

The Role of the Rule of Law, the Legal Approximation and the National Judiciary in ASEAN Integration

Visoot Tuvayanond*

The two decades of economic boom in ASEAN was due to the influx of foreign investments, so when the creation of NAFTA has diverted the investment flow from Southeast Asia, ASEAN countries have to offer more incentives to be appealing to foreign investors. However, an increase of incentives alone will never suffice, because other countries also do the same to entice foreign investments. Consequently, in order to salvage the diverted investment flow, ASEAN countries have to enhance their attractiveness by improving their legal framework to accommodate the needs and concerns of foreign investors via the approximation of their legislation and judiciary practices to ensure the transparency and predictability that foreign investors normally look for in capital importing countries. The biggest drawback in this regard is that not all legislation and judiciary practices are prone to be harmonized on account of conflict of national interests, differences in political regimes and in religions, and more importantly the inadequacy of political will of ASEAN countries to push further their integration. So the approximation of the legislation and judiciary practices will have to be limited to only where it is feasible.

Although ASEAN is already widely known nowadays, it will still be useful to recapitulate the ambiance and circumstances under which it was established, the subsequent development of its economic and political integration and its achievements, both on the up side and down side, and an overview of the general layout of its legal framework so as to ensure a proper understanding of the core issues and *scenario* of our subject matter.

* Lecturer of International Law and International Trade Law, University of the Thai Chamber of Commerce, former Thai Ambassador to Portugal and ex-Deputy Director-General of the Treaty and Legal Affairs Department and ex-Deputy Director-General of the ASEAN Affairs Department of the Ministry of Foreign Affairs of Thailand

1. The Creation and Evolution of ASEAN

The Association of Southeast Asian Nations (ASEAN) was founded on the 8th of August 1967 in the era of the raging global Cold War, by the signature of its constituent instrument¹ by the Foreign Ministers of its 5 founding countries: Indonesia, Malaysia, the Philippines, Singapore and Thailand² amidst poverty, political instability, conflicts and upheaval in the region. In other words, at the moment when their very survival and national independence were precarious. The prime objective of ASEAN was to ensure peace, stability, progress, development and prosperity in its region *via* political and economic cooperation with a view to eradicating poverty which was seen as the root cause that precipitated people into communism.³ Under the circumstances at the inception of ASEAN, such an objective appeared to be too ambitious and in the eyes of pessimistic authors and commentators was probably even utopian because the South-South economic cooperation paradigm in terms of intra-ASEAN trade was unrealistic and could only be symbolic, due to the fact that the levels of development of ASEAN countries then being so similar, all of them produced and exported very much the same commodities and products that competed with, instead of being complementary to each other. *A fortiori* when the region was so badly divided by ideological conflict and infested with proxy wars. Insurgencies and retarded economies compelled the non-communist nations in Southeast Asia to depend on the foreign Powers for security and aid, and to sacrifice a great deal of their limited

¹ Commonly known as the Bangkok Declaration of 1967.

² The five founding member countries are listed in alphabetical order so as to avoid a polemic on their order of precedence.

³ Although it is undeniable that the fear of communist expansion in Asia was the main drive that compelled the five ASEAN founding non-communist countries, i.e. Indonesia, Malaysia, the Philippines, Singapore and Thailand, to create the Association of Southeast Asian Nations (ASEAN), at our post-Cold War era when communism is no longer regarded as a threat, communist and non-communist countries can nowadays co-exist with each other in peace and harmony in the heart of ASEAN, one of the fundamental ASEAN principles being the non-interference in internal affairs of each other.

resources and budget to national defence. Territorial disputes⁴ and racial tension caused constant irritation and misgivings among the Southeast Asian countries.⁵ Hence the pessimism and skepticism of most authors at that time over the viability and survival of ASEAN.

2. The Achievements of ASEAN

The ultimate goal that this regional organization set for itself since its birth was to eventually bring together all Southeast Asian countries.⁶ ASEAN succeeded thirty-two years later at the post-Cold War epoch in finally encompassing all Southeast Asian countries upon the admission of Cambodia on April 30th, 1999.⁷ ASEAN now comprises ten countries, whose territories stretch across the entire Southeast Asia, incorporating a large portion of the Asian continental landmass and several archipelagos. Its overall population of approximately 500 million people, surpasses that of the whole European Union,⁸ thus constituting a non-negligible political and economic integration bloc, that can serve as an ideal manufacturing base for export oriented investments and local consumption oriented ones with the availability of raw materials and low cost qualified and unskilled manpower for hi-tech and labor intensive industries in abundance, and as a perfect outlet for their products on account of its potential to become an enormous market in this hemisphere of the globe. Not only has ASEAN achieved the inclusion of all Southeast Asian countries within its fold as initially planned at its inception, but it has also evolved into an influential political and economic integration bloc in the region.

⁴ For instances, the territorial disputes between Malaysia and Indonesia over Sabah and Sarawak, etc.

⁵ For more ample details on its creation, Cf. ASEAN website.

⁶ Formerly viewed by many authors as an unrealizable ambition under the prevailing political ambiance at that time.

⁷ Before Cambodia, Brunei Darussalam was admitted in 1984, Viet Nam in 1995, then Laos and Myanmar in 1997.

⁸ One of every ten persons in the world today is a Southeast Asian.

Although economically, ASEAN belongs to the Third World, some of its member countries were as recently as only a few years ago, prior to the financial collapse, lauded as having already joined the World top 20 most competitive economies and were even commended by the IMF as exemplary for the South-South economic cooperation paradigm.⁹ The multitude of people in ASEAN countries constitutes a huge, increasingly middle-classed market, half the size of China's, with a combined gross domestic product (GDP) of US\$600 billion.¹⁰ ASEAN can thus be said to have achieved a rather impressive success in terms of economic growth, stability and significant poverty alleviation¹¹ thanks to the regular influx of substantial trade and investment flows from all major capital exporting countries for two consecutive decades.¹²

Apart from its economic importance and the natural resources that its marine territories hold, ASEAN, as the bridge between the Indian and Pacific Oceans, straddling some of the busiest sea-lanes in the World, is also of a global strategic importance, since the oil tankers and freighters transiting diurnally through these sea-lanes uphold Japan's status of an industrial Big Power and ensure the regular replenishment of fuel for the US Armada in the Pacific Ocean. This success of ASEAN is all the more phenomenal considering that it was established at a time of poverty and conflict and that although in the wake of the aggravation of the economic turmoil after the atrocious September 11th terrorist attacks on the US in New York and in Washington D.C., it may be premature to jump to the conclusion that the ASEAN economies have already recovered from the

⁹ They were then categorized as "Near Developed Countries" and was even nicknamed as "New Economy Tigers." Its spectacular success was also referred to in a World Bank Policy Research report as "The East Asian Miracle."

