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The ASEAN Economic Community and the rule of law

I. Introduction

1. The Association of Southeast Asian Nations (ASEAN)

ASEAN is a *geo-regional international organisation* uniting all ten Southeast Asian states (Phillipines, Malaysia, Brunei, Singapore, Indonesia, Thailand, Myanmar, Cambodia, Laos and Vietnam), with a population of more than 610 Mio. people. It was granted legal personality by the ASEAN Charter of 2007[2]. All member states are members of the WTO. In 1992 they formed an *ASEAN Free Trade Area (AFTA)*. Step by step they reduced the tariff rates for most goods originating within ASEAN towards 0 - 5 %.

2. The ambitious project of the ASEAN Economic Community (AEC)

In 2007 the 12th ASEAN Summit decided to establish an ASEAN Economic Community (AEC) *by 2015*. The ambitious project is often compared to the European internal market. The AEC shall be one of three pillars of the ASEAN Community, complemented by an ASEAN Political-Security Community (APSC) and an ASEAN Socio-Cultural Community (ASCC).

The AEC envisages the key characteristics of a *single market and production base* with a *free flow of goods, services, investment, capital and skilled labour*. It also envisages a *highly competitive economic region* of equitable economic development that shall be fully integrated into the global economy. Some details and steps to attain this target are laid out in the *ASEAN Economic Community Blueprint*, which the 13th ASEAN Summit adopted in 2007. The Blueprint provides for the full elimination of non-tariff barriers, modern rules of origin, trade facilitation, customs integration and modernisation, the removal of restrictions on trade in services, a comprehensive investment agreement, a greater harmonisation of capital market standards and a facilitated issuance of visas and employment passes for skilled labour and professionals in cross-border trade and investment. It also envisages competition policies and consumer protection in all member states, a better protection of intellectual property, the promotion of e-commerce, infrastructure development, the support of small and medium enterprises, development cooperation within ASEAN and a "coherent approach" towards external economic relations.

3. The different concepts of free trade areas, customs unions, single markets and integration and the rule of law

To avoid confusion different concepts must be distinguished: In a *free trade area* several states allow free trade among themselves by eliminating tariff and non-tariff barriers (customs, quantitative im-/export restrictions and measures with equivalent effect). In a *customs union* they also adopt common customs tariffs for the external trade. In a *single market* they guarantee the free movement of goods, services, persons and capital comprehensively, promote it by the harmonisation of relevant laws and protect it against distortions of competition. In an *economic union* they even coordinate their domestic economic policies. *Integration*, going beyond, means the unification of the states and their peoples in a long-term, allembracing union envisaging a common future.

All concepts involve an international treaty but also require a high degree of political good will, since the partners remain sovereign states keeping (not the right but) the legal power to adopt laws and measures not in line with it.

European experience shows that ambitious projects of this kind will only succeed if they are strictly based on the law and if the respect for and the reliable implementation of the law throughout the region in the daily economic life is secured by strong institutions and efficient mechanisms of law enforcement and legal protection. The *rule of law* is *a key factor* for supra- and international integration, even for the merger of multiple national markets into a single geo-regional market. European experience indicates that the supranational way (where the geo-regional law is directly binding in the member states) is the most if not only efficient way. Furthermore, the roles of a geo-regional court (to ensure the uniform interpretation of the geo-regional law) and the national courts (to apply and enforce the geo-regional law in the context of the national legal system) and, finally, the cooperation of these courts have proved essential. Specific cultural factors in the Southeast Asian civilisation may reduce the importance of the rule of law but this effect will be limited.

II. The legal and institutional framework of ASEAN

The European internal market could materialise because it was embedded into the highly developed legal and institutional framework of the EU. Is there a similar framework of ASEAN facilitating the establishment of the AEC?

1. The ASEAN Charter and other legal documents

The ASEAN Charter, constituting ASEAN as an international organisation (cf. art. 3), follows a different approach than the EU and FEU Treaties. It stresses the "respect for independence, sovereignty" and the *"non-interference in the internal affairs"* as fundamental principles of ASEAN (cf. art. 2(2) lit. a, e).

