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Harmonization of Law in ASEAN Countries towards Economic Integration*

Erman Rajagukguk**

Southeast Asia is a region rooted in cultural, ethnic, geographic and developmental diversity but generally viewed as a united block. The integration among ASEAN Countries becomes an avoidable demand in facing economic globalization. ASEAN Economic integration will be formed in ASEAN economic society in 2015. The economic integration among ASEAN countries emerged two problems: first, do the ASEAN countries need harmonization of law which correlates with the economic activities? Secondly, is the harmonization of law possible? This paper explores the need and possibility to increase the integration in the form of law and regulation to harmonize regional law, to allow ASEAN countries to function cooperatively and consistently among them and with the world.

Keywords: *ASEAN countries, economic integration, harmonization of law*

I. Introduction

This week, Indonesia becomes a host of summit with another 10 members of Association of Southeast Asian Nations (ASEAN) for the second time of this year. With Indonesia holding the rotating chairmanship of the regional grouping for one year starting on January 1 this year, it held the 18th ASEAN Summit in Jakarta in May and it now hosts the 19th summit in Bali starting last week.[1]

Southeast Asia is a region rooted in cultural, ethnic, geographic and developmental diversity but generally viewed as a united block. Under the steady expansion of globalization and the drastic competition from neighboring regions, regionalization in Southeast Asia is confronting new challenges and entering a new era.[2]

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[1] Jakarta Globe, November 17, 2011.

[2] Lin Chun Hung, "ASEAN Charter: Deeper Regional Integration under International Law?", *9 Chinese Journal of International Law* (December, 2010), p. 821.

The integration among ASEAN countries becomes an avoidable demand in facing economic globalization. The global changing by the increase of commerce, industry, and infestation has crossed the country borders and has emerged the necessity to corporate. ASEAN Economic integration will be formed in ASEAN economic society in 2015.

The economic integration among ASEAN countries emerged two problems: first, do the ASEAN countries need harmonization of law which correlates with the economic activities? Secondly, is the harmonization of law possible?

This paper explores the need and possibility to increase the integration in the form of law and regulation to harmonize regional law, to allow ASEAN countries to function cooperatively and consistently among them and with the world.

II. The Need for Harmonization of Law in ASEAN Countries

The role of law in developing the third countries is to expand great intellectual interest and considered political importance. We have been trying incessantly to determine the extent to which the role of law influenced the economic development. We act upon the assumption that there is such relationship. The legal certainty is important next to the economic opportunity, political stability, and investment incentive. We recognize that the rapid economic development would require an effective legal framework.

Burg's study of the law and development literature cites that at least three qualities in law which renders it conducive to the development: stability, predictability and fairness. The need for predictability is great in countries especially for Indonesia, where for the first time, makes an effort to achieve sustainable development.

In the stability function, the potential of law is to balance and accommodate competing interests, such as, balance between the need of energy and environmental protection, balance between corporate interest for profit and labor rights for appropriate wages.

Finally, aspects of fairness such as due process, equality of treatment, and standards for government behavior, are necessary for both the maintenance of the market mechanism and the prevention of

bureaucratic excesses.

Friedman said that a legal system has three elements: substance, apparatus, and legal culture. The statutes and regulations constitute only one of the elements in a legal system. In order to enable it to live and proceed, the apparatus and the legal culture of the people must support the operational aspect of the law. Legal reform, therefore be continued for the improvement of judicative, executive, and legislative apparatuses. In line with this, there must be legal culture reform on the part of the ASEAN people supporting democracy, justice and protection of human rights, energy and environment.

Laws and regulations will not suffice. There is a need for clean and efficient apparatus to implement the laws and regulations.

The role of the court will be increasingly important in the future. The involvement of the court in dispute resolution becomes importance as well as arbitration. Efforts must be continued to have a clean and dignified court.

In addition improving the court institution, ASEAN should establish a mean of alternative dispute resolution. Dispute resolution through the court in the West and in the East has its shortcomings, i.e. it is time-consuming from the first level court up to the appeal or cassation level, it is costly.

Cultural reasons in ASEAN countries have also caused the people to tend to put aside the court as a place for resolution of disputes arising among themselves.

Although the Parliament is a political representative institution, knowledge of and information on matters of a technical nature has to be available. Therefore, experts from various sectors have to support the Parliament. Thus the Parliament will be able to perform its function with a quality that is balanced with the executive. Many legislative in initiatives in various industrialized and developing countries fail to achieve their purposes the ones that and are almost always blamed are the public segments, so that the law cannot be enforced. Actually, the responsibility for the failure is mostly with the legislative itself because they fail to capture the living aspiration.