¹⁰ Cf. ASEAN website.

¹¹ Such alleviation of poverty is, Alas!, deteriorating with the massive layoff and unemployment problems resulting from the financial crisis that started in 1997.

¹² The GSP accorded by developed countries, especially by the US, which is a major market for ASEAN countries, was also largely contributive to such a success.

past three years of deep crisis that threatened to reverse the region's economic and social gains of over twenty years, it is manifestly not precluded that such eventuality will ultimately occur,¹³ provided that the approximation of legislation and national judiciary in ASEAN countries, which is the main theme of our topic, is effectively carried out, wherever feasible, and observed in real terms.

The spectacular economic boom in ASEAN during the past two decades is living proof of how much foreign investments could contribute to the prosperity and economic growth of a country and the region. That is why all ASEAN countries have streamlined their economic policy toward the creation of propitious environments, which are conducive to a successful conduct of foreign investments and businesses, ranging from improving their infrastructure, offering enticing incentives to foreign investments, *e.g.* an exemption of import duties for the capital goods imported for investments, three to eight years of tax holidays, special tariff charges for the use of public utilities like electricity, water supply and telephone services, etc., to the creation of the ASEAN Free Trade Area (AFTA), which entitles the investors to export their locally manufactured products duty free to all ASEAN countries, thus enabling them to have a *de facto* monopoly or exclusive market in the region for themselves in all legalities, because goods imported from outside of ASEAN will never be able to compete with the like locally manufactured products price-wise, given that the tax exemption, the low cost labor¹⁴ and the much lower shipping costs alone already give to the products of the investors in ASEAN an infinite advantage over the products of the provenance from outside of ASEAN. At first glance these privileges may seem to be amply attractive to

¹³ It has to be recognized, however, that in view of the on-going global economic recession, its "V" shape recovery will still have to wait for many years to come.

¹⁴ Though the labor costs in some ASEAN countries like Thailand, Malaysia and Singapore have of late substantially increased, they are still relatively much lower than in industrially developed countries, besides, the labor costs in new ASEAN member countries are still very low.

any foreign and local potential investors, but in reality, there is much more to it than a mere offer of the appealing incentives since all countries in other parts of the World, being just as aware as ASEAN of this fact, have also been seeking the ways and means to render their countries and regions more enticing to investors. Under such circumstances, ASEAN countries will have to probe further for better ways and means to enhance its competitiveness in this area and one of the possible avenues along that line is precisely to improve their legal framework to better accommodate the needs and concerns of foreign businessmen and investors. So the first step to be taken in that direction is to identify such needs and concerns of foreign investors in light of the following remarks.

In doing business, domestic and international alike, investors and businessmen have to scrutinize all facets of the environment, which are susceptible of generating a handsome return from their business ventures and the adverse impacts on their operation and economic viability, which could be consequential from the environment in their home countries, but more importantly from the one in the country, where they intend to make their investments.

3. The Role of the Rules of Law in ASEAN

The legal environment is obviously one of the most salient features of all international environments that can have negative or positive impacts on trans-boundary business and investments, and will, therefore, always have to be taken into account in every international business deal, given that international trade and trade-related investments can prosper only under propitious and appropriate legal frameworks both on international and domestic planes. Although international businesses and investments are governed and regulated both by international and municipal laws, foreign investments and international transactions at the level of the private sector are regulated more by municipal law than by international law. Hence, businessmen tend to attach greater importance to municipal laws in the

matters relating to their international transactions and investments in a foreign country,¹⁵ given that municipal laws always have to comply with the country's international commitments, which are translated into the national legislation, and municipal laws can always be unilaterally repealed or amended at any time, whereas international commitments can be unilaterally amended only if it is so authorized by relevant agreements and the prevailing international law. Businessmen, therefore, always take into account and focus their attention on the municipal laws of the countries where they do business in all international business deals.

Fundamentally, what businessmen and foreign investors look for in the capital importing countries and their economic systems are primarily: the security and freedom for their personnel and properties, stability, predictability and transparency of the legal and economic frameworks of the host countries, *viz*, **security and freedom for their personnel, assets and properties**: business enterprises and investors normally hope to get a guarantee for the security and freedom abroad for their personnel and for the disposal of their properties as well as an adequate protection against expropriation and nationalization, since thwarting the movements of the personnel and expatriation of the capital, funds and profits of the foreign business and investment are not conducive to their prosperity and success; **stability**, which includes political and financial stability and on top of all, the policy stability, failing which no long term business planification will ever be conceivable; **predictability**: as under the liberal trade paradigm, taxes must be stable, predictable and non-prohibitive and the government must not thwart private persons' voluntary transactions. The government's regulation of or interference with international trade which deviates from the liberal trade philosophy of the WTO and the government

¹⁵ Private enterprises do, however, sometimes invoke international agreements to justify their claims for certain rights or freedom to do business in the host country (for example, AIA claimed for the right under the Thai/US Treaty of Amity to run its insurance business in Thailand).

intervention in the market to regulate or prohibit the trans-boundary flow of goods are not permissible; **transparency**, which is very akin to the notion of the predictability, connotes that the legal framework and judiciary practices must be consistent and not arbitrary, etc., hence the desirability that the matters left to the discretion of the public authority should be minimized to the optimum, because the investors are often exasperated and become discouraged when dealing with the local authority on account of an abuse of power and the confusing and time-consuming regulations established by individual States; and lastly, the municipal laws must be appropriate and propitious for foreign businesses and investments; and incidentally, it goes without saying that the equality of chances should also be ensured in compliance with the cardinal WTO principles of the MFN (Most Favored Nation treatment) and the NT (National Treatment), etc.

