courts mandate the sole use of its national language for all documents to be submitted for enforcement proceedings. This may at times prove impractical leading to delays and expense. English is the dominant language for international commerce. As well, ALA Member States have always adopted English as the common language of discourse3. Adopting a similar approach will distinguish the courts of ALA Member States as the ones that are prepared to accept a language other than their own national language for enforcement proceedings under the Convention. This best practice does not extend to oblige the courts of ALA Member States to conduct the proceedings in English.*

11. The best practices for the enforcement of arbitral awards, if adopted by the Governing Council, can perhaps be cast in the form of a set of Guidelines for members of ALA Member States to adopt and these Guidelines can be made available on the ALA website for all ALA Member States and members of the public to access.

(b) Mediation as a dispute resolution mechanism

12. Turning to mediation, a review of the papers presented at the 9th General Assembly indicates that mediation is practiced in some form in all ALA Member States; in this regard, two features that can be found in the ADR landscape of ALA Member States warrant mention.

13. First, a number of ALA Member States, including Indonesia, Malaysia, the Philippines, Singapore and Thailand, practice some form of court-annexed or court-based mediation. While the extent to which such mediation forms part of the judicial process varies greatly between ALA Member States, there is some evidence that mediation of this nature has been effective in achieving high settlement rates for at least some type of cases.

14. At the same time, public and private institutions that specialize in the promotion of non-court based mediation (for example, by providing mediation services or training and accrediting mediators), in general cases or in relation to specific fields, have been established in some ALA Member States. Notable examples include Malaysia's Malaysian Mediation Centre, Singapore's Singapore Mediation Centre and Thailand's Centre for Peace in Health Care and its Centre for Peace and Good Governance.

(c) Suggested approach

15. It is humbly suggested that if what is set out above is accepted at the next Governing Council meeting (to be held in Pattaya), a Special Committee comprising representatives from each ALA National Committee who specialize in arbitration be given the mandate to compose and finalise the text of the Guidelines that will constitute best practices for the enforcement of arbitral awards.

16. At the same time, the ALA National Committees of the various ALA Member States can consider arranging for study visits by delegations to different ALA Member States to learn more about mediation and specific issues related thereto, such as the use of court-based mediation, the training of mediators and the promotion of mediation as a dispute resolution mechanism. This would be with a view to developing best practices for the guidance of ALA Member States in relation to mediation in the future.

ROLE OF ALA IN THE 5TH CHINA-ASEAN FORUM ON LEGAL COOPERATION AND DEVELOPMENT*

By Atty. Avelino V. Cruz

I have been told of the high regard with which the China Law Society views the role of the Asean Law Association (ALA) as key participant in the CAFTA Legal Forum.

What indeed is the Asean Law Association?

Unique among Bar societies of the region, ALA encouraged a strong mix of lawyers, judges and teachers of Law in the ASEAN legal community. In Jakarta in 1979, the first gathering of ASEAN legal luminaries was convened thru the initiative of Indonesian Justice Minister, Mochtar Kantaatmadya. Moving forward, Dean Tan Sook Yee of Singapore and the Atty. Edgardo Angara of the Philippines delivered concept papers. Then, the following year, the ALA Constitution was approved in the first ever ALA General Assembly in Manila. The goal of a deep and lasting impact on legal cooperation in the ASEAN community with ALA as its instrument, was set in place. As aptly stated by the late Lord President, Tun Mohamed Suffian of Malaysia (Thereafter an ALA President):

> *"It is desirable that we judges, lawyers and law teachers should get together to discuss legal problems and ascertain how they have been solved in each other's countries. It is fortunate that there is no copyright in the law, so that we can copy freely what has been found workable in another country and thus profit from each other's experience."*

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* *Established in 2005, China-ASEAN Forum on Legal Cooperation and Development is a high-level, open influential and cohesive platform for legal professionals, government officials and entrepreneurs of China and ASEAN countries to conduct legal exchange and dialogue. The first four Forums were held from 2005-2010 in Nanning, Halong Bay of Vietnam and Chongqing.*
China-ASEAN legal Training Base was established in 2007 in Nanning, Guangxi of China by China Law Society. Up to now, four training courses for ASEAN trainees and one training course for Chinese trainees were held and almost one hundred legal practitioners attended the courses. In 2010, the Alumni of China-ASEAN Legal Training Base was founded and the Alumni website was launched. China-ASEAN Legal Research Center was also set up in 2010.