Metaphorically speaking, let us suppose that economic growth is a building. This building should stand on a strong foundation, i.e. the

law. This strong foundation can exist if the ground, i.e. the political situation, is stable. Foreign capitals will come if there are political stability, economic opportunities, and legal certainty.

III. The Possibility of Harmonization of Law in ASEAN Countries

The harmonization of law in economy is conceivable, because the economic law is neutral, which means, the law in this field does not influenced by beliefs and/or customs in each nation. Moreover in a long term, harmonization of law is possibly grown to unification of law.

As the development of commerce, industry and investment among ASEAN Countries, and the transactition of goods and services in the framework of industrialization acrossed borders; demands harmonization of law, among them are in, Law of Contract, Law of Corporation, Law of International Commerce, Law of Finance, Intellectual Property Rights, and Law of Arbitration. There is a demand in harmonization of regulations in export and import (customs office and tax) as well.

The three ASEAN countries, Malaysia, Singapore and Brunei who were colonized by the British embrace Common Law system; on the other side, Indonesia, Vietnam, Lao and Cambodia who were colonized by the Dutch and France embrace Civil Law system and also Timor Leste who was colonized by Portuguese and had formerly bundled with Indonesia. Thai who had never been colonized also embrace Civil Law System.

The possibility of harmonization of law between Common Law and Civil Law, in the economic activity become great, Common Law and Civil Law become convergance, but still divergence. Predictability within the region through a unified response to legal issues would allow individual countries to participate more fully in international economics and encourage foreign investment.[3]

IV. Harmonization in Trade Law

Former meetings among ASEAN ministers have agreed to support ASEAN Community in year 2015. Among of the commitments

[3] Megan R. Williams, "ASEAN: do Progress and Effectiveness Require a Judiciary?", 30 *Suffolk Transnational Law Review* (2007), p. 457.

are about the free trade among ASEAN Countries and then ASEAN countries become a single market.

Free flow of goods is one of the principal means by which the aims of a single market and production base can be achieved. A single market for goods and services will also facilitate the development of production networks in the region and enhance ASEAN's capacity to serve as a global production centre or as a part of the global supply chain.

Through ASEAN Free Trade Area (AFTA), ASEAN has achieved significant progress in the removal of tariffs. However, free flow of goods would require not only zero tariffs but also the removal of non-tariff barriers as well. In addition, another major component that would facilitate free flow of goods is to trade facilitation measures such as integrating customs procedures, establishing the ASEAN Single Window, continuously enhancing the Common Effective Preferential Tariffs (CEPT), Rules of Origin including its Operational Certification Procedures, and harmonizing standards and conformance procedures.

The Common Effective Preferential Tariffs for ASEAN Free Trade Area (CEPT-AFTA) Agreement will be reviewed and enhanced to become a comprehensive agreement in realizing free flow of goods and applicable to ASEAN needs for accelerated economic integration towards 2015.

Harmonized and standardized trade and customs, processes, procedures and related information flows are expected to reduce transaction costs in ASEAN which will enhance export competitiveness and facilitate the integration of ASEAN into a single market for goods, services and investments and a single production base.

The former meetings have also agreed in the followings:

a. Assess trade facilitation conditions in ASEAN;
b. Develop and implement a comprehensive trade facilitation work programme which aims at simplifying, harmonizing and standardizing trade and customs, processes, procedures and related information flows;
c. Promote transparency and visibility of all actions and interventions by all stakeholders within international trade transactions;
d. Establish a regional trade facilitation cooperation mechanism;
e. Establish ASEAN Trade Facilitation Repository;

f. Develop national level measures to support and ensure effective implementation of regional level initiatives; and
g. Develop a comprehensive capacity building programmes to ensure smooth implementation of the work programme.

In light of the acceleration of AEC, the realization of ASEAN Customs Vision 2020 is brought forward to 2015. In particular, the 2005-2010 Strategic Plan of Customs Development aims to: (a) integrate customs structures; (b) modernize tariff classification, customs valuation and origin determination and establish ASEAN e-Customs; (c) smoothen customs clearance; (d) strengthen human resources development; (e) promote partnership with relevant international organizations; (f) narrow the development gaps in customs; and (g) adopt risk management techniques and audit-based control (PCA) for trade facilitation.[4]

V. Investment Rule and Regulation

In the former meetings, ASEAN leaders have agreed with free and open investment regime in order to enhancing ASEAN's competitiveness in attracting foreign direct investment (FDI) as well as intra-ASEAN investment.