Since such needs and concerns of businessmen and investors can be effectively accommodated only with an appropriate enabling legislation of the host country, it can rightly be presumed that *the rules of law play a crucial role* in ASEAN as capital importing countries.¹⁶ *A fortiori* when it is obvious that while municipal laws can promote foreign investments and enhance their chance to prosper, it can also constitute a far-reaching drawback for ASEAN by being prohibitive or becoming an impediment to an efficient operation of their business on account of the discrepancies between the municipal laws of its member countries, which run counter-current to the need for predictability and transparency as previously pointed out. Hence the impelling necessity for the approximation of legislation in ASEAN countries, which will be the core ingredient and an impetus for an economic rebound in this region.

¹⁶ Nowadays ASEAN countries are also capital exporting countries, for instances, Thailand has made a lot of investments in China, India, Germany, Vietnam, Brunei Darussalam and other neighbouring countries like Laos, Cambodia and Myanmar (formerly called Burma), Singapore has also made investments in Cambodia, Myanmar and Vietnam, and Malaysia has made some investments in Thailand, etc.

4. The Legal Approximation

The legal approximation in this context connotes that legislation in ASEAN countries should be similar, without having to be identical to each other, and needs to only be *approximately* harmonized¹⁷ in order to be attractive to foreign investment. It would, of course, be ideal for the ASEAN legislation to be identical, considering that everybody is legally presumed to know the laws, but the laws of every country are normally in the language of that country and only some of them are translated into English. It would thus be impossible for foreigners to really know all of the laws of the host countries, when even their nationals do not know them all. It would therefore be naive or even an aberration to expect the legislation in all ASEAN countries to be identical, when in the same country, laws are not always identical everywhere. For instance, the applicable law in civil cases involving family and inheritance for the Islamic people in the four Southern provinces of Thailand, which are densely populated by Islamic people, is Muslim law, instead of the family and inheritance law in the Civil and Commercial Codes, which is applicable *erga omnes* in the rest of the country; and in the United States, capital punishment still exists in some States and not in other States, even for the same felonies. It is, nevertheless, imperative for ASEAN countries legislation to have at least the minimum standard of uniformity to attract foreign investments and businesses and be conducive to their success and prosperity and also to avoid the heinous uncertainty previously alluded to. The approximation of the legislation of ASEAN countries is all the more important with the creation of AFTA, because the advent of AFTA should stimulate and step up ASEAN economic cooperation and enhance the volume of intra-ASEAN trade, due to the fact that under the CEPT Scheme which is the legal

¹⁷ As the term "approximation," which in this context means an approximate harmonization, is not quite a currently used legal term, in order to facilitate the comprehension of our subject matter, we will use the term "harmonization" in lieu of the term "approximation" with the above-mentioned understanding.

framework of AFTA,¹⁸ ASEAN products are entitled to be exported to all ASEAN countries duty free.¹⁹ Without the approximation, the inconsistency in legislation and judiciary practices in ASEAN would risk becoming a troublesome setback that baffles the achievement of the objectives of AFTA.

Having thus identified the needs and concerns of foreign investors and businessmen, the next step to take now is to identify the laws, which need to be looked into in the process of the harmonization of the laws in ASEAN and prioritize their harmonization, but given that it is impossible to exhaustively enumerate such laws in detail when they are so numerous and especially under such a time constraint, the identification of the laws that need to be harmonized can only be done by way of examples and by categories.

5. Harmonization of the Implementing Legislation for the International Agreements of ASEAN Countries

Although the implementing legislation for international agreements is also a municipal law, it has to be singled out to be dealt with separately from other types of municipal laws, because the implementing legislation must be consistent with the international agreements that it implements, harmonizing the implementing legislation for international agreements is

¹⁸ For details on the creation of AFTA and CEPT Scheme, which is the framework agreement of AFTA, Cf. Prof. Dr. Jaturon Thirawat (1993) Some Observations on AFTA. *Thammasat Law Review*, no. 1, (translated into Japanese and published by Nihon Keizai Shimbun, 1993, in "Global Thinkers, Challenge Orthodox: Japanese Views of the World's Economy and Political Situations, pp. 229-248. These views were subsequently reiterated by JETRO in March 2002), and "Salient Aspects and Issues Relating to AFTA," article used as external reading materials for the MBA (International Programme) at the School of Graduate Studies, the University of the Thai Chamber of Commerce.

¹⁹ Although the on-going global slumbering economy is not very conducive to the enhancement of the intra-ASEAN trade in the immediate future, once the crisis is over, things should be looking up once again in this region on account of this new positive factor.

thus tantamount to harmonizing the international agreements themselves. Therefore, in the context of our subject matter it has to be understood that the harmonization of the implementing legislation automatically includes the harmonization of the international agreements that it implements.

Though the prime concerns of the *businessmen and investors* focus mainly on the municipal laws, it does not mean that in the harmonization of its laws, ASEAN could ignore the international agreements that provide the necessary legal and economic frameworks for foreign businesses and investments in ASEAN countries e.g. the monetary and tariff agreements, the agreement on the avoidance of double taxation and the agreement on the promotion and protection of investments, etc.

There are two types of international agreements and their implementing legislation in ASEAN relating to foreign businesses and investments, *i.e.* the ones that could and should be harmonized, and the ones that either do not need to, or are not disposed to be harmonized.

6. The Implementing Legislation for the International Agreements in ASEAN which should be Harmonized

The implementing legislation for the constituent instruments of ASEAN and AFTA has to be harmonized in all ASEAN countries, given that in any case this type of law has to be consistent with the international commitments of the contracting countries, which in this case are identical for all ASEAN countries.

Another implementing legislation for the international commitments of ASEAN countries, which should be harmonized is the one that enables ASEAN countries to comply with their international commitments under the framework of WTO, except those that vary with the different status of the

countries concerned²⁰ for the similar reason that all ASEAN countries being members of the WTO, their implementing legislation has to be consistent with their international obligations.

The agreement on the avoidance of double taxation provides a legal framework which is indispensable for foreign investments without which the foreign investors will have to pay taxes both to the host countries and to their home countries for the income deriving from the same business, which will be highly disadvantageous for them *vis-à-vis* the investors of the countries which have concluded this type of agreement with the host countries as well as *vis-à-vis* the investors who are nationals of the host country. Such an international agreement and its implementing legislation should, therefore, be harmonized.