Having been with ALA since its inception and having once served as ALA Secretary General and currently, as President of ALA Philippines, I saw the seeds of the shared vision bear fruit over the last 33 years as ALA grew into a vibrant and strong institution. Its membership of five countries grew to ten. Only last month, Myanmar was admitted to membership at the Bali General Assembly. It was also a historic moment as China became the first ALA dialogue partner invited to participate.

Nonetheless, significant events had preceded the Bali Assembly. In the Vietnam Assembly in October 2009, ASEAN Secretary General Surin Pitsuwan rallied ALA countries and individual members to assume the role of ASEAN's legal adviser after ALA was officially designated under the ASEAN Charter signed on November 20, 2007, as the accredited non-governmental organizations for Law.

Since its founding, ALA's rolls were filled with the most distinguished names in the ASEAN legal profession, many of its members later rising to key positions in the ASEAN – a Prime Minister of Thailand, a Deputy Prime Minister of Singapore, two Senate Presidents from the Philippines, and several Chief Justices of the High Courts and legal luminaries and leaders as well of the Bar Societies and Law Offices. In Bali last month, five Chief Justices from ASEAN countries and Presidents of Bar societies actively participated. There is furthermore a wide output of legal scholarship from ALA's Law Journal, book publications on Asean Legal Systems, and the constantly updated ALA website run from Singapore. Not to forget, ALA since 2002 has even launched a Golf Chapter with Justice James Foong, a CAFTA dialogue leader, as its first Chairman and these golf gatherings have now threatened to rival attendance in the General Assembly itself.

Indeed, as far as ASEAN, and of course the CAFTA/ASEAN program, ALA has become the exclusive regional organization best positioned to propel its vision of legal cooperation in the ASEAN legal community, with China as dialogue partner. In years to come, ALA is poised to mature from highly developed activities in legal cooperation to its Constitution's goal of harmonization of Laws within the ASEAN.

It was in 1991 in Kuala Lumpur, when the seeds of the China/ASEAN dialogue relations were planted thru China's participation in the ASEAN Ministerial Meeting as a guest of Malaysia in 2002. China and the ASEAN countries inked a framework agreement for comprehensive economic cooperation. The goal of free trade in investments, goods and services between

the two groups had been set. Since then, much work was done to focus on liberalization of market access and national treatment, and to open the door to negotiations of otherwise restrictive limitations on foreign capital participation. Thus in January 21, 2010, CAFTA was fully realized, at which time, 97% of all tariffs have been eliminated except for Cambodia, Laos and Vietnam which will fully implement in 2015. CAFTA is now the largest free trade area in terms of population.

The record shows that by 2009. ASEAN exports to China had decreased by 48% or USD 13 Billion; China's export to ASEAN, by 55% or USD 10 Billion, the biggest gains being in Indonesia, Malaysia, Singapore and Thailand. The biggest inroads on exports by China were in the Philippines and Thailand with USD 3.1 Billion each. Just last week, Globe Telecom of the Philippines has rolled out a pilot project for the USD836 Million network modernization via a technologically advanced network in partnership with Huawei of China.

That said, let me focus on two vital subjects among many, for legal cooperation in the newly expanded China-ASEAN legal community. First, the issue of free trade on legal services, and second, the enforcement of commercial arbitration awards.

First, Legal services are better characterized as "cross border legal practice" rather than the more mundane "trade or industry". Lawyers and judges like to think of Law as a noble profession, due to the profession's stake in promoting justice and the Rule of Law. Because of traditionally restrictive nationality rules in law practice among ASEAN countries, the move towards liberalization has been slow. It has quickened in pace, however, since the advent of globalization, the internet which enabled legal communications at the speed of thought, and even the growing pervasive influence of social media in the region, which includes China's own *"Sina Weibu."*

In Singapore, foreign lawyers are permitted to officially register under conditions approved by the Attorney General. I am told that 62 foreign Law Firms and 6 foreign Law offices have been registered in addition to joint Law Ventures. Nevertheless, though documents in a transaction involving foreign law may be left to the responsibility of the foreign lawyer, any legal opinion relating to Singapore law is restricted to a practicing Singapore lawyer.

Malaysia has similar registration procedures, likewise under the authority of the Attorney General. The grantee of a special admission certificate still needs to apply for admission as advocate or solicitor before the courts for the period specified in the certificate.