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[2] Charter of the Association of Southeast Asian Nations of 20/11/2007, www.asean.org/archive/publications/ASEAN-Charter.pdf (original text in English) and www.asean.org/asean/asean-charter/translations-of-the-asean-charter (translations).

ASEAN is an *"inter-governmental organisation"* (art. 3). This basic concept is reflected in weak, government-controlled institutions, featuring the ASEAN Summit (the heads of state or government) as "supreme policy-making body" (art. 7). Other institutions are the ASEAN Coordinating Council of foreign ministers (art. 8), three ASEAN Community Councils (art. 9) and 37 subordinated ASEAN Sectoral Ministerial Bodies (cf. art. 10 and Annex 1). Instead of a Commission there is a Secretary-General who does not have own decision-making powers but shall "facilitate and monitor progress in the implementation of ASEAN agreements and decisions" (art. 11). These institutions are complemented by a Committee of Permanent Representatives (art. 12) and a toothless ASEAN Intergovernmental Commission on Human Rights (cf. art. 14).

Following the *"ASEAN way"*, decision-making is based on *consultation and consensus* (art. 20). A pragmatic approach facilitates consensus: In the implementation of economic commitments, a formula for "flexible participation" (e.g. "ASEAN minus X") may be applied where there is a consensus to do so (art. 21(2)).

There are *no supranational elements*. ASEAN does not produce directly applicable secondary law. The common way to conduct policy is to adopt an ASEAN Summit *declaration*. However, the Summit has also adopted numerous *agreements*, which have the legal nature of an international treaty and usually need to be ratified in the member states. Moreover soft instruments such as *memoranda of understanding* play an important role.

2. The commitment of ASEAN and its member states to the rule of law

In the wake of development and globalisation, the general idea of the rule of law has become popular in South-east Asia as in other countries with emerging economies. In particular intellectuals and the emerging new middle class but also government think tanks and highly qualified superior officials looking for a way to secure a sustainable development, are open-minded about it. There is a growing awareness that long-term sustainable economic growth is impossible without the legal security and certainty provided by the rule of law - in particular in times of international economic openness and cooperation.

Thus, modern ASEAN and its member states are committed to the rule of law. The Charter declares the strengthening of the rule of law a purpose of ASEAN (art. 1(7)). It obliges not only the organisation but also its member states to act in accordance with the *fundamental principle of adherence to the rule of law* (art. 2(2) lit. h). The Secretariat describes the rule of law as a fundamental feature of ASEAN on its website.[3] Several member states have anchored their commitment in their constitutions.[4] Many have adopted the rule of law as a guiding concept of legal policy. They are supported by the United Nations Development Programme, NGOs, the EU and Western governments. Strengthening the rule of law is an integral element of modern development cooperation. For example, German institutions and NGOs are involved in a "Rule of Law Dialogue" with Vietnam.

The adoption of the fundamental idea of the rule of law has brought misunderstandings and distortions. There is no common sense or awareness of the various formal and material requirements of the rule of law. Continental and Common Law doctrines are mingled. The mixing-up with complementing and interacting but separate elements of modern constitutionalism such as separation of powers, democracy and human rights threatens to dilute the contours of the concept and to relativise it. Vietnam has an interesting special problem: The Constitution of 2013 defines it as a "*socialist* state ruled by law" but the difference between the ordinary and the "socialist rule of law" is not clear. In ASEAN, legal science and doctrine still have a way to go. In this situation, the judicial development of law by an ASEAN geo-regional court could be helpful to build up an ASEAN rule of law doctrine.