7. The Implementing Legislation for the International Agreements in ASEAN which cannot be Harmonized

Since the conclusion of treaties is a direct attribute of national sovereignty and the need to conclude any treaties is always contingent upon the national interest and policy of individual countries at the given moment, it would not be pragmatic to expect the ASEAN countries to harmonize *all* of their international treaties, which are related to foreign businesses and investments, since in certain areas foreign business and investments may be desirable in some ASEAN countries, but undesirable in others. Therefore, as the implementing legislation has to be consistent with the international agreements of the countries, its harmonization will not be practical, because it will lead to harmonizing the international agreements of the countries, which cannot be generalized and has to be done on a case by case basis, taking into account the prevailing national

²⁰ For example, GATT and WTO grant different grace periods to developing countries for the liberalization of the trade in services according to the levels of their underdevelopment.

interests and policy. For example, as the international trade law under the legal framework of WTO on the liberalization of the trade in services grants various grace periods to developing countries according to the levels of their underdevelopment as previously stated, the harmonization of ASEAN countries implementing legislation for the liberalization of the trade in services would certainly not be in keeping with such a concession, at least for the time being, because the levels of development of ASEAN countries vary from one country to another.

8. The Harmonization of Municipal Laws in ASEAN

With regard to municipal laws in general, distinction has to be made between the laws which are directly and indirectly related to the foreign businesses and investments and the ones which are irrelevant thereto, as well as between the laws which are disposed to be harmonized and those whose harmonization is either not required or not feasible. A distinction has to also be made between what is possible and what is feasible, as the harmonization of certain municipal laws might theoretically be possible but not feasible in real practice.

9. The Laws which are Directly Related to Foreign Businesses and Investments

There are several municipal laws which are directly related to foreign businesses and investments, such as the fiscal laws like the revenue code, the customs and taxation laws, the law on the promotion of investments, the foreign business law, the retail sales law, the bankruptcy law and the Act for the establishment of and procedure for the Bankruptcy Court, the business laws in the Civil and Commercial Codes and so forth,²¹

²¹ For more details on the laws and regulations which are related to business and investments, Cf. The Thai Chamber of Commerce's inventory of the laws and regulations which could cause inconvenience to commercial businesses and investments.

but not all of them are disposed to be harmonized.

With regard to the Law of Torts, the Law of Property, the Law of Person, and the business law such as the law of Specific Contracts in the Civil and Commercial Codes, it would of course be ideal for the basic laws of this kind, which are of a fundamental importance for foreign business and investments, to be harmonized, but the practical problem in this respect is that these laws form part and parcel of a major legislation of the country and are thus difficult to be singled out for a harmonization one by one, as a major legislation is normally amended comprehensively, and not on a piecemeal basis. It is noteworthy, however, that the basic business laws such as the Law of Specific Contracts in the Civil and Commercial Codes, the Insurance Law, the Conflict of Laws Act, etc. in ASEAN, having been inspired by and are based on the laws of Western countries, they should fundamentally be *grosso modo* already consistent with each other and thus should not need to be harmonized, especially given that they only need to be approximately harmonious. Consequently only the municipal laws relating to foreign investments and business that reflect the national economic policy and interests of the country are likely to differ from one country to the other, because the national interests and policies in certain areas may not be the same in every ASEAN country.

However, some of the municipal laws, which are directly related to and essential for foreign business and investments need to be harmonized otherwise the enhancement of the intra-ASEAN trade and the design to convert ASEAN into a major regional market will never be realizable and truly effective. The harmonization of such laws is thus an impetus for ASEAN, especially at the present time when the augmentation of the volume of intra-ASEAN trade has been rendered possible by the diversification of ASEAN products, stemming from the fact that every ASEAN country having offered a variety of incentives to attract foreign investments which has broadened the latitude of choices to foreign investors and businessmen to make their investments in the ASEAN

countries that will best suit their types of businesses.²² Although this diversification of ASEAN products has resolved their problem of non-complementarity, which has been one of the major causes of the shortfalls in the intra-ASEAN trade, unless these municipal laws are at least approximately harmonized, ASEAN will never be able to fully benefit therefrom to boost and rejuvenate intra-ASEAN trade and cooperation that will ensure its future economic rebound.

10. The Municipal Laws which should be Harmonized

The municipal laws in ASEAN countries, which are disposed to and should be harmonized, are those, which are directly related to and needed in the normal course of the operation of foreign investments and business such as:

The Law on Negotiable Instruments obviously has to figure on top of the priority list of the municipal laws that need to be harmonized, as negotiable instruments, like bills of exchange, promissory notes, cheques and letters of credit, etc., are indispensable for all large scale business deals both local and trans-boundary and the inconsistency in the legislation and practices of ASEAN countries in this connection can seriously frustrate intra- and extra-ASEAN trades and investments.

The Bankruptcy Law and the Law for the Establishment of the Bankruptcy Court and its Procedure should also be harmonized, because expeditious and efficient liquidation of properties and assets of insolvent persons and enterprises under the laws of the host countries would be reassuring to the foreign investors, so a minimum standard of uniformity of these type of laws will certainly facilitate the conduct of international

²² For examples, Thailand is suitable for the manufacturing and assemblage of automobiles, Malaysia is suitable for the manufacturing of electrical appliance devices, Laos P.D.R., Cambodia and Myanmar are suitable for labor intensive industries, due to the fact that their minimum wages are still very low, etc.

business and investments and ensure the transparency and predictability of the legal process and of the consequences of insolvency.