In those meetings, the leaders discussed how to strengthen, among others, in the following provisions:
a. investor-state dispute settlement mechanism;
b. transfer and repatriation of capital, profits, dividends, etc.;
c. transparent coverage on the expropriation and compensation;
d. full protection and security; and
e. Treatment of compensation for losses resulting from strife.

A more transparent, consistent and predictable investment rules and regulations endorse the ASEAN countries agreed of taking the following steps:
a. Harmonize, where possible, investment policies to achieve industrial complementation and economic integration;
b. Streamline and simplify procedures for investment applications and approvals;

[4] ASEAN Economic Community Blueprint, Singapore Year Book of International Law, 2008.

c. Promote dissemination of investment information: rules, regulations, policies and procedures, including through one-stop investment centre or investment promotion board;
d. Strengthen databases on all forms of investments covering goods and services to facilitate policy formulation;
e. Strengthen the coordination among government ministries and agencies concerned;
f. Consult with ASEAN private sectors to facilitate investment.[5]

VI. Settlement of Dispute and Arbitration

In November 2004, the Association of Southeast Asian Nations (ASEAN) established its Enhanced Dispute Settlement Mechanism (EDSM). The ASEAN Countries sought to improve upon their first Dispute Settlement Mechanism, which had proven too weak to assure effective economic cooperation between them. The ASEAN Countries have traditionally maintained such a strong commitment to national sovereignty that it has often obstructed their efforts at cooperation.6

However, in the 1987 ASEAN IGA, the ACIA now accommodates other dispute resolution mechanisms apart from arbitration, such as conciliation and consultation. Investors may submit to arbitrate any claims based on breach of ACIA obligations (on national treatment, MFN treatment, senior management and board of directors, treatment of investment, compensation in cases of strife, transfers, expropriation and compensation) relating to the management, conduct, operation, sale or other disposition of a covered investment, for which the investor has suffered loss or damage arising from such breach. At its own discretion, the investor may submit such claim to any of the following institutions, in the alternative:

a. to the courts or administrative tribunals of the disputing Member State, provided that such courts or tribunals have jurisdiction over such claims; or
b. under the ICSID Convention and the ICSID Rules of Procedure for

[5] *Ibid.*

[6] Joel Vander Kooi, "The ASEAN Enhanced Dispute Settlement Mechanism: Doing it the "ASEAN Way", *New York International Law Review* (Winter, 2007), p. 1.

Arbitration Proceedings, provided that both the disputing Member State and the non-disputing Member State are parties to the ICSID Convention; or

c. under the ICSID Additional Facility Rules, provided that either of the disputing Member State or the non-disputing Member State is a party to the ICSID Convention; or
d. under the UNCITRAL Arbitration Rules; or
e. to the Regional Centre for Arbitration at Kuala Lumpur or at any other regional centre for arbitration within ASEAN; or
f. If the disputing parties agree, to any other arbitration institution.[7]

The ASEAN Countries has also become the ICSID Convention Member (International Centre Settlement for investment Disputes) concerning the Disputes between States and Investors and also New York Convention of 1958 concerning the Recognition and Enforcement of Foreign Arbitration Award; ASEAN countries; still need harmonizing the domestic law in the arbitration.

VII. Other Economic Law

The harmonization of law among the ASEAN countries is also needed in the Law of Business Organization including the Corporation Law, the Law of Contract, the Security Law and The Competition Law. Harmonizing for giving the protection to the investors, minorities' shareholders, supervisors and directors. The Rationality of harmonization of law is to promote the protection managerial equally and dominant shareholders as well as the interest of minority shareholders.

The financial service is slightly close with the Security Law and the Corporation Law. Harmonization of the Security Law, such as, securities offering, insider training and market manipulation, the takeover bids and mandatory disclosure is very important.

[7] Diane A. Desierto, "ASEAN's Constitutionalization of International Law: Challenges to Evolution under the New ASEAN Charter", *Columbia Journal of Transnational Law* (2011), p. 310.

VIII. Conclusion

In conclusion, any economic integration cannot occur without a previous political process, both at the national and international level. Economic integration cannot subsist without a solid legal framework. Today, international legal instruments developed within multilateral institutions and applicable to certain cross-border transactions have become increasingly important to the development of a substantive law.

The establishment of a legal and regulatory environment where private transnational exchanges can safely take place has become essential for ASEAN countries to attract further investment, as well as to promote the development of the local private sector. Harmonization of law and legal reforms directed both at the domestic and international, are then core issues to be addressed in order to support economic integration.

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