3. Dispute settlement within ASEAN

Legal protection within ASEAN does not comply with modern rule of law standards. The Charter does not provide for legal remedies of the citizens. Concerning the states, it urges them in the tradition of the "ASEAN way" "to resolve peacefully all disputes ... through dialogue, consultation and negotiation" (art. 22(1)). Instead of an ASEAN Court of Justice there are *dispute settlement mechanisms* (art. 22(2)). Each instrument determines, which mechanism shall be used in which matters.[5] Often this is just consultation. Disputes concerning economic agreements are settled according to an ASEAN Protocol on Enhanced Dispute Settlement Mechanism[6] (art. 24(3)). After procedures for consultation, good offices, conciliation or mediation are terminated, member states can request the establishment of a "panel" which will submit findings and recommendations in a written report open for appellate review. From the perspective of the rule of law, a spontaneously set up "panel" of a rather arbitrary composition cannot replace the access to an independent, highly qualified lawful judge. In particular it *cannot produce jurisprudence*, which is essential for the development of law. In practice, when using a panel system, the states prefer to use the dispute settlement system of the WTO.

Under art. 26 ASEAN Charter those disputes, which remain unresolved,[7] shall be referred to the ASEAN Summit for its decision. The same applies in the case of a serious breach of the Charter (art. 20(4)) or non-compliance with the results of dispute settlement proceedings (art. 27(2)). This role of the *heads of states and governments as final arbiter and enforcer* denies any separation of power and is incompatible with the idea of a politically neutral dispute resolution. However, it fits in perfectly with the strictly intergovernmental character of ASEAN.

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3 Cf. ASEAN Sectretariat, The Rule of Law - a Fundamental Feature of ASEAN Since Its Inception, 2013, www.asean.org/news/asean-secretariat-news/item/the-rule-of-law-a-fundamental-feature-of-asean-since-its-inception.

4 See art. 1(3) of the Constitution of the Republic of Indonesia of 1945, art. 78(6) of the Constitution of the Kingdom of Thailand of 2007, art. 2(1), 8(1) and 4(3) of the Constitution of the Socialist Republic of Vietnam of 2013. Some member states refer to certain elements of the rule of law in their constitution; see, for example, art. 6 and 10 of the Constitution of the Lao People's Democratic Republic of 2003.

5 A general Protocol to the ASEAN Charter on Dispute Settlement Mechanisms of 08/04/2010 (http://agreement.asean.org/media/download/20131229165853.pdf), which will apply to disputes concerning the Charter or other (non-economic) instruments, also provides for arbitration by an Arbitral Tribunal. However, after more than four years, it is not yet in force.

6 ASEAN Protocol on Enhanced Dispute Settlement Mechanism of 29/11/2004, http://agreement.asean.org/media/download/20140119110631.pdf.

7 In future art. 9 of the Protocol to the ASEAN Charter on Dispute Settlement Mechanisms of 2010 provides for a preliminary procedure in which the ASEAN Coordinating Council attempts to resolve the dispute.

III. The legal basis of the ASEAN Economic Community - a sufficient basis for an effective realisation of a single ASEAN market?

1. No legal foundations in the ASEAN Charter

While the legal foundations of the European internal market are laid down in numerous institutional, procedural and substantive provisions in the FEU Treaty and the Protocols, there is nothing like that in the ASEAN Charter. The Charter is confined to the establishment of an institution at the working level, the *ASEAN Economic Community Council* (art. 9). In order to realise the objectives of the AEC, this subordinated institution ensures the implementation of the relevant decisions of the ASEAN Summit, coordinates the work of the different sectors and submits reports and recommendations to the Summit - but does not decide itself (cf. art. 9(4)).

2. Multiple sectoral agreements for the realisation of the objectives of the AEC

There is *no general treaty* on the frew flow of goods, services, investment, capital and skilled labour in ASEAN. Consequently, there is no coherent institutional framework and there are no generally applicable rules on procedures, implementation etc. There is also *no system of economic fundamental freedoms* as subjective rights as under art. 28 et seq. FEU Treaty. The ASEAN Summit has chosen the path to adopt sectoral agreements with varying approaches, some of them on very special issues.[8] The following agreements should be highlighted:

a) The ASEAN Trade in Goods Agreement of 2009 (ATIGA)[9]

ATIGA ist the backbone of the AEC. It integrates and consolidates all legal documents on trade into one single legal instrument covering various areas, such as tariff liberalisation until 2015 (Chapter 2), rules of origin (Chapter 3), non-tariff measures (Chapters 4, 7 and 8), trade facilitation (Chapter 5), customs procedures (Chapter 6) and trade remedy measures (Chapter 9). ATIGA provides for the classical dispute settlement and also for the establishment of a supporting AFTA Council (Chapter 10). Concerning customs, it is complemented by an ASEAN Agreement on Customs of 2012.[10]