The Competition Law is another area that should be harmonized, not so much for the protection of ASEAN investors from anti-competitive practice of each other but rather from such a practice of foreign investors doing business in ASEAN. Especially when the prevailing competition laws in ASEAN countries are so unequal in their aptitude and efficiency to cope with the contracts and arrangements made and performed outside of ASEAN but may distort competition within ASEAN countries.²³ Besides, the application and enforcement of this legislation in ASEAN are still far from being systematic, mainly because the legislation of this type is still relatively new in this hemisphere. The harmonization of this legislation in ASEAN is nonetheless desirable, because the uniformity in the ASEAN legislation in this area will sooner or later become essential when the distortion of the competition begins to be really harmful to the economies of ASEAN countries.²⁴

The laws on the protection of intellectual properties too may need to be harmonized in order to reassure foreign investors and businessmen, but not all of them are apt to be harmonized, because in many instances, individual member countries may have specific arrangements with other countries, *e.g.* Thailand has special arrangements with the US in respect of pharmaceutical products and computer software. Besides some ASEAN countries may have different international commitments under different conventions, for example, Thailand is the only ASEAN country that has made and still maintains all of the six permissible reservations in its accession to

²³ For a comparative study of the prevailing Competition Laws in ASEAN countries, Cf. Lawan Thanadsillapakul (2000) "Competition Laws and Economic Integration in ASEAN", *Thammasat Review*, 5 (1), 165-201.

²⁴ The Competition Law of the EU can be a very good model that can serve as the basis for the harmonization of the Competition Laws in ASEAN countries, because it has a very efficient remedy for the problem of the contracts and arrangements made and performed outside the EU but may distort the competition within and between the EU countries.

the Berlin Act of the Berne Convention on Copy Rights. Besides, the preparedness and aptitude to protect all sorts of intellectual properties are very unequal in ASEAN countries. The discrepancy in the types of intellectual properties which are protected in ASEAN countries²⁵ is thus inevitable under the present circumstances. Furthermore, there are so many legal issues relating to the protection of intellectual properties, which are very controversial and still remain unresolved. For example, in the on-going litigation in the EU between the suppliers of the Levi blue jeans and Tesco retailer, in which the contentious issue is whether or not the supplier is entitled to control the distribution of its products, *i.e.* by compelling the retailers not to sell the products below the manufacturer's-recommended prices. From the standpoint of the supplier of the Levi blue jeans, as the manufacturer of the Levi blue jeans has the exclusive right of authorizing the exploitation of the Levi trade mark, it is entitled to fix the conditions under which such a trade mark may be exploited, and fixing the recommended prices is an exercise of such a prerogative. Whereas, from the standpoint of Tesco as the retailer, allowing the manufacturer of Levi blue jeans to fix the prices of the jeans would be a restraint of trade that runs counter-current to the free trade in the market economy regime, which is one of the main objectives of the international trade law that advocates free competition. It will also be a blank check for the manufacturer to arbitrarily fix different prices at its entire discretion for the products in the same market, which is illogical and not conducive to the achievement of the WTO objectives. The harmonization of the protection of intellectual properties under the laws of every ASEAN country whenever and wherever feasible is, however, definitely advisable if ASEAN really wishes to be appealing to foreign investors.

The laws on the protection of the environment and ecology also

²⁵ In Thailand, only copyright, patent right and trade marks are currently protected under Thai laws (the laws protecting some other intellectual properties are still in the process of being legislated).

need to be harmonized especially in view of the potential enhancement of the intra-ASEAN trade and the ever-increasing tendency of developed countries to attach more and more importance to the protection of the environment in their international trade practice. As to the intra-ASEAN trade itself, the discrepancies in the standard of quality of the goods and of the protection of environment and ecology imposed by the law of the ASEAN countries could grievously frustrate their mutual trades. Take for example Malaysia, which imposes a particular norm for crates used in the transportation of fish, which is not compatible with the wooden crates normally used by Thai fishermen, claiming that the wooden crates are cumbersome litter so only re-usable plastic crates of a specific norm are permitted to be used when transporting fish into the territory of Malaysia. Such a regulation obliges Thai fishermen doing business with Malaysia to purchase the Malaysian pre-fabricated plastic crates. The inconsistencies in the norms imposed by individual member countries for the protection of the environment can thus inconvenience the future enhancement of intra-ASEAN trade.

Another type of law in ASEAN countries that should be urgently harmonized is probably the ones relating to the application of the I.T. or information technology to trade, which has by far altered the feature and landscape of international as well as domestic trade, otherwise ASEAN would risk being left off the main stream of the world trade and investments,²⁶ considering that the various I.T. related trades and activities such as E-Commerce, the trade in I.T. related products like computers and computer software, and even the Internet service, are often seen as the possible means of redress for the economic slow down and recession. Besides, the EDI has nowadays become one of the most commonly used ways and means to do international business. If the laws relating to the IT

²⁶ Thailand is currently in the process of legislating six laws relating to the I.T., three of which, namely, the Computer Related Crime Bill, the Data Protection Bill and the Electronic Fund Transfer Bill, are pending in the Parliament and are on the verge of being enacted.

in ASEAN are not urgently harmonized, both intra- and extra-ASEAN trade would risk being compromised and ASEAN will be badly handicapped²⁷ in this sector of very lucrative businesses.

The Labor Law in ASEAN countries should also be harmonized, especially in the wake of the emergence of the social dumping concept in the multilateral trade negotiations under the framework of WTO, which has given rise to a hot issue on the so-called Labor Standard, the outcome of which might have a considerable bearing on the future of the volume of foreign investments in ASEAN, especially if it renders labor costs less advantageous. Besides, with the on-going privatization process and debt restructuring and business restructuring of debtors under the Emergency Decree on the Thai Asset Management Corporation (TAMC) in Thailand and a similar process in other ASEAN countries, ASEAN has a stronger reason to harmonize the laws of its member countries to collectively and jointly curb the possibility of an abuse of the predominant position by foreign investors who take over insolvent local business to massively lay off their employees in the restructuring of the taken over enterprises, claiming that it is a necessary rationalization of labor that would ensure the efficiency in the administration of the enterprises and the sustainable level of their return that would eventually lead to their good governance.²⁸ The word '*approximately*' must be high-lighted here because only the provisions of the labor law, which are designed to protect the employees from being unjustly exploited by the employers, need to be harmonized,²⁹ since the labor law is not apt to be harmonized *in toto*. For instance, it is not possible for the minimum wage to be the same in ASEAN given the large gaps

²⁷ Take for instance, unless the trade related cyber crimes, such as frauds and hacking of credit cards, can not be eliminated and electronic signatures are not legally recognized, the e-commerce will never prosper in ASEAN.

²⁸ A taking over of insolvent businesses in Thailand by foreign investors has so far always ended up by a massive lay off of workers.

²⁹ ASEAN must however, make sure that the labor law will not become prohibitive as the result of the harmonization.

between the costs of living in its member countries.