In Indonesia, the Advocates Law of 2003 provided for certification of foreign lawyers on a limited basis, principally in foreign and international law. They also have to be employed by a local advocate Law Firm or certified as experts. Vietnam adopted wide acceptance of foreign Law practitioners and Law offices, including those from China. It was a smart move that served to promote Vietnam's quickening pace of foreign investments.

The primary statute regulating the legal profession in Thailand is Advocates ACT B.E. 2528 of 1985. Practice of law is limited to Thai nationals alone.

Similarly, the Philippines remain in the back water of these developments since Law practice continue to be restricted by nationality rules in both Business Law and Litigation. Although foreign lawyers continue to visit the country their role is merely advisory in such cases as international arbitration. Ironically, many years ago in 1901, American and even Spanish Law Firms were permitted to thrive and merge with local practitioners. It is timely that in the last CAFTA-ASEAN Dialogue in KL, Philippine Supreme Court Justices participated and saw the advantage of liberalization. The opportunity to quickly liberalize lies in the Philippine Supreme Court itself which constitutionally has sole control of legal practice through its Rules of Court.

The other major field for productive China-ASEAN dialogue is, I submit in the recognition and enforcement of Foreign arbitral awards in commercial disputes. ALA as an organization, has taken major strides in this direction. It was at the Governing Council meeting in Manila in February 2010 when in response to the challenge of Secretary General Surin Pitsuwan, a special Task Force was created to draft Arbitration Guidelines for the ASEAN Secretariat. The Task Force was composed of two members from each country. It was chaired by Singapore and I represented the Philippines. It has met twice in Vietnam – once in October 2010,and again in October 2011. It succeeded in crafting a document entitled "Guidelines and Best Practices on the Enforcement of Arbitral Awards within the ASEAN." In it, each

member country was urged to establish an enabling enforcement agency in-charge of certification of arbitral awards that are to be recognized and enforced within the ASEAN States. A registrar and a center for such purpose is to be set up in the ALA Secretariat.

A uniform ASEAN approach was recommended to plug the gap in Article IV of United Nations' 1958 Convention on Arbitration, so that when an agreement is duly certified or authenticated within the ASEAN state, the document would be deemed to comply with the enforcement requirements of the Convention without prejudice to the rights any party may invoke under Law or Treaty. The ALA Governing Council approved the guidelines in its meeting last month in Bali and these were promptly transmitted to Secretary General Surin Pitsuwan. I recommend that the CAFTA/ASEAN dialogues parallel this effort in so far as China/ASEAN commercial arbitration is concerned. That would fine tune and fast track the enforcement of commercial arbitration awards, looking forward to full economic integration within the ASEAN in 2005.

I have simply set out in bold strokes the above 2 subjects which in my view deserve thoughtful consideration by the CAFTA/ASEAN Legal Forum. The journey towards a full blown CAFTA/ASEAN legal cooperation, I would like to think, is off to an auspicious start.

My congratulations to the officials of the Huanyu China-ASEAN Legal Cooperation Center, which promises to be a venue for productive studies in such fields as I have dwelt upon above but also for many others awaiting the thrust of mutual legal cooperation in the new China/ASEAN legal community. I have also been in touch with the leaders of China Law Society and CAFTA thru Director General Mr. Gu Zhaomin. His group should be congratulated for its energy and dedication in sponsoring the holding of the next CAFTA Legal Forum in Manila in November of this year, with ALA Philippines as lead oprganizer. I invite all of you to join us and receive the warm hospitality and generous friendship of Filipino lawyers and citizens alike, and be part of a historic moment - the holding of the first ever China/ASEAN Legal Forum in the Philippines.

Our brother lawyers from the China Law Society are no doubt familiar with the old Chinese adage "the journey of a thousand miles begins with a first step." Sustaining the CAFTA/ASEAN dialogue in years to come marks the first of several such steps.
Thank you.

ALA HYMN

Music: Avelino V. Cruz
Lyrics: Magdangal M. de Leon

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

Come, spread the word, Let's heed the call.
Lawyers and Judges and Law teachers all.
Join hands and fight for the freedoms we owe
To Asean Brotherhood, to the Rule of Law.

We are brothers all in Asean Land.
Trust and understanding are all ours to share.
We're united as one in our diversity,
blending cultures & history
Harmonizing our Laws is our mission of hope.
Together, we will reach our cherished dream,
Our fervent pray'r, a vision of justice and peace.
We promise to keep our noble faith,
Our fervent pray'r for a region of progress and peace.

ASEAN Law Association!
ASEAN Law! ASEAN Law!

AVC/October 12, 2005