ATIGA imposes a strong reduction but not the total and unconditional elimination of all customs and non-tariff barriers. Sometimes it leans on or refers to the rights and obligations under WTO law. It does *not yet* establish *a real internal market* as in Europe. There is not even yet an ASEAN customs union. As a consequence, ATIGA provisions are more detailed and the style is more technical than in the corresponding provisions in the FEU Treaty. ATIGA still has the strong smell of bureaucratic international business law. However, it may be a convenient platform for a completion of the ASEAN single market with the next steps.

b) Agreements on the free flow of services

An *ASEAN Framework Agreement on Services of 1995 (AFAS)*[11] provides vaguely for a gradual liberalisation of the trade in services (cf. art. III) comprising a mutual recognition of evidence of qualification (art. IV) in separate agreements. Some agreements liberalising special services have been adopted (e.g. the ASEAN Multilateral Agreements on the Full Liberalisation of Passenger Air Services [2010] and Air Freight Services [2009], an ASEAN Mutual Recognition Arrangement Framework on Accountancy Services [2009] and Mutual Recognition Arrangements on tourism professionals [2012], medical and dental practitioners [2009], architectural services [2007], nursing services [2006] and engineering services [2005].

c) The ASEAN Comprehensive Investment Agreement of 2009 (ACIA)[12]

There is no general freedom of establishment or free movement of capital. However, the ACIA aims to achieve the "end goal of economic integration under the AEC" through progressive liberalisation of investment regimes, enhanced protection of investors, transparency and joint promotion of the region as an "integrated investment area" (art. 1). It guarantees national and most-favoured-nation treatment (art. 5, 6) and free transfers relating to admitted investments (art. 13). The states must grant entry, temporary stay and work authorisation to investors and key personnel (art. 22). They must not require legal persons to appoint own nationals to senior management positions but may still insist on a majority of own nationals in the board of directors (art.8). A special ministerial body, the ASEAN Investment Area Council, is responsible for overseeing the implementation of the ACIA.

Unlike other agreements the ACIA focuses on the *effective protection of the citizen*. Detailed provisions in Section B on investment disputes between investors and member states provide for the remedies of conciliation, consultations and in particular *arbitration*.

d) The ASEAN Agreement on the Movement of Natural Persons of 2012 (MNP)[13]

According to a special agreement[14], citizens of ASEAN member states do not need a visa for a stay up to 14 days. Moreover, in order to support the free flow of goods, services and investment, the MNP facilitates the *temporary entry and stay* of involved persons, in particular business visitors, intra-corporate transferees (executives, managers and specialists) and contractual service suppliers. The MNP does not grant access to the employment market in another member state. There is a limited dispute settlement and there are no guarantees of legal remedies of the citizens (cf. art. 11).

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8 See the comprehensive list of the agreements at the ASEAN website, http://agreement.asean.org/search/by_pillar/2.html.

9 ASEAN Trade in Goods Agreement of 26/02/2009, http://agreement.asean.org/media/download/20140119034633.pdf. The agreement came into force on 30/04/2010.

10 ASEAN Agreement on Customs of 30/03/2012, http://agreement.asean.org/media/download/20140117163238.pdf.

11 ASEAN Framework Agreement on Services of 15/12/1995, http://agreement.asean.org/media/download/20140119141949.pdf.

12 ASEAN Comprehensive Investment Agreement of 26/02/2009, http://agreement.asean.org/media/download/20140119035519.pdf.

13 ASEAN Agreement on the Movement of Natural Persons of 19/11/2012, http://agreement.asean.org/media/download/20140117162554.pdf.

14 See the ASEAN Framework Agreement on Visa Exemption of 25/07/2006, www.asean.org/communities/asean-political-security-community/item/asean-framework-agreement-on-visa-exemption-kuala-lumpur-25-july-2006-2.