11. The Municipal Laws Which are Possible But not Feasible to be Harmonized

The good examples of the laws, which are possible or even desirable but not feasible to be harmonized, are *inter alia* the Constitution of the country and its organic laws, the laws forming part of a major legislation, such as the laws on Specific Contracts and business laws in the Civil and Commercial Codes, the Investment Promotion Act and the Immigration Law, etc.

The provisions of the Constitution of the country and its Organic Laws are not apt to be harmonized,³⁰ even if they are directly related to foreign investments, due to the fact that it is fundamentally a matter of sovereignty and national policy, which depends on national interest, that are not always identical in ASEAN countries. After all, the intrinsic nature of the Constitution, which is the supreme law of the land, is the minimum standard of permanence and continuity.

In the case of Thailand, the Foreign Business Act, B.E.2542 (1999),³¹ the Investments Promotion Act and the Bill on the Retail Sales, currently pending in Parliament, which are directly related to foreign business and investments, are policy oriented laws, therefore not so predisposed to be harmonized, because the national interest and *in extenso* national policies in these domains are not quite the same in ASEAN countries. For instances, with regard to the Foreign Business Law, since the levels of the preparedness of some ASEAN countries to compete with foreign investors in certain

³⁰ The harmonization of the constitution of the member countries is possible only when that regional integration organization has already reached the stage of being a federation. Even in a highly integrated collectivity like the EU, the constitutions of its member countries cannot be harmonized, let alone ASEAN countries.

³¹ Which repealed the Announcement No. 281 of the National Executive Council of November 24th, B.E. 2515 (1972).

areas may be higher or lower than in other member countries, the lists of professions reserved for their nationals cannot be expected to be identical, thus rendering it hardly feasible to harmonize such a law.

As to the law on retail sales, although it is directly related to foreign businesses and investments, this law is not so disposed to be harmonized, because the large scale retail sales by foreign investors may be viewed as desirable in some ASEAN countries,³² but undesirable in the eyes of the others,³³ obviously for fear of foreign economic domination.³⁴

The Investments Promotion Law is likewise a good example of the municipal laws, whose harmonization may be desirable, but not feasible due to the fact that even in a regional economic integration organization like ASEAN and AFTA, the member countries' interests are oftentimes contradictory, because ASEAN countries have been competing with each other in offering a lot of incentives so as to be more appealing to foreign investments than the others. It would therefore be contrary to all common sense to expect ASEAN countries to harmonize their investment laws.

The harmonization of the Land Law in all ASEAN countries would surely facilitate foreign business and investments and therefore be

³² The competition between hyper-markets of foreign investors can, after all, maintain the inflation rate in the host country at a relatively low level. Besides, hyper-markets can also be, for locally manufactured products, the large and perfect outlets, which are indispensable for the industries in the economy of scale, and create a lot of jobs for the nationals of the host countries.

³³ Even in the same country, opinions are very divided depending on from whose perspective it is viewed.

³⁴ Although according to the international commitments of member countries under the framework of WTO, the globalization of international trades also includes retail sales, it is permissible for the member countries to limit the scope and number of foreign super- or hyper-markets as well as their zoning, but the existing Thai laws relating to this matter have no provisions that permit such a limitation, that is the reason why the number of foreign super-and hyper-markets is increasing rapidly in Thailand to the detriment of small enterprises and street side shop-house groceries, thus warranting an urgent enactment of a special legislation to regulate foreign businesses and investments in this domain.

desirable but it is obviously not feasible due to the differences in the political regimes and also in the national interests of individual ASEAN countries, the current Land Laws in ASEAN are quite different from each other, for instance, according to Thai law, foreigners can own land only in a limited number of cases, e.g. under the Condominium Act, Investment Promotion Act, etc., whereas in Indonesia, Myanmar (or Burma), Brunei Darussalam and the Laos P.D.R., foreigners are totally prohibited from owning land in their countries, either for a *raison d'Etat* or on account of those countries' political regimes.³⁵ Under such circumstances a harmonization of the law in this area is unconceivable.

Though the Customs Law is directly related to foreign business and investments and could have a substantial bearing on their operation and economic viability, it is not feasible under the present circumstances to harmonize the customs law of ASEAN countries, because ASEAN has not yet been integrated to the point of being a customs union, therefore harmonizing its customs law for the extra-ASEAN trade is not necessary. Even for the intra-ASEAN trade, the harmonization of the customs law is required only for the stipulations relating to the import duties exemption for locally manufactured commodities, which fall under the ambit of the CEPT Scheme.

12. The Municipal Laws which are Indirectly Related to Foreign Business and Investments

The Immigration Law is not directly related to foreign business and investments but it can facilitate or frustrate their functioning, depending on whether it is prohibitive or conducive to the success of their operation. Take for example in the case of the EU immigration law, formerly a visa to any

³⁵ Under the communist regime, the land belongs exclusively to the State, therefore, an individual, regardless of whether he or she is a foreigner or a national of that country, is not entitled to have ownership on the land in the territory of the country.

European country could be obtained in any country where there is an embassy or consulate of that country, whose visa is sought, nowadays the visa must be applied for in the home country of the applicants. Such a requirement is manifestly prohibitive and would hamper the operation of foreign investment in the EU, since the investors may need to travel to different EU countries in quest of new markets. Having to return to their home countries just to obtain the visas to the EU countries other than the one where they have made their investment is troublesome, time consuming and very costly. To avoid such inconvenience, they will have to secure the visas for every EU country, without knowing for sure when and whether they will ever need to visit those other EU countries at all. Besides, at the expiration of the visas, the investors will have to return to their home countries to renew them all,³⁶ which will require them to pay for a round trip and the fees for the visas again. Furthermore, unless they are granted multiple entry visas the investors will be obliged to return to their home countries as many times as they need to revisit the countries, which are their potential new markets in the EU. Drawing the lesson from this frustrating experience in the case of the EU, ASEAN countries will have to decide whether to opt for such a draconian immigration regime or a more lenient one and also to decide whether or not to harmonize their immigration laws and practices at all.³⁷

Inasmuch as it is obviously desirable for the Immigration Law to be harmonized, since it can have a substantial repercussion on the operation and economic viability of foreign investments, it is hardly feasible under the present circumstances for the immigration law of ASEAN countries to be harmonized, given that the great disparity in the economic lives in ASEAN

³⁶ The situation would be even worse, if the validity periods of those visas are not identical.