IV. Conclusion

The AEC *still* has *a way to go* towards a single market with a free flow of goods, services, investment, capital and skilled labour. So far, there is no customs union, a very limited liberalisation of services, no free movement of ordinary employees, no systematic harmonisation of laws and no protection of competition against distortion by state subsidies. Most notably, the ASEAN agreements do not grant the citizen a system of subjective (personal) rights such as the European economic fundamental freedoms that have served as a catalyst in European integration. However, customs within the AEC have been almost abolished, non-tariff barriers more and more eliminated, first steps of harmonisation of laws taken, foreign investments considerably facilitated and protected, and there is a growing mobility of persons within ASEAN. Furthermore, there are some first signs of real (general) integration, for example the ACIA's objective to create an "integrated investment area", various provisions stressing the need of coherence and providing for the support of the less developed by the more developed member states, and the growing awareness of a common *"ASEAN identity"* (cf. art. 1(14) ASEAN Charter). The AEC has come a considerable way in a short time and the intergovernmental approach of ASEAN may allow progressing quickly - in particular if there should be any need to react to pressure or competition from outside.

The *rule of law* is *not implemented effectively* in the AEC's legal framework. Without guarantees of legal protection (except for investors), the citizen depends on the good will of his national government to defend his rights against governments or authorities of other member states, using the highly deficient ASEAN dispute settlement system. In practice, for small and medium enterprises, bribing the foreign authorities will be the more efficient way. Furthermore, without an ASEAN Court, there is *no judicial development and fine-tuning of the AEC law* and no qualified guardian of its uniform interpretation and application. Consequently, there will be no ASEANisation of administrative law (analogously to the Europeanisation of administrative law), which is to a certain extent necessary for the smooth functioning of a single market. However, these deficiencies must be seen in the specific regional context: Most ASEAN member states are still in the process of building up a modern administration and an efficient court system with the necessary highly qualified civil servants and judges, which may be able to reliably respect, apply and enforce business law in the future. Moreover, the "legalistic way" is contrary to the traditional "ASEAN way" of focusing not on the lawful result but on consensus. Concerning both aspects, there has been a remarkable change in the last decades. If this development continues, analogously to the progress in the member states, future reforms may bring a more diversified system of stronger ASEAN institutions and a more elaborated legal framework for the ASEAN single market.

Excerpt from the Charter of the Association of Southeast Asian Nations of 2007

Art. 2 sect. 2 lit. e and h [Principles]

ASEAN and its Member States shall act in accordance with the following principles: ...
(e) non-interference in the internal affaires of ASEAN Member States; ...
(h) adherence to the rule of law, good governance, the principles of democracy and constitutional government;...

Art. 3 [Legal Personality of ASEAN]

ASEAN, as an inter-governmental organisation, is hereby conferred legal personality.

Art. 22 [General Principles of Settlement of Disputes]

1. Member States shall 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.

Art. 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.

Further reading

Basu Das, Sanchita; Menon, Jayant Menon; Severino, Rodolfo C. Severino;Shrestha, Omkar Lal Shrestha (editors): The ASEAN Economic Community: A Work in Progress, 2013, http://pourlebonheurdupeuple.com/aec-work-progress.pdf#page=304

Chesterman, Simon: From Community to Compliance? The Evolution of Monitoring Obligations in ASEAN, 2015 [coming soon]

Hamada, Koichi; Reszat, Beate; Volz, Ulrich (editors): Towards Monetary and Financial Integration in East Asia, 2009

Hew, Denis (editor): Brick by Brick: The Building of an ASEAN Economic Community, 2007

Ke, Jing Jia: Moving towards ASEAN Economic Community: A New Era Starting from the ATIGA, in: Global Trade and Customs Journal 9 (2014), p. 415 ff.,

Plummer, Michael G.; Yue, Chia Siow (editors): Realizing the ASEAN Economic Community: A Comprehensive Assessment, 2009

Sim, Edmund W.: The Outsourcing of Legal Norms and Institutions by the ASEAN Economic Community, in: Indonesian Journal of International and Comparative Law 1/2014, p. 314 ff.