³⁷ It must be admitted, however, that with so much of the differences in the standards of living and economic lives in different ASEAN countries, some ASEAN countries may not be disposed to harmonize their immigration laws for fear of an influx of economic migrants from less developed ASEAN countries into their territories.

may compel some ASEAN countries to restrict and regulate migration from neighboring countries, especially when in spite of the current close surveillance some ASEAN countries already have an acute problem with clandestine immigration.³⁸

The Land Law is another area that needs to be looked into, in the process of the legal harmonization, because the prevailing State practice in ASEAN in this matter is by far different from each other in different ASEAN countries, for instances, in Brunei Darussalam, Indonesia, Lao P.D.R., Vietnam and Myanmar, foreigners are not permitted to own land, while in Thailand such ownership is possible, but limited to only in some specific exceptional cases, such as for the promoted foreign investments the foreign investors are allowed to own a piece of land necessary for the conduct of their business and under the condominium law foreign owners of the condominium are entitled to own the land, which is the compound of the condominium under the co-ownership regime.³⁹ Although from the foreign investors standpoint the harmonization of the land law would be most convenient and attractive for foreign investments, it may not be feasible in many ASEAN countries, whose national policy is not to allow foreigners to own land in their countries either on account of the potential that any parcel of the land in their countries may hold petroleum or gaz deposits, or because allowing foreigners to own land in their countries is not compatible with their political regime, etc.

13. The Municipal Laws, which are Irrelevant to Foreign Businesses and Investments

There are two categories of municipal laws which are irrelevant to foreign businesses and investments, *i.e.* the ones, that may have indirect

³⁸In spite of the strict control at their borders, the clandestine migration of foreign workers is a big problem for Singapore, Malaysia and Thailand.

³⁹Unless that foreigner owns the entire condominium all by himself.

repercussions on foreign businesses and investments, and the ones, which have no bearing on foreign business and investments at all.

An example of the municipal law of this kind that may have indirect repercussions on foreign business and investments is the Penal law which is generally irrelevant to foreign business and investments but may have a very serious consequence on the personal security of foreign investors, e.g. illegal possession of fire-arms is not severely punished in Thailand but punishable by death in Malaysia. Having heroine in one's-possession if not in a large quantity is still a crime in Thailand, but not a very serious one, whereas in Malaysia it is a serious crime, which is punishable by death. The severity of the penalties for such crimes is however the matter of national security and public order policy, and is, for that reason, not prone to be harmonized.

Another type of law in the same category is the Human Rights Law. Although basically the Human Rights law has nothing to do with foreign businesses and investments, nowadays it certainly can and does have an important bearing on the volume of the inflow of foreign businesses and investments, given that Western countries and notably the US, are hostile and opposed to doing business with the countries, where Human Rights are manifestly violated or inadequately protected.⁴⁰ Human Rights law is, however, obviously not disposed to be harmonized in ASEAN countries, for the simple reasons that, *primo* it is a well known fact that in some of the ASEAN countries the respect of human rights is still sub-standard in the eyes of Western countries but it is an over-riding principle in ASEAN not to interfere with internal affairs of each other, thus a harmonization of Human Rights Law in ASEAN is unlikely to be feasible, *a fortiori* when none of the ASEAN countries are known to have specifically enacted a Human Rights Law, even though human rights protection is

⁴⁰ For example, the US bans the trade with Myanmar for not respecting the political freedom of its people.

enshrined *expressis verbis* in various laws and in the Constitutions of some ASEAN countries.⁴¹ *Secundo* the perception of Human Rights is not identical in every ASEAN country on account of the differences in their religions⁴² and political regimes.⁴³

The Nationality Act is another good example of the type of law that, while being in principle, irrelevant to foreign businesses and investments, can have indirect impacts on them, as the status of a foreign enterprise is determined by the proportion of the equity shares held by foreigners, and the nationality of a natural person depends on the law on nationality of the countries concerned. With regard to the nationality of the individuals, the principles enshrined in the nationality laws in ASEAN countries may be slightly different, but the basic principles are in general very much the same.⁴⁴ Even though there may be some slight differences among them, they are already more or less harmonious, therefore, no approximation is required.

The municipal laws which are irrelevant to and have no bearing on foreign business and investments at all are those relating to the activities which are exclusively reserved to the nationals of the host countries, such as the legislation relating to the legislative and municipal elections, etc.

14. The Role of the National Judiciary

In spite of its previously expounded importance, the harmonization of the laws in ASEAN countries *per se* will never suffice and would be futile without their appropriate and effective application, due to the fact that the

⁴¹ Cf., for example, Section 3 of the Constitution of the Kingdom of Thailand.

⁴² The rights of women in Muslim countries may not be in line with the norm of non-Muslim countries.

⁴³ The civil rights in a communist country may not be perceived in the same manner as in non-communist countries.

⁴⁴ The principles of "*jus soli*," "*jus sanguinis*" and the ones on the "naturalization" are basically the same in the Nationality Laws of ASEAN countries.

legislation of a country is merely a legal framework, which will be truly meaningful and serve its purposes if it is properly applied and effectively enforced⁴⁵ by the competent administrative and judiciary authorities in all ASEAN countries especially and very much more so by the judiciary authority in the exercise of its interpretative and contentions competence because it will constitute a jurisprudence, which can have a significant bearing on the conduct of foreign businesses and investments. It may, therefore, be rightly presumed that the national judiciary plays an eminent role in the ASEAN economic integration and also in reassuring and attracting foreign investors.

15. The Approximation of the National Judiciary

Although the judiciary systems in ASEAN are based on the judiciary systems of Western countries⁴⁶ and should for that reason be already more or less similar to each other, they are nonetheless not quite the same in terms of the procedural laws, the legal proceedings and the execution of the adjudication of the Courts, which to a certain extent differ from one country to another. The institutional organization of the Courts may likewise be similar without being entirely uniform in ASEAN countries, due to the fact that the needs and judiciary policies of individual ASEAN countries are not identical in all aspects. In Thailand, there are three tiers of the Courts of Justice, *i.e.* the Courts of First Instance, the Court of Appeal and the Supreme Court. Outside of Bangkok there are the District Courts and the Provincial Courts, whose jurisdiction is unlimited in civil, criminal and bankruptcy matters, in every province as the Courts of First Instance,⁴⁷

⁴⁵ Currently there are thousands of laws in Thailand that remain dead letter.

⁴⁶ In four southern provinces, which are densely populated by Islamic people, there are Muslim Courts to administer and apply Islamic Laws and usages in civil cases involving family and inheritance.

⁴⁷ Normally there is only one Provincial Court in each province, but in certain big provinces there may be two Provincial Courts.

but there are Provincial Juvenile Courts in only four major provinces. There are supposed to also be the Regional Labor Courts and Provincial Labor Courts.⁴⁸ With the judicial system reform, now there are also the Administrative Tribunals in some major Provinces. While in the Bangkok Metropolis, there are practically every type of the Courts, like the Civil Court, the Penal Court, the District or Magistrates' Courts, the Central Juvenile Court, the Bankruptcy Court, the Intellectual Properties and International Trade Court, the Central Labor Court, the Central Tax Court, the Military Court and the Central Administrative Tribunal, as the Courts of First Instance, and the Constitution Tribunal. There are also the Appellate Court whose jurisdiction covers all civil, criminal, bankruptcy and juvenile cases, appealed from all Courts of First Instance, and the Supreme Court, which is the highest and final court of appeal also in all criminal, civil, bankruptcy and juvenile cases in the Kingdom and a semi-original jurisdiction over election petitions.⁴⁹ Besides, in the reform of the judiciary system, the High Administrative Tribunal has also been recently established. In the other ASEAN countries, the Courts in general are very much the same as in Thailand, and only specialized Courts may vary in accordance with the specific needs of the countries concerned. Therefore, what will need to be harmonized are not the judiciary systems themselves but rather the judicial practices in ASEAN countries, which are not always consistent with each other. For instance, the legal proceeding in Thailand could take longer time than in some ASEAN countries, as the delay tactics are often condoned by the Thai Courts, thus some legal proceedings may drag on and on for years which is not at all practical for international business transactions, hence the recourse to an arbitration is very frequently

⁴⁸ To date only the Central Labor Court in Bangkok has been established.

⁴⁹ Neither the scope, nor the volume of this article permit to exhaustively enumerate all of the Thai Courts and the scopes of their respective jurisdictions. For more ample detail in this regard, Cf. Prasopsook Boondech, "The Thai Judicial System," in the conference document of the 7th Lawasia Conference; "Judicial System in Thailand," publication of the Ministry of Justice; and The Statute of the Courts of Justice.

provided for in trans-boundary deals and all agreements on the promotion and protection of investments. Besides, the judgements of the Court may be or may not be directly enforceable, depending on whether they are judgements of that country's courts or of foreign courts, in which case the judiciary practice in ASEAN may not be the same, given that not all ASEAN countries have concluded the international agreements on the execution of foreign judgements with other countries.

The enforcement of arbitral awards in ASEAN countries is one of the areas that should be harmonized, foreign investors often choose to resort to arbitration to settle their dispute with the government agencies on their business transaction but the practices in ASEAN are not always the same in this matter. For example, in Thailand, only the award of an in Court arbitration is directly enforceable, whereas the award of an out of Court arbitration is not directly enforceable. A foreign arbitration award can however be directly enforced on account of Thailand's international commitment under the New York Convention, etc.

The Jurisprudence and Judicial Practices

The adjudication of the Courts on the amounts of the compensation for the damages suffered by the injured persons differs from one country to another, *e.g.* in the Lockerbie Case, the amounts of compensations to be paid for the death of the American airline passengers, if claimed for in the US would be much more substantial than in the UK. A similar remark could be made on ASEAN countries judicial practices. For example,⁵⁰ in Thailand, under the Law of Tort, all substantiated damages are supposed to be recoverable, but in practice, the very expensive litigation and lawyers fees, forming part of such damages, are in fact recoverable only nominally, because the Court's ruling usually imposes

⁵⁰Due to the limit of the scope and time-frame for this article, only a couple of areas, where the judiciary practices in ASEAN are potentially different, can be invoked as examples of the kind of discrepancy that one can come across in ASEAN.

an obligation to compensate for this type of damage only in a symbolic amount which does not at all reflect the real damages. Defamation is a criminal offence, which is punishable by a fine or imprisonment, or both, under the Thai law, but the penalty of imprisonment has never been imposed by the Thai Court in real terms. The consistency in the ASEAN countries judicial practices in like matters would certainly be most desirable, but the practical problem is that due to the cardinal principle of the independence of the Judiciary Power, the Executive Power is in no position to require the judicial authority to harmonize its practices. It all depends, therefore, on the political will of the Judiciary Powers in the ASEAN countries to at least approximately harmonize their practices to ensure the transparency and predictability in the legal process, which are so dear to businessmen.

Conclusion

Fundamentally, the harmonization or approximation of the legislation and national judiciary in ASEAN is not purely a legal matter, but rather a question of national policy, which reflects the national interests at a given moment and translated into the municipal law. In any case whether or not the legal approximation will attain its objective depends very much on its implementation in the national judiciary practices. In the final analysis, major factors, which are drawbacks in the ASEAN integration process that obstruct and impede the harmonization or approximation of the legislation and national judiciary in ASEAN countries in real terms are primarily the differences in or the conflict of their national interests and the inadequacy of the political will of ASEAN countries to push further such integration, *a fortiori* when even at its inception, it was given to understand that the furthest that ASEAN countries were willing to go in their integration was just to become a free trade area. It is noteworthy in this regard that, in order for the legal harmonization to be truly meaningful and workable, the economic policies

of the country will also need to be harmonized. The differences in the political regimes and in the national religions too are the root causes of such drawbacks for ASEAN in this connection but this latter factor is a fact of life that the ASEAN countries and the investors have to live with, and have in consequence to be content with the approximation of the laws and national judiciary practices only where it is feasible. Under such circumstances, although theoretically it is not precluded for ASEAN to become a customs union in the future, such a far-reaching extent of its integration is unlikely to be achieved within the foreseeable future.

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